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The Honorable Senator Floyd Prozanski, Chair
Senate Judiciary Committee, Members

Testimony regarding SB 835

Dear Chair Prozanski, Vice-Chair Thatcher, and Members of the Senate Judiciary Committee,

The Board of Parole (Board) recognizes that reforms should to be made to the early medical release process. The Board's hope is that this bill will draw attention to an important process that needs medical expertise, staffing, and proper funding. However, the Board currently has serious concerns about SB 835 regarding 1) the number of people that would qualify for this process, 2) the minimal limitations regarding when someone may apply and reapply, 3) the amount of time and resources that is needed to determine the level of risk for everyone that is eligible, 4) how to formulate and conceptualize risk that meet the statutory requirement, and 5) our ability, as a small agency, to operationalize this concept.

I. Concerns regarding the number of people that would qualify

Section 5 of this bill describes broad and subjective criteria regarding eligibility for early medical release and some criteria are based on general assessments of potential future outcomes. The criteria in Section 5 are so broad and subjective that we believe almost all, if not all, AICs would qualify. Currently, there are over 12,000 AICs in custody, with the number expected to rise soon after the pandemic is over. We understand that the drafters of this bill will be making amendments to Section 5, but we still have questions about how many individuals will qualify.

At this time, we do not feel comfortable recommending suggestions for which criteria should be removed from Section 5. Rather, the Board's recommendation is to convene a workgroup to discuss how to make the criteria more objective so AICs who meet the criteria can be easily identified and a consensus can be formed about who should get the resources and attention to be eligible for this process. The Board is also concerned that the Oregon Judicial Department, the Oregon District Attorneys Association, the Oregon Department of Justice, and other relevant organizations that will be affected by this bill have not been asked to provide significant input. Section 6 of this bill would create an extremely large amount of work for the court system, and the Board does not feel comfortable making unilateral decisions about which criteria to prioritize without a meaningful discussion about how each criterion could impact the operations of other governmental entities.

The Board is a small agency, but we are tasked with making important decisions that affect many. Part of being responsible stewards of such authority is to ensure that we respect and solicit input from other system stakeholders before we make large systemic changes to our operations.

Without doing so would erode trust in our agency, create chaos within our system, and lead to unintended consequences.

II. Minimal limitations regarding when someone may apply and reapply

Section 2 allows individuals who are denied early medical release to reapply if their circumstances have changed without providing any clear guidance for what those circumstances could be. The bill provides in Section 2, Section 5, and Section 6 that an applicant whose application for release is denied may reapply for release provided that "the medical condition or other circumstance" have changed since the previous application. The term "other circumstances" can mean anything. The term "medical condition" is also extremely broad.

Additionally, the bill allows AICs to apply for this process without a specified minimum period of confinement. Presumably, a person could qualify medically upon serving only one day of incarceration and receive an early medical release hearing soon after. Once again, if denied, the person can reapply for an unlimited number of times thereafter. Such a process will be traumatizing for victims, especially those who have suffered from violent or sex crimes, and would provide little sense of procedural fairness and reliability for the criminal justice process.

III. Time and resources needed to determine the risk level of everyone that applies

Section 1 of the bill provides that "The board shall affirm the committee's recommendation, reset the release date and release the adult in custody unless the board finds, by clear and convincing evidence, that the adult in custody poses a specific danger to the safety of another person or the public and the danger outweighs any compassionate reasons for the release."

The Board is unclear how it should prove to itself an issue that meets a "clear and convincing" standard. Usually the clear and convincing standard applies to a litigant who must prove that standard to a separate trier of fact who determines if the "clear and convincing" standard is met. Like most other agencies, the Board is subject to a "substantial evidence and reasoning" standard when justifying its decisions. Regardless of the standard, but especially if the bill requires a standard higher than "substantial evidence and reasoning," the Board would need time and resources to investigate the applicant's criminal history, examine their in-custody conduct, conduct a thorough risk assessment, order a psychological or psychosexual evaluation, and other potentially costly and time-consuming procedures to ensure that it has enough evidence to prove that the person presents a risk.

IV. Concerns about how to formulate and conceptualize risk that meets the statutory requirement

The Board is also unclear about the investigatory effort it would need to find that someone poses a "specific" danger as outlined in Section 1 of this bill. For parole hearings, for example, often our contracted psychologists conceptualize risk based on the level of intervention necessary to prevent a person from engaging in violent acts. An examinee's risk can be categorized as "low" if the examinee would require little action or plans to manage the risk of violence. An examinee's risk can be categorized as "moderate" if the examinee has significant risk factors related to violence, and a risk management plan may be sufficient to manage the examinee's risk in a community setting. An examinee's risk can be categorized as "high" if the examinee has significant risk factors related to violence and a risk management plan would be inadequate to manage the examinee's risk in a community setting and high risk placement in a controlled environment (e.g. prison, jail, forensic or civil psychiatric hospital) is typically recommended.

The Board, subject matter experts, and forensic psychologists also usually conceptualize risk by considering a series of factors that are most strongly correlated to risk. Generally, we weigh the number of risk factors as well as the relevancy and significance of each factor to formulate a risk assessment. This process does not usually identify a "specific" risk to a victim or the public, rather, it weighs a variety of relevant risk factors to determine if a person can be safely managed in the community. The Board is concerned that the term "specific" does not comply with evidence-based principles of conceptualizing risk and may require additional investigation to determine if a specific member of the public will be harmed, or if we can predict that a specific type of crime will be committed to a clear and convincing degree. The drafters of this bill have asked for our input on this matter, and we look forward to providing feedback.

V. Concerns about our ability to operationalize this concept

We are a small agency that currently employs 20 full time employees. Out of the 20 employees, only four, the appointed Board Members, have release authority for AICs. The four Board Members are required to sit in panels of at least three for almost all our current hearings. The Board handles mostly parole hearings for AICs who have committed murder, aggravated murder, or deemed dangerous offender. We are a small agency that specializes in making individualized release decisions for AICs with complex risk factors who have committed crimes of physical and sexual violence. We are not the ideal agency to be tasked with operationalizing potentially thousands, or even hundreds, of hearings right away. We simply do not have the infrastructure to do so without a significant financial investment in our operations and time to expand our agency in a responsible way.

SB 835 would allow thousands of AIC to apply and then reapply for early medical release and only five parole board members to hold hearings for each applicant and make a risk determination. There is no way a board of five people (currently staffed at four due to budget reductions), who also have other statutorily mandated tasks, can make these complex decisions for thousands, or even hundreds, especially if the Board Members need to prove, based on clear and convincing evidence, if each individual will present a specific threat if released. Once again, this would require a lengthy process of document collection, risk formulation, and legal analysis for each case.

VI. Conclusion

The Board of Parole recognizes that there are many adults-in-custody with chronic and complex health conditions. We have met many of them in the course of our parole hearings and consider their situation when making release decisions. Indeed, we have released individuals whose health conditions mitigated the risk they would pose to the community. The criminal justice system should be responsive to these circumstances.

On the other hand, the Board understands from numerous survivors of sexual and physical violence that they were able to heal from the trauma they experienced in part by relying on promises made by the criminal justice system, among the most important being the guarantee that their abusers will serve specific sentences. In the Board's experience, when we make release decisions, it often means a mother will have to relive the moment they heard that their son was killed; a son will have to revisit the moment he found the bodies of his dead parents; a father will have to remember the moment he learned that his daughter was shot by her abuser.

Some of these survivors may think that the original sentence was too harsh. Some of them may understand that an adult-in-custody who is suffering greatly from illness should be able to spend the rest of their life outside of the confines of prison. Some may never want the person released

even if all indicators show that the individual is in great pain or incapacitated. Regardless of the individual opinions of the victims, to revise a sentence should require, at a minimum, a reasonable justification that considers the impact such a change will have on the victims. If tasked with hearing from these victims, the Board will need to be able to provide them with reasonable justifications for why the person that caused them harm is being released early. Overly vague or broad criteria and processes that provide little procedural predictability will create further harm, reduce trust, and may impede future reforms. We understand that the drafters of this bill will be making significant amendments, and we hope that they keep these considerations in mind when drafting their changes.

Thank you for taking the time to consider our concerns. Once again, we hope is that this bill will draw attention to an important process that needs medical expertise, staffing, and proper funding. We are willing to engage in all stakeholders and participate in a workgroup to improve our system.

Best,

Michael Hsu, Board Chairperson