

SB 214

Measure Title:

RELATING TO PUBLIC SAFETY

Report Title:

Public Safety; Correctional Impact Statement

Description:

Requires a correctional impact statement be attached to any bill that proposes a change in the law that creates a public offense, significantly changes an existing public offense or the penalty for an existing offense; or changes existing sentencing, parole, or probation procedures.

LINDA LINGLE
GOVERNOR



STATE OF HAWAII
DEPARTMENT OF PUBLIC SAFETY
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Law Enforcement

No. _____

TESTIMONY ON SENATE BILL 214
RELATING TO PUBLIC SAFETY
by
Clayton A. Frank, Director
Department of Public Safety

Senate Committee on Public Safety and Military Affairs
Senator Will Espero, Chair

Tuesday, February 3, 2009; 1:15PM
State Capitol, Conference Room 229

Senator Espero, Senator Bunda, and Members of the Committee:

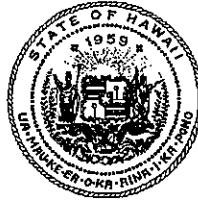
The Department of Public Safety (PSD) understands and sincerely appreciates this committee's concerns with the impact that new bills may have on the Department. There are many bills every legislative session that will impact the corrections division and possibly our offender population.

Senate Bill 214 does not specify who will develop or write the many comprehensive correctional impact statements that may be required. As you know, this measure calls for the report(s) to include the number of criminal cases per year that may be impacted by the proposed legislation, the fiscal impact, projected impact on native Hawaiians, the projected impact on at risk communities, and the impact on existing correctional institutions. Compliance with this measure would require time consuming, and complex evaluation of each bill that may have impact on the PSD.

At present, the PSD does not have the required staff or other resources necessary to comply with the provisions of this measure. The Department acknowledges that this measure has merits; however, given the fiscal difficulties, it would not be prudent to pursue enactment at this time. Therefore, PSD does not support this measure as written.

Thank you for the opportunity to provide testimony on this measure.

LINDA LINGLE
GOVERNOR



STATE OF HAWAII
HAWAII PAROLING AUTHORITY
1177 ALAKEA STREET, GROUND FLOOR
Honolulu, Hawaii 96813

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DANE K. ODA
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TESTIMONY ON SENATE BILL 214
RELATING TO PUBLIC SAFETY

HAWAII PAROLING AUTHORITY
Albert Tufono, Chair

Committee on Public Safety and Military Affairs
Senator Will Espero, Chair
Senator Robert Bunda, Vice Chair

Chair Espero, Vice Chair Bunda and Committee Members:

The Hawaii Paroling Authority (HPA) cannot support Senate Bill 214 as currently written. HPA is a member of the corrections population management commission and supports its efforts, however, this bill does not specify who will be responsible for producing the correctional impact statement. Given the numerous legislative bills that are introduced each year regarding penal code, probation and parole, persons responsible for producing these statements would require resources that are not currently available. While the efforts of the commission to project prison population trends are commendable, this bill cannot be effective without proper funding.

Thank you for this opportunity to testify.

COMMUNITY ALLIANCE ON PRISONS

76 North King Street, Honolulu, HI 96817

Phone/E-Mail: (808) 533-3454/kat.caphi@gmail.com



COMMITTEE ON PUBLIC SAFETY AND MILITARY AFFAIRS

Sen. Will Espero, Chair

Sen. Robert Bunda, Vice Chair

Tuesday, February 3, 2009

1:15 PM

Room 229

STRONG SUPPORT

SB 214 - Correctional Impact Statements

Sent to: PSMTestimony@capitol.hawaii.gov

Aloha Chair Espero, Vice Chair Bunda and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative working to improve conditions of confinement for our incarcerated individuals, enhance our quality of justice, and promote public safety. We come today to speak for the 6,000+ individuals whose voices have been silenced by incarceration, always mindful that more than 2,000 of those individuals are serving their sentences abroad, thousands of miles from their homes and loved ones.

SB 214 requires a correctional impact statement be attached to any bill that proposes a change in the law that creates a public offense, significantly changes an existing public offense or the penalty for an existing offense, or changes existing sentencing, parole, or probation procedures.

"Equity and fairness in policymaking is no accident. Legislative bodies must pay close attention to the impact of their policies and play an active role in ensuring that both their intent and impact are consistent with a jurisdiction's expressed values. By measuring equity impact in a few representative areas, a legislative body can assess whether laws and rulemaking advance a shared agenda of fairness; spread the burden of regulation fairly; and help address historic patterns of institutional bias and discrimination."

(Source: Developing an Equity Impact Statement- A Tool for Policymaking - www.thepraxisproject.org)

The Pew Center on the States released their report, **One in 100: Behind Bars in America 2008**

(http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf) that highlighted the racial disparities in the criminal justice system. You don't have to be a researcher to see it on page 6 of the report entitled, "Who's Behind Bars?":

- White men over 18 years of age 1 in 106
- All men over 18 years of age 1 in 54
- Hispanic men over 18 years of age 1 in 36
- Black men over 18 years of age 1 in 15
- Black men 20-34 years of age 1 in 9
- White women 35-39 years of age 1 in 355
- Hispanic women 35-39 years of age 1 in 297
- All women 35-39 years of age 1 in 265
- Black women 35-39 years of age 1 in 100

The disproportionate representation of Hawaiians in our criminal processing system is startling and calls for a serious review of policies.

Distribution of Inmate Population by Ethnic Group or Race in Hawai'i Correctional Facilities: As of June 30, 2005

Race	Males	Females	TOTAL
	Percentage	Percentage	Percentage
Total Number	3,641	671	4,312
African American	4%	3%	4%
Caucasian	22%	27%	23%
Chinese	1%	1%	1%
Filipino	14%	10%	13%
Hawaiian / Part Hawaiian	37%	44%	38%
Hispanic	3%	2%	3%
Japanese	5%	4%	5%
Korean	1%	1%	1%
Samoan	5%	3%	5%
Other Pacific Islander	2%	1%	2%
Other*	3%	2%	3%
Not reported	2%	2%	2%
TOTAL	100%	100%	100%

Source: State of Hawai'i Department of Public Safety

*Total inmate counts based on facility tabulations. It represents the number of inmates physically housed in the facility and inmates on the „out count“ such as on furlough, in hospitals, intermittent leave, transition housing, etc. It excludes inmates housed in contracted out-of-state facilities and other out-of-state facilities. Percentage distributions based on inmate records from Offendertrak, Hawai'i Department of Public Safety.

Sum of percentages may not equal total due to rounding.

**Ethnicity and race based on information provided by inmates.

*Other includes Native American Indian, Vietnamese, other Asians, etc.

OHA 2006 Native Hawaiian Databook

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It is common knowledge that the majority of Hawai'i's incarcerated individuals are serving time for drugs or drug-related convictions. Hawai'i's sentences are longer than New York's with the punitive Rockefeller Drug Law. Women are losing their children because of the passage of the Adoption and Dafe Families Act, which mandates that children in foster care be permanently placed within 15-22 months. This is devastating to women in Hawai'i, especially those of Hawaiian ancestry, who are losing their children or threatened with the loss of their children because their sentences are longer than 22 months. We also know that there is not enough drug treatment in prison, as the recent National Institute of Drug Abuse (NIDA) report shows.

The 2006 OHA Native Hawaiian Databook's 2005 chart reveals that Native Hawaiians are disproportionately exiled from their ancestral lands as shown in the following chart.

Sadly, this is happening while we know the problems suffered by the Hawaiian population and the importance of strengthening families. This banishment creates another stressor for the incarcerated individual and for the `ohana left behind, especially the children.

Distribution of Inmate Population by Ethnic Group or Race in Out-of-State Correctional Facilities: As of June 30, 2005

Race	Males	Females	Total
	Percentage	Percentage	Percentage
Total Number	1,693	87	1,780
African American	5%	6%	5%
Caucasian	21%	22%	21%
Chinese	1%	1%	1%
Filipino	12%	5%	12%
Hawaiian / Part Hawaiian	41%	47%	41%
Hispanic	3%	2%	3%
Japanese	5%	3%	5%
Korean	1%	2%	1%
Samoaan	7%	8%	7%
Other Pacific Islander	1%	1%	1%
Other*	2%	1%	2%
Not reported	1%	1%	2%
TOTAL	100%	100%	100%

Source: State of Hawai'i Department of Public Safety

* Total inmate counts include inmates housed in contracted out-of-state facilities and other out-of-state facilities. Percentage distributions based on inmate records from Offendertrak, Hawai'i Department of Public Safety. Sum of percentages may not equal total due to rounding.
 ** Ethnicity and race based on information provided by inmates.
 Other includes Native American Indian, Vietnamese, other Asians, etc.

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OHA 2006 Native Hawaiian Databook

Across the United States and in England, the racial injustice in the criminal system is being called to task. States like Connecticut and Iowa have enacted laws to address this concern. The Sentencing Project report, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, can be accessed at: http://www.sentencingproject.org/Admin/Documents/publications/rd_stateratesofincbyraceandethnicity.pdf

SB 214 can use the Sentencing Simulation Model, a tool developed by the Department of Public Safety and then left unfunded. The Sentencing Simulation Model is a policymaking tool that can analyze the impact of a potential law on the prison system, on Hawaiians and on a number of variables so that unintended consequences can be avoided by identifying them up front.

As Mark Mauer, Executive Director of The Sentencing Project says:

“Racial disparities in the use of imprisonment should be of concern to all Americans. While incarceration is clearly an appropriate punishment option for people convicted of a crime, its ripple effects are substantial. High minority rates of confinement mean that many children of color are growing up with a parent behind bars, having to cope with the stigma of prison and the loss of emotional support. Further, the life prospects of people sent to prison - reduced wages, frayed family ties - weaken the fabric of the community overall. Finally, the criminal justice system can only be effective if it gains the confidence of the broad community. Addressing the degree of fairness in the justice system is a critical first step toward this goal.”

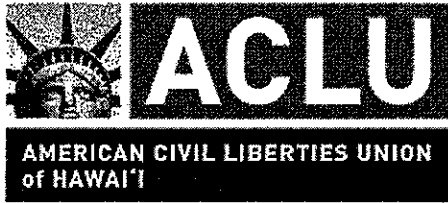
(Source: Racial fairness gaining ground in the justice system – www.baltimoresun.com/news/opinion/opcd/bal-op.racial30jul30,0,4407252.story)

The fiscal crisis also is a clarion call for a review of our policies. It also presents an opportunity to re-think what we are doing.

The findings of the Criminal Justice Institute (CJI) that Hawai'i is over-classifying inmates means that many individuals are being held at costly facilities, some thousands of miles from home. According to CJI 60% of the nonviolent individuals held in CCA prisons are minimum or community custody.

Improving the quality of justice in Hawai'i will save money, increase confidence in the justice system, and promote fairness and equality in how our laws are enforced.

Mahalo for this opportunity to offer our STRONG SUPPORT OF SB 214.



Via E-mail: PSMTestimony@Capitol.hawaii.gov
Committee: Committee on Public Safety and Military Affairs
Hearing Date/Time: Tuesday, February 3, 2009, 1:15 p.m.
Place: Room 229
Re: Testimony of the ACLU of Hawaii in Support of SB 214, Relating to Public Safety

Dear Chair Espero and Members of the Committee on Public Safety and Military Affairs:

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes in strong support of SB 214, which seeks to require a correctional impact statement be attached to any bill that proposes a change in the law that creates a public offense, significantly changes an existing public offense or the penalty for an existing offense, or changes existing sentencing, parole or probation procedures.

In these difficult economic times, it is important that proposed legislation is carefully scrutinized (through methods like impact statements) to determine whether passing the legislation is in the State’s best interests. Correctional impact statements are particularly important because of the immense costs that come with sending additional individuals to prison (or sending individuals to prison for longer periods of time). The minimal – or nonexistent – deterrent effect from extended sentences and mandatory minimum terms, for example, simply may not be worth the extraordinary financial cost to Hawaii’s taxpayers. A correctional impact statement will help inform the process to ensure that we spend our limited resources in the most efficient and effective way possible, saving the State from long-term expenses that have little to no benefit in return.

Furthermore, correctional impact statements may help to address some of the racial and ethnic disparities that exist in our criminal justice system. For example, as evidenced in the recent info briefing regarding the over-representation of native Hawaiians in the criminal justice system, native Hawaiians are disproportionately represented in prison. Again, the minor up-front cost of preparing an impact statement will go a long way to ensuring that we have an effective and equitable criminal justice system.

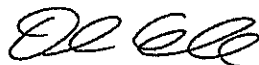
American Civil Liberties Union of Hawaii
P.O. Box 3410
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Hon. Sen. Espero, Chair, PSM Committee,
and Members Thereof
February 3, 2009
Page 2 of 2

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii 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 Hawaii has been serving Hawaii for over 40 years.

Thank you for this opportunity to testify.

Sincerely,



Daniel M. Gluck
Senior Staff Attorney
ACLU of Hawaii

American Civil Liberties Union of Hawai'i
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the
**Drug Policy
Forum**
of hawai'i

February 3, 2009

To: Senator Will Espero, Chair
Senator Robert Bunda, Vice Chair
And Member of the Committee on Public Safety and Military Affairs

From: Jeanne Ohta, Executive Director

RE: SB 214 Relating to Public Safety
Hearing: February 3, 2009, 1:15 p.m., Room 229

Position: Support

I am Jeanne Ohta, Executive Director of the Drug Policy Forum of Hawai'i. Thank you for this opportunity to testify in support of SB 214 which requires that a correctional impact statement be attached to any bill that proposes a change in the law that creates a public offense, significantly changes an existing public offense or the penalty for an existing offense, or changes existing sentencing, parole, or probation procedures.

Ethnic disparities exist in the rates of incarceration in Hawai'i. It is estimated that 38% of those incarcerated are of Native Hawaiian ancestry. Since Native Hawaiians make up less than 38% of the state's population, there is an apparent over-representation of Native Hawaiians. Although there are many reasons for this over-representation, many of the policies on sentencing and drugs produce disproportionate racial effects.

In hind-sight, some of these effects could have been predicted prior to the adoption of legislation. I am not implying that these effects were deliberate or intended. I believe that legislation is enacted with good intention but sometimes there are unintended consequences. These unintended consequences can be avoided if the potential impact of proposed legislation is known prior to enactment. It is more difficult to correct the situation after the disparity has occurred.

The correctional impact statement is similar to environmental impact statements. It would allow legislators and the public to know in advance any racial disparity and to consider alternative policies that could accomplish the same goal without causing harm to the affected populations. It would also include information on how many criminal cases per year will be affected; the fiscal impact of incarceration for those cases; the projected impact on at-risk communities; and how the census of Hawai'i's prisons will be affected.

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Incarceration has become an expensive policy, with costs rising each year. Any new proposal should be considered with these additional costs in mind. Is the policy effective in increasing public safety? Are there alternatives that are more effective in achieving our goals and more cost-effective?

Connecticut and Iowa are the first states to enact legislation requiring racial impact statements. Similar bills have been introduced in Oregon and Illinois.

Examples of legislation and policies that have adversely affected communities of color are: crack/powder cocaine disparities; drug-free zone laws; and zero-tolerance policies. Eliminating the potential disparities will help keep fairness within our criminal justice system. When we fail to do that, we foster public mistrust in the system and it impedes the State's ability to promote public safety. A sense that the criminal justice system is fair is essential to the functioning of Hawai'i's democratic society.

Please pass SB214 so that any new legislation will be accompanied by the resulting fiscal and racial impacts; and those impacts can be considered before the legislation is enacted.

From: Jyoti Mau [mailto:light@jyotimau.com]
Sent: Monday, February 02, 2009 2:01 PM
To: PSM Testimony
Subject: SB214

COMMITTEE ON PUBLIC SAFETY AND MILITARY AFFAIRS

Sen. Will Espero, Chair

Sen. Robert Bunda, Vice Chair

Tuesday, February 3, 2009

1:15 PM

Room 229

SB214

SUPPORT

Dear Legislators,

SB214 will provide policy makers with valuable information to help them make informed decisions by using the Sentencing Simulation Model developed by PSD several years ago. This information helps to determine the impact of legislation on the criminal justice system, the economy, on Hawaiians, at-risk communities and prisons. Current technology makes this possible and the information provided by these correctional impact statements are invaluable to researchers, families, and concerned citizens. I think that anything that enables an individual or a government to make more informed decisions is a beneficial tool to implement. Thank you.

Sincerely,

Jyoti Mau

TO: COMMITTEE ON PUBLIC SAFETY AND MILITARY
Sen. Will Espero, Chair
Sen. Robert Bunda, Vice Chair
Tuesday, February 3, 2009
1:15 PM
Room 229, Hawaii State Capitol

RE: Testimony in Support of SB 214 Relating to Public Safety, Racial Correctional Impact Statement

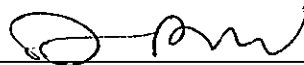
FROM: African American Lawyers Association

Dear Senator Espero and Members of the Committee on Public Safety and Military:

My name is attorney Daphne Barbee-Wooten representing the African American Lawyers Association (AALA). AALA supports SB 214 relating to racial impact statements. Racial disparities in the prison is no joke. It is very real. Nationwide there is disproportionate black males incarcerated than in the public at large, close to 50%. In Hawaii, there is a disproportionate of Hawaiians incarcerated. Some states such as Oregon and Iowa have already introduced racial impact statements which alert the criminal justice system to this problem of racial disparity. See attached articles, "Racial Impact Statements: Changing Politics to Address Disparities" and "The Sentencing Project". We only ask that instead of just focusing on Native Hawaiians, that all other racial groups such as African American, Latinos, Japanese Americans, Chinese Americans, Filipino Americans, and other ethnicities also be included in this reporting and study.

Dated: Honolulu, Hawaii

2-2-09



Daphne Barbee-Wooten
Attorney at Law

Racial Impact Statements

CHANGING POLICIES TO ADDRESS DISPARITIES

BY MARC MAUER

In reaction to a study that found Iowa topped the nation in racial disparity in its prison population, Iowa Governor Chet Culver in April 2008 made history by signing into law the nation's first piece of legislation to require policy makers to prepare racial impact statements for proposed legislation that affects sentencing, probation, or parole policies. In signing the bill, Gov. Culver noted that "I am committed to making sure government at all levels reflects our shared values of fairness and justice." In the following months Connecticut and Wisconsin took similar action.

These policy initiatives come at a moment when the scale of racial disparity within the criminal justice system is truly staggering. One of every nine black males between the ages of 20 and 34 is incarcerated in prison or jail, and one of every three black males born today can expect to do time in state or federal prison if current trends continue. For Hispanic males, the lifetime odds of imprisonment are one in six. Rates for women are lower overall, but the racial/ethnic disparities are similar.

The effects of high rates of incarceration go beyond the experience of imprisonment itself, and have broad consequences for both the offender and the community. A prison term results in challenges in gaining employment, reduced lifetime earnings, and restrictions on access to various public benefits. Families of offenders themselves experience the shame and stigma of incarceration, as well as the loss of financial and emotional support with a loved one behind bars. And for the community at large, the challenges of reentry result in high rates of recidivism and the consequent costs of a burgeoning prison system.

Thus, we are faced with twin problems in the justice system. Clearly, we need policies and practices that can work effectively to promote public safety. At the same time, it also behooves us to find ways to reduce the disproportionate rate of incarceration for people of color. These are not competing goals. If we are successful in addressing crime in a proactive way, we will be able to re-

duce high imprisonment rates; conversely, by promoting racial justice we will increase confidence in the criminal justice system and thereby aid public safety efforts.

Reducing minority rates of confinement is a complex process. These outcomes result from a complex set of factors, including socioeconomic disadvantages, involvement in criminal behavior, resource allocation in the criminal justice system, sentencing policies, limited diversionary options, and biased decision making among practitioners. We can debate the relative contribution of each of these factors, but there are few who would dispute that each plays at least some role.

The premise behind racial impact statements is that policies often have unintended consequences that would be best addressed prior to adoption of new initiatives. In this sense they are similar to fiscal and environmental impact statements. Policy makers contemplating new construction projects or social initiatives routinely conduct such assessments, which are now widely viewed as responsible mechanisms of government.

Racial impact statements are particularly important for criminal justice policy because it is exceedingly difficult to reverse sentencing policies once they have been adopted. The classic example in this regard is the federal crack cocaine mandatory sentencing policies. Adopted in 1986 and 1988, at a time of widespread concern about this new form of cocaine, the laws were hastily passed by Congress with virtually no discussion of their potential racial impact. Two decades later, the results are in and they are very sobering. More than 80 percent of the prosecutions for crack (as opposed to powder cocaine) offenses have been of African Americans, far out of proportion to the degree that they use the drug, and there is broad consensus that the penalties are overly punitive. (U.S. Sentencing Commission, *Cocaine and Federal Sentencing Policy*, May 2007.) But despite the fact that the U.S. Sentencing Commission amended its guidelines for crack offenses in 2007, and bipartisan legislation has been introduced in Congress to scale back the penalties, the mandatory sentencing policies remain in place today.

Reports Offer Hard Numbers

Although in recent years there has been increasing attention to issues of race and criminal justice, two policy

MARC MAUER is the executive director of *The Sentencing Project* in Washington, D.C. He is the author of *Race to Incarcerate* and the coeditor of *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, both published by *The New Press*. He can be contacted at mauer@sentencingproject.org.

reports issued in 2007 provided lawmakers with renewed incentive to address these issues. In a study titled "And Justice for Some," the National Council on Crime and Delinquency found wide racial disparities in the juvenile justice system nationally. (Report available at <http://www.buildingblocksforyouth.org/justiceforsome/jfs.html>.) At the state level, Wisconsin led the nation in the degree of racial disparity among youths in custody, with children of color being detained at more than 10 times the rate of white youth.

State officials responded to the report with alarm, leading Governor Jim Doyle to establish a broad-based Governor's Commission on Reducing Racial Disparities in the Wisconsin Justice System. The commission reviewed policies, analyzed data, and heard citizen testimony over the course of the year, and then issued a comprehensive report with recommendations for reducing disparities at each stage of the system. Following that release, in April 2008 Governor Doyle issued a sweeping executive order calling on all relevant state agencies to track decision making by race, to create an oversight commission charged with advocating for policies to reduce disparities, and to support a range of practices regarding reentry and alternatives to parole revocation.

A second report, "Uneven Justice," produced by The Sentencing Project, analyzed racial and ethnic disparities in the adult criminal justice system. ("Uneven Justice" available at http://www.sentencingproject.org/Admin/Documents/publications/rd_stateratesofincbyraceandethnicity.pdf.) The report found that nationally, African Americans were nearly six times as likely as whites to be incarcerated, but that there was a broad variation in this ratio among the states. States in the upper Midwest and in the Northeast generally had the highest rates of disparity, representing a combined effect of higher than average black rates of incarceration along with lower than average white rates. The State of Iowa led the nation with a black/white ratio of more than 13 to 1.

The public and political response to the findings in Iowa was substantial. The report received front-page coverage and subsequent editorials in the *Des Moines Register*, and statements of concern from Gov. Culver. The legislative response was led by Rep. Wayne Ford, the longest serving African-American lawmaker in the state, who in 2008 introduced racial impact legislation. The bill quickly received broad support and was adopted almost unanimously. The legislation requires that in addition to preparing a correctional impact statement for proposed policy changes, the legislative services agency should also conduct a racial impact analysis that examines the impact of sentencing or parole changes on racial and ethnic minorities.

Concurrently, in Connecticut, Rep. Michael Lawlor,

chair of the state's House Judiciary Committee and a longtime leader in justice reform, introduced a similar measure. The bill called for racial and ethnic impact statements to be prepared for bills and amendments that would increase or decrease the pretrial or sentenced populations of state corrections facilities. This legislation also received bipartisan support and was signed into law by Gov. Jodi Rell in June 2008.

The racial impact legislation adopted in Iowa and Connecticut will go into effect in 2009, but we already have a model in place that provides some guidance as to how these mechanisms can aid policy makers. In 2008, the Minnesota Sentencing Guidelines Commission began to conduct such inquiries for a proposed new sentencing policy. In their overview of the process, the commissioners noted their policy goals:

If a significant racial disparity can be predicted before a bill is passed, it may be possible to consider alternatives that enhance public safety without creating additional disparity in Minnesota's criminal justice system. Just as with the Commission's fiscal impact notes, the agency does not intend to comment on whether or not a particular bill should be enacted. Rather, it is setting out facts that may be useful to the Legislature, whose members frequently express concerns about the disparity between the number of minorities in our population and the number in our prisons.

(*Racial Impact for H.F. 2949*, Minnesota Sentencing Guidelines Commission, February 27, 2008.)

Thus, for one bill designed to increase penalties for robbery, the commission's analysis found that "[m]inorities are even more over-represented among persons sentenced to prison for attempted aggravated robbery than non-minorities and their sentences would be increased if this bill were to be adopted. . . . The average increase in sentence length for those offenders would be 8 months for white offenders, 10 months for black offenders, 15 months for American Indian offenders, and 23 months for Hispanic offenders." But for another bill, designed to defer judgment for certain controlled substance offenses, the commission concluded that it would have no impact on racial disparity in prisons since the legislation did not provide an option for diversion for those repeat drug offenders sentenced to imprisonment.

In considering the utility of such policies, lawmakers will need to consider the scope and procedures involved in establishing such mechanisms, including the following issues. (For greater detail, see Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 (No. 1) OHIO STATE J. CRIM. L. (Fall 2007).)

Scope of racial impact statements

While proposed changes in sentencing policies are the most obvious decision-making point at which unwarranted racial disparities might emerge, a host of policy decisions at other stages of the criminal justice system can affect the racial/ethnic demographics of the prison population as well. These include adjustments to sentencing guidelines, "truth in sentencing" and other policies that affect length of stay in prison, parole release and revocation policies, and "early" release mechanisms, such as participation in drug treatment or other programs. Conceivably, a racial impact statement policy could cover one or more of these decision-making points.

Preparation of racial impact statements

Depending on the jurisdiction, there are a variety of mechanisms and agencies that could be charged with preparing racial impact statements. These would include:

- *Sentencing Commissions*—In addition to the federal system, 21 states and the District of Columbia currently have a sentencing commission that in most cases should be capable of producing racial impact statements. Generally, these bodies have relatively sophisticated databases of sentencing data and trends, and usually contain relatively complete information on race, gender, and offense demographics. Some states, including North Carolina and Virginia, already maintain legislative requirements that their sentencing commissions produce impact statements to project any effects of new policy on the size of the prison population. And as described above, the Minnesota commission has begun to produce racial impact assessments as an outgrowth of an internal policy decision.
- *Budget and Fiscal Agencies*—Many state legislative analysts routinely produce fiscal and other analyses of legislative initiatives, and could be delegated to produce racial impact statements as well.
- *Departments of Correction*—State and federal corrections agencies now generally have sophisticated analytical tools with which they can produce detailed forecasts of changes in prison populations based on sentencing data and trends. To the extent that their databases contain information on race and ethnicity, it is likely that they could produce racial impact statements as well.

Policy implementation

Racial impact statements should be viewed as a mechanism to help guide the development of sound and fair policy, but they are not an impediment to enacting

changes in the law. That is, they represent one component of the discussion regarding sentencing policy, but only in conjunction with other relevant considerations. In some cases, lawmakers might receive analyses indicating that African Americans or other racial/ethnic groups would be disproportionately impacted by a proposed sentencing change, but conclude that public safety concerns override these considerations.

In order to see how this might play out in the legislative arena, consider two types of proposed changes. In the first example, legislators are contemplating a sentencing enhancement to school zone drug laws that penalize conduct committed within a certain distance of a school. The racial impact statement provides data indicating that African Americans would be disproportionately affected by such a change, most likely as a result of the disproportionate effect of these policies on the densely populated urban areas where African Americans are more likely to reside. If so, then lawmakers need to assess the concern about exacerbating racial disparity with the goal of providing greater public safety.

A key aspect of formulating policy in this regard relates to the breadth and effectiveness of the school zone law. Certainly, no one wants drug dealers peddling narcotics to school children on the playground during recess. But in some states, these laws also provide for additional penalties for drug transactions between consenting adults that take place in the middle of the night. Clearly, these drug sales are illegal, but should penalties be enhanced if they will disproportionately affect African Americans?

Using the public safety framework, legislators might decide that they could avoid exacerbating racial disparity and promote better public safety by tailoring the law itself rather than the punishment. For example, they could define the statute in a more targeted way, specifically focusing on selling drugs to children on school property. Such a policy could address legitimate concerns of the public while also delineating distinctions in penalties that would not adversely affect minority defendants.

In a second example, consider a legislative proposal to enhance mandatory sentences for robbery convictions. An impact statement produced for such a proposal might demonstrate that African Americans would be disproportionately affected by such a change as a result of greater involvement in the crime. After reviewing such documentation, many policy makers would be likely to place the concern for public safety above the objective of reducing racial disparity, and proceed with adopting the initiative. But it is also conceivable that legislators could use this analysis as an occasion to explore overall investments in public safety. For example, extending the length of time that persons convicted of robbery stay in prison clearly

provides some incapacitation benefits in crime control. But as offenders age in prison, their risk of recidivism generally declines, so at a certain point the additional cost of incarceration may not provide cost-effective approaches to producing public safety. For policy makers the question then becomes how to evaluate the degree of public safety produced through additional years of imprisonment compared to investing those funds in community policing, drug treatment, preschool programs, or other measures believed to be effective interventions. Reasonable people may disagree on how to answer this question, but it should frame the relevant questions.

Growing Movement to Address Disparity

Interest in the concept of racial impact statements is growing rapidly, both in the legal community and among policy makers. Within the ABA, in 2004 the Justice Kennedy Commission recommended a sweeping policy that legislatures “conduct racial and ethnic disparity impact analyses to evaluate the potential disparate effects on racial and ethnic groups of *existing statutes* and proposed legislation; . . . and propose legislative alternatives intended to eliminate predicted racial and ethnic disparity at each stage of the criminal justice process (emphasis added).” The policy was approved by the House of Delegates later that year.

Initiatives at the local level have highlighted ways in which jurisdictions can address issues of disparity in a collaborative way. In 2001, the mayor’s office in Bloomington, Indiana, convened a task force to address concerns about racial disparity raised by community groups. Over a two-year period, aided by researchers at Indiana University, the group analyzed a wealth of local data regarding arrests, charging, prosecution, and sentencing in order to aid policy makers in assessing what changes in policy or practice could reduce unwarranted disparities.

An ongoing project of the Vera Institute of Justice provides a means of developing practical approaches to addressing disparities within the prosecution function. The multiyear project is working with prosecutors in three jurisdictions—Milwaukee, Mecklenberg County (Charlotte), N.C., and San Diego—to collect and analyze data regarding decision making in prosecutors’ offices. Based on their findings, the project staff will aid prosecutors in adapting case management systems to collect data on racial dynamics, develop protocols for ongoing review of data, and implement corrective policies and procedures.

At the federal level, bipartisan legislation introduced in the 110th Congress by Sen. Joseph Biden (D-Del.) and Sen. Arlen Specter (R-Pa.) was focused on providing federal prosecutors with a mechanism by which they could engage

Local initiatives highlight ways to address the issue in a collaborative way.

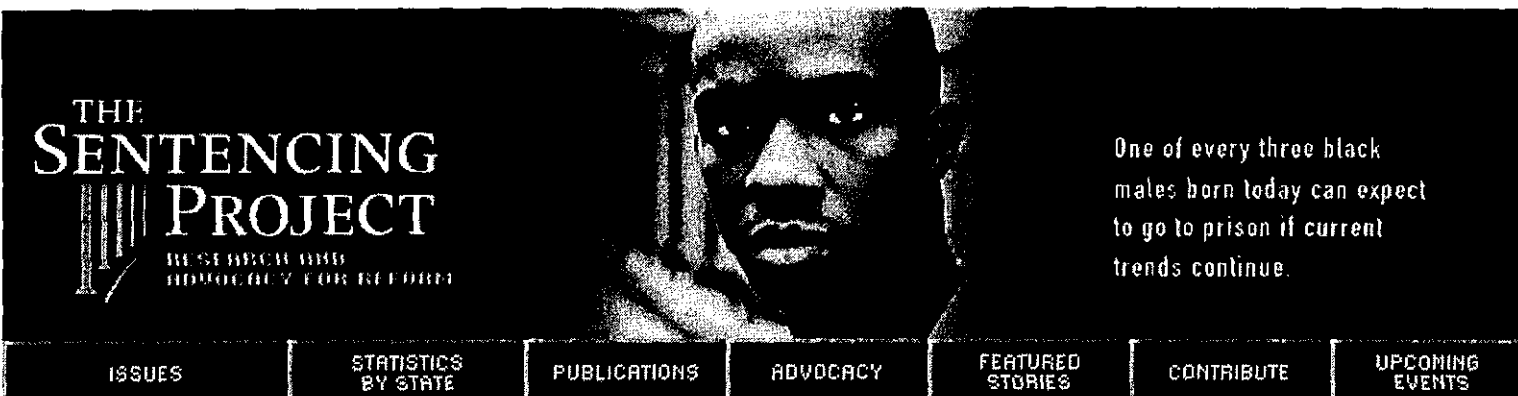
In 2007, as part of its revision to the Model Penal Code, the American Law Institute called for sentencing commissions to prepare projections to quantify “demographic patterns,” along with correctional resource projections. The ALI noted that “The provision does not dictate the policy decisions that will result. Rather, the provision treats numerical disparities in punishment as an important societal cost that must be considered along with other factors when the existing sentencing structure is assessed, or when changes within the system are contemplated.” (American Law Institute, “Model Penal Code: Sentencing,” 2007, p. 138.)

Policy makers and practitioners are also creating a range of mechanisms to address unwarranted disparities. In 2007, the Delaware Supreme Court, in conjunction with the Delaware Criminal Justice Council, convened a two-day Racial and Ethnic Fairness Summit. The meeting involved 75 key policy makers, practitioners, and community leaders in a frank discussion of how to promote policies that were both fair and *perceived* to be fair by all members of the community. The summit produced a working document of recommendations that is guiding the work of the Council in these areas.

a broad segment of the community in assessing the racial dynamics of prosecution. The Justice Integrity Act of 2008 called for establishing broad-based task forces in 10 U.S. attorney districts, comprised of leaders from the jurisdiction’s federal and state justice systems, as well as community representatives. The task forces would be charged with producing racial and ethnic fairness plans that analyze data on prosecutorial decision making, assessing whether disparities are explained by relevant legal variables, and recommending policies and practices to reduce any unjustified disparities. It is expected that the bill will be reintroduced in 2009.

Conclusion

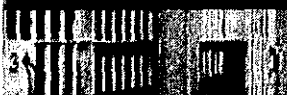
Issues of race and justice permeate American society, but nowhere are they as profound as in the criminal justice system. Racial and ethnic disparities result from a complex set of factors, many beyond the purview of the criminal justice system. But criminal justice leaders have an opportunity, and an obligation, to ensure that their policies and practices at the very least do not exacerbate any unwarranted disparities. Racial impact statements offer one means by which policy makers can begin to engage in a proactive assessment of how to address these challenging issues in a constructive way. ■



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RACIAL DISPARITY

More than 60% of the people in prison are now racial and ethnic minorities. For Black males in their twenties, 1 in every 8 is in prison or jail on any given day. These trends have been intensified by the disproportionate impact of the "war on drugs," in which three-fourths of all persons in prison for drug offenses are people of color.

Racial Disparity News

January 27, 2009

OREGON JOINS MOMENTUM, INTRODUCES RACIAL IMPACT BILL

Oregon Rep. Chip Shields (D) has introduced a racial impact bill that would require lawmakers to consider the potential racial or ethnic impact of proposed criminal justice legislation. The bill, HB 2352, would apply not only to legislation considered by the legislature, but also to ballot measures considered by voters. Oregon joins a trend of states recognizing the need for such legislation including Iowa, Illinois and Connecticut, which have recently adopted such policies in an effort to alleviate the racial disparity that exists in prisons nationally.

January 18, 2009 *(Birmingham News)*

Key Publications

Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers

Disparity By Geography: The War on Drugs in America's Cities

A 25-Year Quagmire: The "War On Drugs" and Its Impact on American Society

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