Oregon
Tina Kotek, Governor

Board of Parole and Post-Prison Supervision
1321 Tandem Ave. NE
Salem, OR 97301
(503) 945-0900
http://egov.oregon.gov/BOPPPS

March 10, 2023

The Honorable Senator Deb Patterson, Chair
Senate Committee on Health Care, Members

Testimony re: SB 520

Dear Chair Patterson, Vice-Chair Hayden, and Members of the Committee on Health Care,

The Board of Parole (Board) recognizes that reforms should be made to the early medical release process. The Board's hope is that this bill will draw attention to an important process that requires medical expertise, staffing, and robust funding. However, the Board has serious concerns about SB 520 regarding our ability, as a small agency, to operationalize this concept.

I. Concerns about our ability to operationalize this concept.

We are a small agency that currently employs 27 full time employees. Out of those, only five, the appointed Board Members, have release authority over AICs. The five Board Members are required to sit in panels of at least three for almost every hearing. The Board handles mostly parole hearings for AICs who have committed murder, aggravated murder, or deemed a 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 hundreds, if not thousands, of file reviews 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. The implementation of this bill essentially doubles the size of the Board overnight.

Section 16 requires the Board to operationalize and implement this new program within 90 days of passage. This is an unattainable expectation given the breadth of the work required and the number of agencies involved in its implementation.

Further, the bill provides that the Governor will appoint at least 7 and up to 13 diverse medical professionals to serve on the committee. During the pandemic, most medical professionals were heavily burdened and stretched to their limits. According to the Oregon Association of Hospitals and Health Systems, Oregon's hospitals have been saying for over two years that the system is in distress, and a big reason is a nationwide staffing shortage. While we hope that medical professionals will step up and volunteer, we have serious concerns about finding enough who will do so while meeting the criteria of having the committee reflect the demographics of the Department of Corrections AIC population. This very real possibly creates serious doubt about the sustainability and efficacy of this committee.

II. The requirement of a clear and convincing burden of proof.

Additionally, Section 4 of the bill provides that "The Board shall accept the committee recommendation, advance the release date and order the release of the applicant or referred adult in custody unless the Board finds, by clear and convincing evidence, that the applicant or referred adult in custody poses a danger to the safety of another person or the public and the danger outweighs any compassionate reasons for release." Put another way, if the committee recommends release, the AIC is presumed to be released. The burden is then on the Board to prove dangerousness to a clear and convincing standard to be able to deny release when there are legitimate concerns surrounding issues of public safety.

Directives from the Oregon Court of Appeals and Supreme Court require the Board to provide "substantial evidence and reasoning" in all final Board actions. This is therefore the standard used in all Board decision making. 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. Regardless of the standard, but especially if the bill requires a standard higher than that of "substantial evidence and reasoning," the Board would need time and resources to investigate the applicant's criminal history, examine their in-custody conduct, perform a thorough risk assessment, complete a psychological or psycho-sexual evaluation, and other potentially costly and time-consuming procedures to ensure that it has enough evidence to determine whether the person presents a risk.

III. Uncertainty surrounding the true nature of the shifting workload.

Finally, the uncertainly surrounding the true nature of the workload due to shifting criteria gives the Board serious pause. The bill sets up a five-application limit to the committee per month, but that limit is subject to exception, such as during a Governor's declaration of an emergency. It does not specify what type of emergency needs to be declared, so floods or other natural disasters, for example, could trigger the change in criteria. An additional exception that deserves consideration are the direct referrals the committee will receive from the Department of Corrections, further clouding the actual numbers of applications the committee and the Board will be required to process in the timeframe proscribed in the bill.

The criteria for eligible medical conditions expand during states of emergency and will not be limited to only those who are close to the end of their life or cannot provide for their basic needs. During a state of emergency, the criteria will therefore include any AIC at risk of serious medical complications from disease. The Board has asked the Criminal Justice Commission to estimate the number of applicants who would become eligible under a state of emergency. The Criminal Justice Commission was hesitant to do so given the difficulty of predicting the population who will fit these criteria. The Board is therefore concerned that without a meaningful way to estimate how many people will qualify under a state of emergency, we will be backlogged with applications, making it difficult to focus on those with the most severe medical needs and will be pressured to make mass release decisions without the ability to conduct prudent case-by-case analysis of each individual's risk to reoffend. The Board is a small agency. Our expertise and training do not lend itself to making mass release decisions. We function best when we can analyze and assess individual cases to make specific determinations of risk for future violence.

Furthermore, Section 15 of the bill expands the criteria in January of 2026 to 1) eliminate the five-application cap, and 2) include release possibility for those who have debilitating or progressively debilitating medical

conditions, including but not limited to an injury, illness, disease, physiological or psychological condition or disorder, and 3) allow those serving Measure 11 sentences to apply for a certificate from the Committee that they meet the medical criteria for release, but not actual release. The Criminal Justice Commission estimates that 118 people will qualify to apply. Many more who would not qualify medically will certainly apply as well which will significantly increase the workload of the committee and the Board. These changes will require an increase in funding in 2025.

I. Conclusion

The Board of Parole recognizes that there are many AICs with chronic and complex health conditions. We have met many of them in the course of our work 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 response 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 AIC 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 would 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 who caused them harm is being released early. Overly broad and vague subjective criteria and processes that provide little procedural predictability will create further harm, reduce trust, and may impede future reforms.

Thank you for taking the time to consider our concerns. Once again, we hope that this bill will draw attention to an important process that needs medical expertise, staffing, and robust funding. We remain willing to engage with all stakeholder groups and participate in an official workgroup to collaboratively improve our system.

Best,

Greta Lowry

Board Chairwoman