



Hawai'i

Committee: Senate Committee on Public Safety, Intergovernmental, and Military Affairs  
Hearing Date/Time: Thursday, April 4, 2019, 1:15 p.m.  
Place: Conference Room 229  
Re: Testimony of the ACLU of Hawai'i with Comments on G.M. 543, Submitting for Consideration and Confirmation as the Director of the Department of Public Safety, Gubernatorial Nominee, Nolan P. Espinda, for a Term to Expire at Noon on December 5, 2022

Dear Chair Nishihara, Vice Chair Wakai, and Committee Members:

The American Civil Liberties Union of Hawai'i (“*ACLU of Hawai'i*”) **writes with comments** on G.M. 543, which nominates Nolan P. Espinda as Director of the Department of Public Safety (“*PSD*”) for a term expiring on December 5, 2022. The ACLU of Hawai'i is strictly non-partisan and does not endorse or oppose candidates to elected or appointed office. Accordingly, this testimony does not endorse or oppose this candidate's nomination. In light of the important challenges and opportunities faced by PSD—which the ACLU of Hawai'i has repeatedly raised—this testimony simply recommends your committee pose the following questions to *any* nominee being considered for the position of PSD Director.

**Question 1. How does PSD plan to address unconstitutional conditions and overcrowding at the correctional facilities?**

Over two years ago, the ACLU of Hawai'i submitted a complaint to the Civil Rights Division of the U.S. Department of Justice (the “*DOJ Complaint*”) describing the persistent unconstitutional conditions and overcrowding affecting the 3,924 people held at the time in the correctional facilities owned and operated by PSD.<sup>1</sup> PSD was also made aware of the DOJ Complaint, which described in detail the insufficient shelter, unsanitary conditions, inadequate medical care and mental health services, food shortages, and chronic understaffing at several of PSD's correctional facilities. In late 2016, seven of the nine facilities operated by PSD operated well above their design capacity. Today, while the number of people held in those facilities has declined to 3,540, the same seven facilities continue to operate above their design capacity and most of the unconstitutional conditions and overcrowding remain.<sup>2</sup> Overcrowding and unconstitutional

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<sup>1</sup> January 6, 2017, Complaint from ACLU of Hawai'i to Vanita Gupta, Principal Deputy Assistant Attorney General, Civil Rights Division, United States Department of Justice, available at <https://acluhi.org/complaint-to-u-s-department-of-justice-against-the-state-of-hawai%CA%BBi-concerning-unconstitutional-prison-conditions-and-overcrowding-2017/>.

<sup>2</sup> Since submitting the DOJ Complaint, the ACLU of Hawai'i has received hundreds of complaints describing similar and persistent unconstitutional conditions of confinement.

conditions have likely played a role in the recent riot at Maui Community Correctional Center, which reportedly started when detainees demanded better conditions, and the ten deaths ruled as suicides in correctional facilities since 2015.<sup>3</sup>

**Question 2. How does PSD plan to address the high recidivism rate for people under its supervision?**

Overcrowding and poor conditions likely contribute to Hawaii’s high recidivism rates.<sup>4</sup> For the past ten years, the recidivism rate of people released after completing their entire term of incarceration has fluctuated between 62 and 67.5 percent.<sup>5</sup> During that same time period, the recidivism rate of people released on parole has been somewhere between 45.5 and 56.1 percent. These rates are substantially higher than those for other countries that are part of the Organization for Economic Cooperation and Development (OECD).<sup>6</sup> They are also higher than the 41.4 to 52.3 percent recidivism rate for people sentenced to probation, who are under the jurisdiction of the Judiciary and who have not necessarily served time in a correctional facility.

Since 2017, PSD has been required to assist people that are about to be released in obtaining identification cards and other government documents necessary to apply and obtain government assistance.<sup>7</sup> To date, the ACLU of Hawai‘i has continued to receive complaints of people being released from jail and prison without any such form of identification. This too likely contributes to Hawaii’s recidivism rate.

**Question 3. What does PSD plan to do to reduce the number of people held pretrial?**

In January 2018, the ACLU of Hawai‘i published a report on pretrial practices in Hawai‘i.<sup>8</sup> The report highlighted how about 50 percent of people in Hawaii’s overcrowded jails are being held pretrial, that is, before they have been convicted of the crime for which they were arrested. While there are many factors contributing to pretrial detention, PSD’s Intake Services Center (“ICS”) plays a crucial role in (a) assessing the risks posed by a person charged with a crime and

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<sup>3</sup> Garvin McCain, et al., Bureau of Justice Statistics, *Effect of Prison Crowding on Inmate Behavior* (1980), available at <https://www.bjs.gov/content/pub/pdf/epcib.pdf>.

<sup>4</sup> Michael A. Ruderman, et al., *Does Prison Crowding Predict Higher Rates of Substance Use Related Parole Violations?*, PLoS ONE (2015).

<sup>5</sup> The Interagency Council on Intermediate Sanctions (“ICIS”) defines recidivism as “criminal arrests (most recent charge after supervision start date), revocations, technical violations, and/or criminal contempt of court” within three years from release. See ICIS, 2017 Recidivism Update, available at <https://icis.hawaii.gov/wp-content/uploads/2018/08/Hawaii-Revidivism-2017.pdf>.

<sup>6</sup> HCR 85 Task Force, *Creating Better Outcomes, Safer Communities* (Dec. 2018), 11 n. 50. The OECD was established in 1961 as a forum for governments to share experiences and seeks solutions to common economic and social problems.

<sup>7</sup> Act 56 (2017), available at [https://www.capitol.hawaii.gov/session2017/bills/GM1156\\_PDF](https://www.capitol.hawaii.gov/session2017/bills/GM1156_PDF).

<sup>8</sup> ACLU of Hawai‘i, *As Much Justice as You Can Afford* (Jan. 2018), available at <https://acluhi.org/bailstudy/>.

(b) providing pretrial services to supervise people released pretrial. In terms of assessing risk, ICS uses a risk assessment tool that has been shown to have a disparate impact on overpoliced minority groups and that does not provide useful information to judges about the specific risks posed by an individual.<sup>9</sup> In terms of pretrial services, Hawai‘i currently does not have a court date reminder system and ICS does not appear to focus on managing the needs, as opposed to the risks, that increase the likelihood someone will fail to appear in court.

**Question 4. How does PSD plan to address people being detained past their release date?**

In *Tapaoan v. Cayetano*, Civ. No. 01-00815 DAE-LEK, the ACLU of Hawai‘i challenged PSD’s unlawful over-detention of pretrial detainees, resulting in a \$1.2 million settlement. The 2004 settlement agreement also created a duty to implement procedural safeguards that would assure proper and timely release of prisoners. There have been a number of recent court cases alleging that the PSD has been detaining people past their release date, sometimes for months.<sup>10</sup>

**Question 5. How does PSD intend to ensure its officers’ use of force is proportionate and only used when necessary to prevent a clear and present danger to public safety?**

The State of Hawai‘i ranked 5<sup>th</sup> and 7<sup>th</sup> in the United States for the number of people killed per capita by law enforcement in 2015 and 2016 respectively.<sup>11</sup> In 2019 alone, law enforcement officers in Hawai‘i shot 51-year-old Siatuu Tauai, 28-year-old Delmar Espejo, 26-year-old Thomas Kyle, 37-year-old Casey Asato, and 47-year-old Maurice Arrisgado Jr.<sup>12</sup> With the exception of Mr. Asato, they were all unarmed and killed. A sheriff deputy shot and killed Mr. Espejo and a correctional officer shot and killed Mr. Arrisgado. Based on news reports,

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<sup>9</sup> HCR 134 Taskforce, *Hawai‘i Criminal Pretrial Reform* (Dec. 2018), at 2 (“At the heart of Hawai‘i’s pretrial process is the Intake Service Center (ISC), a division of the Department of Public Safety (DPS).”).

<sup>10</sup> *Editorial: Stop violations of inmates’ rights*, Star Advertiser (Mar. 19, 2019), available at <https://www.staradvertiser.com/2019/03/19/editorial/our-view/editorial-stop-violations-of-inmates-rights/>.

<sup>11</sup> People killed by police in the U.S., The Guardian, available at <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database>.

<sup>12</sup> Chelsea Davis, *HPD officers resist firing guns and are injured in 2 separate cases this week*, Hawai‘i News Now (Mar. 1, 2019), available at <http://www.hawaiinewsnow.com/2019/03/01/hpd-is-pressured-avoid-lethal-force-while-officers-are-injured-separate-cases-this-week/>. According to the news report, “Sheriff’s deputies are not equipped with tasers or body cams.”

Mr. Arrisgado did not appear to be a present danger at the time he was shot<sup>13</sup> and Mr. Espejo was homeless and disabled.<sup>14</sup>

Even though in 2011 the Legislature mandated that PSD “pursue and obtain accreditation for the sheriff division from the Commission on Accreditation for Law Enforcement Agencies, Inc.”<sup>15</sup>, the sheriff division is yet to be accredited. Additionally, the Law Enforcement Standards Board created last year has yet to adopt any standards for law enforcement officers. Given the lack of uniform standards and accreditation, it is crucial for PSD to take the lead and adopt best law enforcement practices,<sup>16</sup> including policies to ensure use of force is proportionate and only used when necessary to prevent a clear and present danger to public safety.

**Question 6. What is PSD’s current policy for controlled substances testing? How many people have had custody status changes as a result of this policy?**

The Ombudsman found that PSD had incorrectly copied a federal policy to determine a threshold for controlled substances.<sup>17</sup> The Ombudsman office found that the Department had set a threshold 100 times lower than the federal policy because the Department changed the unit of measure, using deciliter instead of milliliter. Additionally, the Department was also found to have misinterpreted urinalysis test results. Our office receives ongoing complaints about inaccurate controlled substance test results.

**Question 7. How does PSD plan to protect transgender inmates?**

PSD’s policy on housing transgender inmates in single-sex facilities states that the inmate’s own safety and comfort preferences are to be considered when deciding placement, rather than automatically housing an individual based on the sex assigned to them at birth.<sup>18</sup> Despite this, Civil Beat reported in 2016 that of twenty-nine (29) transgender inmates in the custody of the

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<sup>13</sup> Timothy Hurley, *Escape of slain Oahu Community Correctional Center inmate a ‘major mistake,’ DPS director says*, Star Advertiser (Mar. 2, 2019), available at <https://www.staradvertiser.com/2019/03/02/breaking-news/escape-of-slain-oahu-community-correctional-center-inmate-a-major-mistake-dps-director-says/>.

<sup>14</sup> Casey Lund, *Heartbreak, tears: Family of a man shot at the Capitol raises questions over his death*, Hawai‘i News Now (Feb. 24, 2019), available at <http://www.hawaiinewsnow.com/2019/02/24/heartbreak-tears-family-man-shot-capitol-raises-questions-over-his-death/>.

<sup>15</sup> Haw. Rev. Stat. § 353C-9.

<sup>16</sup> See, e.g., The President’s Task Force on 21<sup>st</sup> Century Policing, *Final Report* (May 2015), available at [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf).

<sup>17</sup> Office of the Ombudsman, State of Hawai‘i, *Fiscal Year 2017-2018, Report No. 49*, available at <https://ombudsman.hawaii.gov/wp-content/uploads/2019/02/Annual-Report-49-for-web.pdf>.

<sup>18</sup> Department of Public Safety, State of Hawai‘i, Policy No. ADM.08.08 (effective July 18, 2014, updated August 25, 2017), available at <https://dps.hawaii.gov/wp-content/uploads/2017/09/ADM.08.08.pdf>.

State, *all* were being housed in accordance with the sex assigned to them at birth, rather than their gender identity.<sup>19</sup> This contravenes best practices and PSD's own policy.

**Question 8. How does PSD plan to protect inmates against sexual assault in correctional facilities?**

Between 2013 and 2017, the reported incidents of "offender-on-offender" sexual assaults have almost doubled.<sup>20</sup>

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The ACLU of Hawai'i respectfully requests that your Committee pose these questions to the nominee during the confirmation hearings. Thank you for the opportunity to testify.

Sincerely,



Mandy Fernandes  
Policy Director  
ACLU of Hawai'i

*The mission of the ACLU of Hawai'i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai'i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai'i is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawai'i has been serving Hawai'i for 50 years.*

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<sup>19</sup> Rui Kaneya, *Is Hawaii Doing Enough to Protect Transgender Inmates in Prisons?*, Civil Beat (June 2, 2016), available at <https://www.civilbeat.org/2016/06/is-hawaii-doing-enough-to-protect-transgender-inmates-in-prisons/>.

<sup>20</sup> *Compare* Response to Act 194, Sessions Law of Hawaii 2010, Sexual Assaults in Correctional Facilities, Department of Public Safety, State of Hawai'i, Report to the 2016 Legislature (26 reported incidents of offender-on-offender sexual abuse in 2013), available at [https://dps.hawaii.gov/wp-content/uploads/2015/02/Act-194\\_Sexual-Assaults-in-Correctional-Facilities2014\\_FINAL1.pdf](https://dps.hawaii.gov/wp-content/uploads/2015/02/Act-194_Sexual-Assaults-in-Correctional-Facilities2014_FINAL1.pdf) with Response to Act 194, Sessions Law of Hawaii 2010, Sexual Assaults in Correctional Facilities, Department of Public Safety, State of Hawai'i, Report to the 2019 Legislature (45 reported incidents of offender-on-offender sexual abuse in 2017), available at <https://dps.hawaii.gov/wp-content/uploads/2018/12/Sexual-Assaults-in-Correctional-Facilities.pdf>.