

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

CRIMINAL JUSTICE COMMITTEE

Thursday, October 12, 2000
Harvest Room, State Capitol
Bismarck, North Dakota

Representative John Mahoney, Chairman, called the meeting to order at 1:00 p.m.

Members present: Representatives John Mahoney, Curtis E. Brekke, Ron Carlisle, Rachael Disrud, Bruce A. Eckre, Gerald O. Sveen, Elwood Thorpe, John M. Warner; Senators Stanley W. Lyson, Carolyn Nelson, Wayne Stenehjem, Darlene Watne

Member absent: Representative G. Jane Gunter

Others present: See attached appendix

It was moved by Senator Stenehjem, seconded by Representative Brekke, and carried on a voice vote that the minutes of the June 22, 2000, meeting be approved as distributed.

SEXUAL OFFENDER STUDY

Sex Crimes Bill Draft

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

Chairman Mahoney called on Mr. Ladd Erickson, Assistant State's Attorney, Morton County, for comments regarding the bill drafts. Mr. Erickson said there is a concern among some state's attorneys that they will lose discretion if the three-year age difference between the adult and the minor is included in the bill draft. He said although he supports the idea, he would recommend the committee remove the references to the age difference in the bill draft. He said the idea could be revived again during the legislative session in the form of an amendment. He also said the words "implicitly or explicitly discusses or" could be added to the language in the section creating a crime for luring minors by computers. He said adding these words would make it clear the communication does not have to be visual, but that it also includes chat room and e-mail conversations. To address the committee's concerns in Section 6 of the bill draft regarding whether the crime of surreptitious intrusion requires a person to physically enter the property, he said, the words "uses a vision-enhancing device or" could be added.

At the request of Chairman Mahoney, committee counsel distributed a letter from Ms. Bonnie Palecek, Executive Director, North Dakota Council on Abused Women's Services, regarding Mr. Erickson's proposed changes to the bill draft. In the letter, Ms. Palecek said her organization supports the age differential as stated in the draft. She said a three-year age difference allows for the consideration of a young person's ability to consent to the relationship. She said she would like to see the decriminalization of consensual relationships between 17- and 18-year-olds. A copy of Ms. Palecek's letter is on file in the Legislative Council office.

In response to a question from Representative Mahoney, Mr. Erickson said he was not sure why the North Dakota Council on Abused Women's Services took the position it did, but he agreed with the council. He said criminal penalties for sexual conduct should be imposed when the conduct is violent, deviant, and when the victim is nonconsenting and should not be based upon morals and religion.

Chairman Mahoney called on Mr. Robert Bennett, Assistant Attorney General, for comments concerning the bill draft. Mr. Bennett said if the bill draft passed, there would be an inconsistency in the penalties for the solicitation of a minor and for luring a minor by computer. He said that could be remedied by changing the penalty for soliciting a person under the age of 15 years to engage in a sexual act or sexual contact from a Class A misdemeanor to a Class C felony. He also said in subsection 2 of Section 3 of the bill draft whenever the term "the minor" is used, it should be changed to "a minor."

Committee Discussion of Sexual Offender Bill Drafts

It was moved by Senator Watne, seconded by Representative Brekke, and carried that the bill draft be amended to change the penalty from a Class A misdemeanor to a Class C felony on page 2, line 8; and that "the minor" be changed to "a minor" on page 2, lines 19 through 22.

In response to a question from Representative Warner, Senator Stenehjem said in a housing discrimination case in West Fargo, the district court held that a landlord could refuse to rent to an

unmarried couple based upon the state's unlawful cohabitation statute.

Chairman Mahoney called on Mr. Jack McDonald, Bismarck, for comments concerning the unlawful cohabitation statute and housing discrimination. Mr. McDonald said there is a Bismarck case similar to the West Fargo case that is still unresolved. He said other states have held the refusal to rent to unmarried couples to be a discriminatory practice.

It was moved by Senator Stenehjem, seconded by Representative Disrud, and carried that the amendments proposed by Mr. Erickson, except for the amendment to add "uses a vision-enhancing device or" to Section 6, be adopted.

Senator Stenehjem said additional case law may be available regarding the constitutionality of the luring of a minor by computer crime when this bill is considered by the Legislative Assembly in January.

It was moved by Senator Stenehjem, seconded by Representative Brekke, and carried on a roll call vote that the bill draft, as amended, relating to changes to the state's sexual offender statutes, be approved and recommended to the Legislative Council. Representatives Mahoney, Brekke, Carlisle, Disrud, Eckre, Sveen, Thorpe, and Warner and Senators Lyson, Nelson, Stenehjem, and Watne voted "aye." No negative votes were cast.

The committee took no action on the bill draft to repeal the statutes regarding unlawful cohabitation and adultery.

Civil Commitment of Sexual Predators Bill Draft

Chairman Mahoney called on Mr. David Boeck, Protection and Advocacy Project, for testimony regarding the civil commitment of sexual predators bill draft. Mr. Boeck said an informal task force was formed to review the bill draft and the state's civil commitment statutes. He said the participants in the task force included individuals from law enforcement, corrections, psychiatry, guardians and service providers, victims support, human services, and disabilities groups. He said the task force began with the premise that North Dakota Century Code (NDCC) Chapter 25-03.3 would be amended to provide that individuals with mental retardation can be committed as sexually dangerous individuals. He said the task force did not address the question of whether individuals with mental retardation are committable under the law. He said the significant proposed changes include:

1. Adding a definition of mental retardation;
2. Clarifying that mental retardation does not cause any individual to engage in sexually predatory conduct;
3. Authorizing judges to appoint a nonattorney "special advocate" to help a victim, witness, or respondent with mental retardation to

understand the proceedings and to better participate in the proceedings;

4. Continuing the ban on detaining a respondent in jail but providing the option of detaining a respondent in a secure local treatment facility before the preliminary hearing;
5. Improving notice to a respondent and the respondent's decisionmakers;
6. Establishing individualized treatment teams to develop, review, and revise an individual's treatment plan;
7. Identifying the rights that apply to a respondent or committed individual; and
8. Articulating a committed individual's right to have a court review of any transfer to a more restrictive treatment setting.

Mr. Boeck said the revisions will increase the likelihood that a committed individual will get appropriate treatment and be released from a residential facility to rejoin the community with appropriate supervision. He said the task force reached a consensus at increasing the standard time allowed for an evaluation from 30 to 45 days. He said, however, that Mr. Alex Schweitzer, Superintendent, State Hospital, was unable to attend the meeting when that issue was discussed, and he may have a different opinion on that issue. Mr. Boeck submitted written testimony, a copy of a proposed bill draft, and a list of the task force members, all of which are on file in the Legislative Council office.

In response to a question from Senator Watne, Mr. Boeck said the task force's bill draft proposes that the special advocate should not be an attorney. He said the intent was that the person be trained to have experience in communicating with impairments and not necessarily be law-trained. He said mentally retarded persons who commit sexually predatory acts are being adequately handled now; however, that was not the opinion of the task force. He said the situations can be handled by the families and by guardians.

Chairman Mahoney called on Ms. Melissa Hauer, Director, Legal Advisory Unit, Department of Human Services, for testimony regarding the task force's proposed bill draft. Ms. Hauer said she was appearing before the committee because Mr. Schweitzer could not attend the meeting. She said the goal of the task force was to develop a proposed bill draft to amend the current statute regarding civil commitment of sexually dangerous individuals. She said the task force's intent was to work with the Attorney General's office on the changes to the statute. She said Ms. Yvonne Smith, Acting Director, Department of Human Services, has not had an opportunity to review the task force's proposed bill draft, and therefore, she is unable to say whether the department is in agreement with the proposals. Ms. Hauer submitted prepared testimony,

a copy of which is on file in the Legislative Council office.

In response to a question from Senator Nelson, Ms. Hauer said Mr. Schweitzer is directly involved in the evaluation process. She said all evaluations have taken longer than 45 days to complete. She said he would favor a 60- to 90-day time period for evaluations. She said to date, state's attorneys have had to request extensions in every case.

Chairman Mahoney called on Ms. Jean R. Mullen, Assistant Attorney General, for testimony regarding the task force's proposed bill draft and the bill draft being considered by the committee. Ms. Mullen said regarding the proposed 90-day evaluation period, many states allow 45 days and some allow as long as 120 days. She said those states with 45 and 60 days have a standing motion for extensions because the time period is not long enough. She said 90 days is not an unreasonable nor is it an unconstitutional amount of time. She said besides the evaluation period issue, there are a number of changes in the task force's proposed bill draft that create red flags and would result in more litigation. Regarding the proposed amendment to add a definition of mental retardation, she said, to add this definition would improperly tie the hands of those mental health professionals attempting to determine whether an individual has a condition of mental retardation. She said she would not recommend the amendment.

In response to a question from Senator Stenehjem, Ms. Mullen said developmental disability is defined in the North Dakota Century Code; however, it is much broader than the definition of mental retardation.

Mr. Boeck said equal protection challenges may arise if the law gives protection to persons with mental retardation but not to others who fall under the statute.

Ms. Mullen said it may be acceptable to reference the definition as stated in the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, but the actual definition should not be codified.

Regarding the proposed amendment to add a definition of qualified expert, Ms. Mullen said, the amendment may limit the ability of state's attorneys to go forward with petitions. She said she was unsure of the number of psychiatrists and psychologists in the state who have specific expertise in sexual offender evaluations of individuals with mental retardation. She said if there are only a very limited number, adding this requirement may be unduly burdensome. She said the proposed amendment to the definition of sexually dangerous person is likely to lead to considerable litigation as to whether a mentally retarded person can ever be found to be a sexually dangerous person. She said, however, some clarifying language could be included to that definition.

Ms. Mullen said the proposed definition of sexually predatory conduct does not refer to the proposal to include individuals with mental retardation under the

scope of the statute but rather goes to redefining a victim's capacity to understand the nature of a sexual act or contact. She said if adopted, the language would vary from the language in the state's gross sexual imposition statute. She said this would increase the burden on a state's attorney bringing a petition for an individual who has been convicted under the language of the gross sexual imposition statute. She said the proposed amendment to the section providing for the appointment of a guardian ad litem goes further by proposing that a special advocate who cannot be an attorney be appointed. She said the proposal mandates certain criteria the special advocate must meet. She said that list of criteria is inappropriate in statutory language, and while it may be desirable for the person who acts as a special advocate to have those attributes, it may be impossible to find any one person who can fulfill those attributes. She said these are guidelines a court should take into consideration in appointing a guardian ad litem or special advocate for a person with mental retardation and should not be codified. She provided prepared testimony regarding her concerns over the bill draft proposed by Mr. Boeck, a copy of which is on file in the Legislative Council office.

Chairman Mahoney said he was not pleased that the task force's proposals were brought before the committee so late in the interim. He said the committee has been working on these issues for over a year, and any major changes to the bill draft being considered by the committee should have been made known to the committee earlier in the interim. He said the committee would not be drastically revising the bill draft it previously has been considering.

In response to a question from Senator Stenehjem, Ms. Mullen said to not enact the changes in the bill draft being considered by the committee would continue the problem. She said the criminal proceedings for those persons with mental retardation who are considered not competent to participate in the proceedings are being dismissed and the offenders are being released back into the community to offend again. She said in spite of Mr. Boeck's personal opinion that these people can be handled within the community, there are state's attorneys who know of a number of individuals who have offended, been released, and then have offended again. She said persons with mental retardation were not included in the 1997 changes to the civil commitment statutes because there was an understanding that the Department of Human Services intended to prepare separate legislation to deal with the commitment of persons with mental retardation who committed sexually predatory conduct.

Chairman Mahoney called on Mr. Boeck to respond to the Ms. Mullen's concerns regarding the proposals. He said of the time allowed for

evaluations, most of it is spent waiting for medical records and not on performing the evaluation.

Representative Mahoney said when this civil commitment law was originally drafted, there were concerns over whether it would withstand constitutional challenges. He said the law has withstood those challenges. He said the changes the task force is proposing are substantial steps beyond what the committee had originally considered. He said the more things are defined in statute, the more open the law will be to litigation. He said the task force could bring any changes not accepted by the committee to the Legislative Assembly.

Mr. Boeck said the task force's position is that the evaluation period be limited to 45 days, although Mr. Schweitzer's position was that it should be 60 days with possible extensions. He also said it is important the definition of qualified expert be changed. He said the difference between guardian ad litem and a special advocate is that the guardian ad litem makes decisions for the individual and the special advocate would advise the individual but the individual makes the choices. He said the qualifications of the special advocate could be put in advisory language rather than mandatory. He said it is inappropriate that the person be held in jail rather than in a hospital, as is proposed by the bill draft being considered by the committee. He said all the proposed changes may also result in regulating the process for persons other than those with mental retardation. He said there is significant potential for equal protection issues if one group is provided with rights that another group does not have. He said the task force strongly felt the Department of Human Services should have authority to adopt rules.

In response to a question from Senator Stenehjem, Mr. Boeck said it would be beneficial to have these protections in the law rather than litigating later on due process and least restrictive commitment issues.

Representative Sveen said a representative of the Attorney General's office should have been a part of the task force.

Chairman Mahoney called on Mr. McDonald, North Dakota Newspaper Association, for comments regarding the civil commitment bill draft. Mr. McDonald said the North Dakota Newspaper Association opposes the provisions of the bill draft insofar as it establishes closed or secret court proceedings for a subject that is usually of great concern to the public. He said if there are concerns that the names of certain victims be kept confidential, then that can be provided for in the legislation without the sweeping closure mandated in the bill draft. He submitted written testimony, a copy of which is on file in the Legislative Council office.

Committee Discussion of Civil Commitment Bill Draft

Chairman Mahoney said the main issue of the bill draft previously considered by the committee is the inclusion of the persons with mental retardation. He said the committee should consider the draft that has been under consideration by the committee and include those changes of the task force on which Ms. Mullen concurs. He said those include the definition of respondent, the definition of treatment facility, the inclusion of the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, definition of mental retardation, and the rulemaking authority.

Representative Warner said he was more comfortable with referencing the definition in the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, rather than codifying that definition.

Senator Nelson said the committee could reference the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, and future editions.

Senator Stenehjem said the law can refer only to a manual that is in existence and not future editions. He said to use language such as Senator Nelson suggested will raise unconstitutional delegation of legislative authority questions.

Representative Carlisle said he is concerned that any bill draft recommended by the committee be able to withstand a constitutional challenge and that it protects the public from sexual predators.

Senator Stenehjem said the civil commitment of sexual predators is a difficult subject, because on one side it involves the commitment of persons who have served their time and on the other side it involves persons who are likely to offend again. He said the task force should work with the Attorney General's office before the legislative session to resolve some of the task force's concerns. He said the use of a special advocate and the section regarding individual rights are two of the task force's ideas that should be given further consideration by Ms. Mullen.

Representative Mahoney said it is important the interested groups work together to resolve the issues before the legislative session.

It was moved by Senator Stenehjem, seconded by Representative Sveen, and carried that the bill draft regarding the civil commitment of sexual predators be amended to include those amendments of the task force agreed to by Ms. Mullen, including a reference to the existing *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, that the committee suggest the task force and Ms. Mullen engage in discussions before the Legislative Assembly convenes to determine if there are additional provisions that should be added to the bill draft during the legislative session, including the inclusion of a special advocate, and that the bill draft, as amended, be approved and recommended to the Legislative Council. Representatives Mahoney, Brekke, Carlisle,

Disrud, Eckre, Sveen, Thorpe, and Warner and Senators Lyson, Nelson, Stenehjerm, and Watne voted "aye." No negative votes were cast.

CORRECTIONAL SYSTEM STUDY

Open Records Bill Draft

At the request of Chairman Mahoney, committee counsel presented a bill draft regarding open records requirements of inmate records. She said the bill draft contains language recommended by the Department of Corrections and Rehabilitation, and it provides that medical, psychological, and treatment records of persons in the custody of the Division of Adult Services of the department are confidential, that case history records are exempt records, and that records with respect to the person's identity, location, criminal conviction, or projected date of release, except for the records of a person who is under protective management, are open records. She said the bill draft also contains an emergency clause.

Chairman Mahoney called on Mr. Ken Sorenson, Assistant Attorney General, for comments concerning the bill draft. Mr. Sorenson said the Department of Corrections and Rehabilitation Division of Adult Services is added to the bill draft to clarify that the statute does not apply to the department's Division of Juvenile Services. He said the bill draft considered by the committee at its last meeting included "social" records in the category of confidential records that are not subject to the public records provisions of NDCC Section 44-04-18 and Section 5 of Article XI of the Constitution of North Dakota. He said this bill draft removes the term "social" records from the category of confidential records and replaces the term with "case history" records. He said the bill draft provides that the case history records are exempt records. He said exempt records become open at the discretion of the department. He said this would allow the department to communicate with inmate families, the media, and other interested parties regarding inmate matters in which the department regards disclosure as appropriate or necessary. He said the exempt category also includes records regarding inmates who the department has to protect. He said the bill draft also includes a provision relating to court records under seal, which the department experiences from time to time. He said those records are also excluded from the definition of exempt record. He said those records referred to by the department as the legal file would be open records. He said the bill draft also adds the Social Security Administration and the Veterans Administration to the list of persons or agencies authorized to receive confidential records without application to the court. He submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Eckre, Mr. Sorenson said information that may be requested by agencies such as the Internal Revenue

Service and the Tax Department would likely be considered financial account information.

In response to a question from Representative Carlisle, Mr. Sorenson said the difference between the two drafts is that the first draft considered by the committee retains "social" records as a confidential category. The second bill draft, he said, changes the term to "case history" records and makes those records exempt.

In response to a question from Senator Lyson, Mr. Sorenson said if a person or agency does not agree with the Department of Corrections and Rehabilitation's decision that a certain exempt record should not be released, the person or agency could appeal that decision to a court. He said the bill draft, however, does not specifically provide for this appeal. Senator Lyson said some of the language used by the department in the bill draft was confusing and, if adopted by the committee, should be clarified and reorganized.

Chairman Mahoney called on Ms. Corinne Hofmann, Protection and Advocacy Project, for comments concerning the bill draft. Ms. Hofmann said the Protection and Advocacy Project recommends the bill draft be amended to include the Protection and Advocacy Project in the list of persons and agencies authorized to receive confidential records without application to the court. She said it is a waste of state resources to require the Protection and Advocacy Project to seek a court order every time it requires access to confidential records. She submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Senator Watne, Ms. Hofmann said part of the process of determining whether a person qualifies for the services of the Protection and Advocacy Project is to determine the individual's needs. She said the records are necessary to determine whether the person's disability is substantial enough to warrant services.

In response to a question from Senator Stenehjerm, Ms. Hofmann said she is proposing that this be added to the bill draft for simplicity purposes rather than creating a separate bill draft.

Chairman Mahoney called on Mr. McDonald for comments regarding the bill drafts. He said the North Dakota Newspaper Association is more supportive of the Department of Corrections and Rehabilitation's version than the one previously considered by the committee because more information is potentially available to the public under that draft. He said, however, the department's bill draft provides that records for those inmates under protective management are not open.

In response to a question from Senator Nelson, Mr. Sorenson said the Division of Adult Services was added to clarify that the statute does not apply to juvenile records. He said if a juvenile's case is moved to

adult court, those records would be treated as adult records.

In response to a question from Senator Stenehjem, Mr. Sorenson said the question of whether an inmate's location was an open record arose following the Kyle Bell situation. He said it was the opinion of the Attorney General that all records of the department were confidential. He said the intent of the legislation passed in 1997 was that the provision only applied to parole records.

In response to a question from Representative Carlisle, Mr. Sorenson said the Department of Corrections and Rehabilitation bill draft gives the department the discretion to release case history records. He said the other bill draft being considered provides that certain legal information regarding the inmate is open, such as identity, location, convictions, and date of release.

Representative Mahoney said under the Department of Corrections and Rehabilitation bill draft, information as to the location of Kyle Bell would be exempt. He said under the other bill draft, the information would be an open record.

Committee Discussion of Open Records Bill Draft

Senator Stenehjem said to keep this bill draft clean, it would be better if the Protection and Advocacy Project would make its proposal a separate bill to be introduced to the Legislative Assembly.

Senator Stenehjem said there are instances when certain information regarding an inmate should be confidential; however, he said, the burden should be on the Department of Corrections and Rehabilitation to explain why the information cannot be made public.

Representative Eckre said there is a concern about the safety of the Department of Corrections and Rehabilitation personnel if all records are open.

Senator Stenehjem said it could be burdensome to require that a person or agency go to court every time information is withheld.

Representative Mahoney said the Department of Corrections and Rehabilitation has a responsibility to the public, and he would like to think that the department would not abuse its discretion in releasing information.

It was moved by Senator Nelson, seconded by Senator Lyson, and carried that the bill draft with the language proposed by the Department of Corrections and Rehabilitation be amended to provide that upon application to the court, the department must demonstrate that there is good reason for withholding the information in the case history records and that on page 2, line 11, the words "medical, psychological, and treatment" be added after "confidentiality,".

It was moved by Senator Stenehjem, seconded by Senator Nelson, and carried on a roll call vote that the bill draft, as amended, relating to open records of Department of Corrections and Rehabilitation and exempt case history records, be approved and recommended to the Legislative Council. Representatives Mahoney, Brekke, Carlisle, Disrud, Sveen, Thorpe, and Warner and Senators Lyson, Nelson, Stenehjem, and Watne voted "aye." Representative Eckre voted "nay."

Chairman Mahoney said Legislative Council staff would work on the form and style of the bill draft before it is presented to the Legislative Council.

It was moved by Representative Brekke, seconded by Senator Stenehjem, and carried on a voice vote that the chairman and the staff of the Legislative Council be requested to prepare a report and the bill drafts recommended by the committee and to present the report and recommended bill drafts to the Legislative Council.

It was moved by Representative Eckre, seconded by Representative Thorpe, and carried on a voice vote that the meeting be adjourned sine die.

Chairman Mahoney adjourned the meeting sine die at 5:05 p.m.

Vonette J. Richter
Committee Counsel

ATTACH:1