

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

CRIMINAL JUSTICE COMMITTEE

Thursday, June 22, 2000
Chapel, James River Correctional Center
Jamestown, North Dakota

Representative John Mahoney, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives John Mahoney, Curtis E. Brekke, Ron Carlisle, Rachael Disrud, Bruce A. Eckre, Gerald O. Sveen, Elwood Thorpe, John M. Warner; Senator Wayne Stenehjem

Members absent: Representatives G. Jane Gunter, Jon Martinson; Senators Stanley W. Lyson, Carolyn Nelson, Darlene Watne

Others present: See attached appendix

It was moved by Senator Stenehjem, seconded by Representative Eckre, and carried on a voice vote that the minutes of the March 2, 2000, meeting be approved.

Chairman Mahoney recognized Senator David E. Nething, a member of the Legislative Council, and Representatives Lyle Hanson and Joe Kroeber, all of whom are legislators from the Jamestown area.

CORRECTIONAL SYSTEM STUDY

James River Correctional Center

Chairman Mahoney called on Ms. Elaine Little, Director, Department of Corrections and Rehabilitation, who introduced Mr. Don Redmann, Director, James River Correctional Center, Jamestown. Mr. Redmann welcomed the committee to the facility and introduced several of his staff members. Mr. Redmann said the number of inmates incarcerated at the center ranges from 217 to 225. He said of that number, 44 are women. He said plans have been developed for the possible renovation of an existing State Hospital building. If renovated, he said, the building would be used to house the female inmates. He said an estimated \$2 million would be necessary to renovate the existing building and \$3 million would be needed to construct an entirely new structure.

In response to a question from Representative Mahoney, Mr. Redmann said the inmates who work at Roughrider Industries are paid minimum wage and can earn \$300 to \$400 per month. He said there is a waiting list of inmates who want to work at Roughrider Industries.

Chairman Mahoney recessed the meeting while the committee toured the center and Roughrider Industries.

Chairman Mahoney called on Ms. Little to discuss recommendations for the center. Ms. Little said

among the concerns for the facility was the lack of programming and the level of staffing. She said the concerns will be addressed in the next budget process.

In response to a question from Representative Sveen, Ms. Little said there is a need to look at the staffing levels in all areas, including nursing, counseling, and administrative services.

In response to a question from Representative Mahoney, Ms. Little said the inmate population has been increasing at a rate of 10 percent per year. She said if the proposed women's facility becomes a reality, the female inmates from the Missouri River Correctional Center would be housed there as well. She said moving all female inmates to one facility would make more beds available for male inmates at both the Bismarck and Jamestown locations. She said rather than adding more beds, another option would be to develop a transitional community program that would be used during the last six months of incarceration.

In response to a question from Representative Warner, Ms. Little said the inmate population is beginning to stabilize. She said a 10 percent increase for the next three years would result in an inmate population of 1,364. In response to a question from Representative Disrud, Ms. Little said with the increasing number of convictions of persons with drug addictions, there is an increasing number of inmates with medical problems. She said the medical costs were underbudgeted for the current biennium.

In response to a question from Representative Warner, Ms. Little said workers' compensation premiums are paid for inmates who work at Roughrider Industries.

In response to a question from Representative Carlisle, Ms. Little said the transition program used in other states is a community-based program. She said if such a program is implemented in North Dakota, it would most likely be based in Fargo or Bismarck and could handle 40 to 50 inmates at a time. She said the program would be operated by a private company and would involve state's attorneys, the courts, and the community. She said the current release program at the Missouri River Correctional Center is only an employment program. She said the transition program would be a whole treatment program.

In response to a question from Representative Disrud, Ms. Little said electronic-tracking devices are not used on inmates involved in work release programs.

In response to a question from Representative Sveen, Ms. Little said if a separate female inmate facility is built, all the programs for the female inmates would be housed in the same building. She said this would keep the female and male inmates separated at all times except when working at Roughrider Industries.

In response to a question from Representative Thorpe, Ms. Little said the funding to improve the entrance and parking lot for the James River Correctional Center has been appropriated. She said the architect work has been done, and the department is waiting for bids.

Open Records Bill Draft

At the request of Chairman Mahoney, committee counsel presented a bill draft regarding open records and parole records of the Department of Corrections and Rehabilitation. She said the bill draft would require that records with respect to an inmate's identity, location, criminal convictions, or projected date of release are open records. She also said the bill draft clarifies that parole records of the Department of Corrections and Rehabilitation are confidential.

Chairman Mahoney called on Ms. Little for testimony concerning the bill draft. Ms. Little said she agrees that most of the inmates' records should be open; however, there are circumstances under which an inmate's identity or location should remain confidential. She said an inmate's identity or location should be confidential if the inmate is being held in protective custody. She said she would like to see a statutory definition for the term "social records" and that social records be exempt from the open records requirement. She said the Department of Corrections and Rehabilitation is preparing proposed legislation to address these open records concerns.

In response to a question from Representative Warner, Ms. Little said the term "social records" is defined by administrative rule but is not defined in the North Dakota Century Code.

Senator Stenehjem said Ms. Little may want to consider including those changes in the bill draft under consideration by the committee.

In response to a question from Representative Carlisle, Ms. Little said there are situations when, because of the nature of the crime, the department is unable to keep an inmate safe in the system. She said for those situations, certain information about the inmate should be confidential.

In response to a question from Representative Disrud, Ms. Little said allowing certain inmate records to be open records could result in potential danger to the department's staff.

In response to a question from Representative Warner, Ms. Little said the department has a policy on how an inmate becomes a protective custody inmate. She said any contact a protective custody inmate has with family members is done at the inmate's own risk.

Senator Stenehjem said any exceptions to the state's open records law must be carefully crafted. He said the public needs to know what occurs behind the doors of the prison. Ms. Little said she would provide the department's proposed changes to the committee to be incorporated into the bill draft under consideration.

Chairman Mahoney called on Mr. Roger Bailey, Executive Director, North Dakota Newspaper Association, for comments concerning the open records bill draft. Mr. Bailey said the association supports the bill draft under consideration. He said the bill draft makes it clear that records that have traditionally been closed, such as medical, social, and psychological records, remain confidential but information that has traditionally been public remains public information. He said secret prisons are not good for democracy. Mr. Bailey submitted written testimony, a copy of which is on file in the Legislative Council office.

SEXUAL OFFENDER STUDY

Sex Crimes Bill Draft

At the request of Chairman Mahoney, committee counsel presented a bill draft regarding changes to the state's sexual offender statutes. She said the bill draft contains age difference changes to the state's sexual offender statutes, creates a new crime for the luring of minors by computer, and repeals the state's adultery and unlawful cohabitation statutes.

Chairman Mahoney called on Mr. Ladd R. Erickson, Assistant State's Attorney, Morton County, Mandan, for comments regarding the bill draft. Mr. Erickson said he hopes the bill draft will start a debate among state's attorneys and criminal defense attorneys.

In response to a question from Representative Mahoney, Mr. Erickson said Section 1 of the bill draft is limited to initiation activities of street gangs but could be expanded to include other similar types of activity. He said his concern would be how to include or define other types of activity. He said criminal street gangs are defined in North Dakota Century Code (NDCC) Section 12.1-06.2-01.

In response to a question from Senator Stenehjem, Mr. Erickson said under Section 1 of the bill draft, everyone would be treated as an adult, regardless of age. He said the criminal street gang initiation activity usually involves a cooperating victim.

In response to a question from Representative Eckre, Mr. Erickson said he suggested using the three-year age difference between the offender and the victim rather than leaving it up to the discretion of the state's attorney because of the problems that may

cause in complying with the Wetterling Act and the Department of Justice requirements. He said it is difficult to address every scenario.

In response to a question from Representative Mahoney, Mr. Erickson said the language in the bill draft regarding the crime of luring of minors by computer is taken from a New York statute. He said the New York statute has been held to be constitutional. He said this type of legislation and court decision will continue to evolve as Internet crimes evolve.

In response to a question from Representative Eckre, Mr. Erickson said because of the sexual deviant intent language contained in Section 5 of the bill draft, the indecent exposure law would not include pranks such as "mooning." He said a person doing such pranks would more likely be charged under the state's disorderly conduct statute or a local ordinance.

In response to a question from Senator Stenehjem, Mr. Erickson said the disorderly conduct statute may need to be amended to cover some of the offenses not intended to be covered by the indecent exposure statute.

In response to a question from Representative Warner, Mr. Erickson said the surreptitious intrusion statute contained in Section 6 of the bill draft requires the individual to have a sexual intent when committing the act.

In response to a question from Representative Eckre, Mr. Erickson said the seven-year statute of limitations provision in Section 11 of the bill draft was intended to make the statute of limitations the same for gross sexual imposition as the statute of limitations for child sexual molestation cases. He said the current statute of limitations is three years.

In response to a question from Senator Stenehjem, Mr. Erickson said the committee may want to consider placing the two repealed sections in the bill draft, Sections 12.1-20-09 and 12.1-20-10, relating to adultery and unlawful cohabitation, in a separate bill draft.

Chairman Mahoney called on Mr. Bruce Romanick, Assistant State's Attorney, Burleigh County, Bismarck, for comments concerning the bill draft. Mr. Romanick said he supports the changes proposed in the bill draft. He said there may be a need to expand Section 3 of the bill draft relating to the luring of minors by computer to cover out-of-state situations. He said he supported the proposed harsher penalty for subsequent violations of the indecent exposure statute. He said the committee may want to add language to that section to include similar or equivalent statutes from another state.

Chairman Mahoney called on Mr. Robert Bennett, Assistant Attorney General, for comments concerning the bill draft. Mr. Bennett said the committee may want to look at the three-year timeframe for age differences between the offender and the victim. He said the timeframe should be based on reasons other than compliance with the Wetterling Act. He said the

committee may want to add "luring by electronic means" to the corruption or solicitation of minors statute rather than having a new crime for the luring of minors by computer. He said with the proposed changes to the indecent exposure statute, the committee may want to add the current "to annoy or harass" language to the disorderly conduct statute. Regarding the repeal of the unlawful cohabitation statute, he said, the legislative history for this statute indicates the statute was only intended to cover fraud by a couple pretending to be a married couple. He said the statute was not intended to make it a crime for two unmarried people to live together. He said to provide consistency among the affected statutes, there may be a need to amend the fornication law, NDCC Section 12.1-20-08.

Chairman Mahoney called on Mr. Jonathan Byers, Assistant Attorney General, for comments regarding the state's compliance with the Wetterling Act. Mr. Byers said in 1999 a number of changes were made to the state's sexual offense statutes regarding exempting persons from the sexual offender registration requirement. He said the Department of Justice has approved the state's program, and approval no longer hinges on including a three-year age difference in the statutes.

Chairman Mahoney called on Ms. Linda Isakson, Abused Adult Resource Center, Bismarck, for comments concerning the bill draft. Ms. Isakson provided to the committee a letter from Ms. Bonnie Palecek. In her letter, Ms. Palecek said the Coalition Against Sexual Assault in North Dakota supports the amendments to current law to incorporate an age differential of three years instead of the current benchmark of age 18. She said the coalition also supports the preservation of the age of 15 years as the minimum age of consent. She said the coalition supports making indecent exposure a registerable sexual offense and creating an enhanced penalty for repeat offenses. She also said the coalition supports raising the statute of limitations for certain adult sexual offenses to seven years. She said the coalition is keeping abreast of a national debate on an indefinite extension of the statute of limitations in sexual assault cases for the purpose of keeping open the option of DNA testing. She said a prolonged statute of limitations could result in a hardship for victims if a rape case could be reopened at any time at the request of the person convicted. A copy of Ms. Palecek's letter is on file in the Legislative Council office.

Committee counsel provided to the committee information concerning information technology and Internet crime laws of other states and information regarding cyberstalking laws of other states. A copy of the information is on file in the Legislative Council office.

Chairman Mahoney said the repeal portion of the bill draft regarding unlawful cohabitation and adultery

should be drafted as a separate bill draft. Chairman Mahoney said the committee should consider expanding Section 1 of the bill draft to include groups other than criminal street gangs.

Civil Commitment of Sexual Predators Bill Draft

At the request of Chairman Mahoney, committee counsel presented a bill draft regarding changes to the state's civil commitment of sexual predators statutes contained in NDCC Chapter 25-03.3. She said the bill draft was the result of changes recommended by the Attorney General's office.

Chairman Mahoney called on Ms. Jean Mullen, Assistant Attorney General, for comments concerning the bill draft. Ms. Mullen said the Attorney General's office supports the amendments contained in the bill draft. Section 1 of the bill draft, she said, provides for the inclusion of individuals with mental retardation under the civil commitment procedures of the chapter. She said this will close a gap in the current law that permits defendants with mental retardation who have been found to lack fitness to proceed to trial for their criminal acts to be released to the community without any treatment. Under the amendment, she said, an individual with mental retardation who is found to lack fitness to proceed to trial may be committed for treatment under the civil commitment chapter. She said there are numerous other instances in the bill draft where changes have been made to ensure that individuals with mental retardation for whom a petition is filed receive due process. Section 2 of the bill draft, she said, was included to expand the venue for bringing a petition. She said this was important for those individuals who were being referred from commitment by the State Penitentiary and the individual had indicated an intent to relocate in a county other than the one from which the individual was committed. She said Section 3 of the bill draft eliminates the current confusion concerning whether a probable cause hearing, a commitment hearing, or the records of the commitment proceeding are closed or open to the public. Section 4 of the bill draft, she said, would codify the referral process to be used by the Department of Corrections and Rehabilitation for inmates who have been convicted of an offense that involves sexually predatory conduct. Section 6, she said, permits an individual detained to remain in a local correctional facility rather than be sent to a treatment facility at a different location. She said this will allow the individual to be able to communicate easily with the individual's attorney in preparation for the probable cause hearing that is held within 72 hours of detention. Section 9, she said, clarifies that during a preliminary hearing, certain evidence that may not otherwise be admitted at a commitment hearing may be admitted for purposes of establishing probable cause. She said the amendments in the bill draft will assist state's attorneys, courts, the Department of

Corrections and Rehabilitation, and the State Hospital in carrying out their duties and responsibilities under the civil commitment chapter and overall assist in achieving a more effective and efficient implementation of the goals of the statute. She submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Mahoney, Ms. Mullen said Section 4, regarding the Department of Corrections and Rehabilitation referral process, would require state's attorneys to make a decision regarding the referral from the department.

In response to a question from Representative Warner, Ms. Mullen said the term "developmentally disabled" includes not only individuals with mental retardation but also those with only physical disabilities. She said the term "mental retardation" is used in the bill draft. She said it is the medically appropriate term to use to describe the individuals for whom the amendments are directed.

Senator Nething said he was concerned about the referral process and the impact the process outlined in the bill draft may have on part-time state's attorneys. In response to a question from Senator Nething, Ms. Mullen said most of the inmates who are being referred by the Department of Corrections and Rehabilitation have failed to comply with sexual offender treatment programs while they were incarcerated. She said a transitional release process should be used for a person who has been civilly committed and who has completed a sexual offender treatment program. She said any followup treatment for a person released from the treatment program must be done entirely through the civil process. She said the department is no longer involved after being released from the criminal system except for those persons who are on supervised probation.

In response to a question from Representative Mahoney, Ms. Mullen said other states use a transition process. She said some form of reinforcement after completion of a treatment program could be done through regional human service centers. She said other states, such as Arizona, use electronic satellite tracking systems to track persons following their release.

In response to a question from Representative Carlisle, Ms. Mullen said because of a concern over violating an inmate's constitutional rights, an inmate cannot be forced to participate in treatment programs while incarcerated. She said an inmate must admit to committing a crime before the inmate is allowed to participate in treatment. She said an inmate who refuses treatment while incarcerated can be required to serve his or her full sentence, but the sentence cannot be extended because of the refusal.

Chairman Mahoney called on Dr. Alan Broadhead, Medical Director, State Hospital, Jamestown, for comments concerning the civil commitment bill draft. Dr. Broadhead said the State Hospital offers no

comment at this time on the amendments that change the statutes to include individuals with mental retardation. He said the State Hospital supports the changes contained in Sections 2, 3, 9, and 11 of the bill draft, regarding jurisdiction, open records and proceedings, the time period to conduct a commitment hearing, and admissible evidence. He said there are concerns over the referral process contained in Section 4. He said this section may increase the number of referrals and thereby increase the growth of the program. He said the State Hospital is preparing a budget for the 2001-03 biennium which anticipates an increase of 12 beds for the sexual offender treatment program. He submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Mahoney, Dr. Broadhead said the bill draft may increase referrals because the referral process in the bill draft requires state's attorneys to take action regardless of the recommendation. Currently, he said, state's attorneys either must reply to the referral or take no action.

In response to a question from Representative Warner, Dr. Broadhead said an actuarial evaluation, as mentioned in Section 4 of the bill draft, is based on a series of questions regarding the respondent, including whether the respondent is married or single, the number and types of convictions, and other risk assessment factors.

Chairman Mahoney called on Ms. Corinne Hofmann, Protection and Advocacy Project,

Bismarck, for comments concerning the bill draft. Ms. Hofmann provided to the committee a copy of a letter from Mr. David Boeck, Protection and Advocacy Project. Mr. Boeck said the Protection and Advocacy Project has assembled a task force of people who are knowledgeable and who have strong interest in the treatment of individuals with mental retardation who may be sexually dangerous predators. He said the task force is not yet ready to provide final comments to the Criminal Justice Committee regarding the bill draft but will make comments and recommendations to the committee at the committee's next meeting. A copy of Mr. Boeck's letter is on file in the Legislative Council office.

Chairman Mahoney said the committee should receive information from the Department of Human Services regarding followup treatment and tracking.

It was moved by Representative Carlisle, seconded by Representative Eckre, and carried on a voice vote that the meeting be adjourned. Chairman Mahoney adjourned the meeting at 2:45 p.m.

Vonette J. Richter
Committee Counsel

ATTACH:1