

SB 2128
2-18-25

SENATE APPROPRIATIONS COMMITTEE
FEBRUARY 17, 2025

TESTIMONY OF CLAIRE NESS
OFFICE OF ATTORNEY GENERAL
SENATE BILL 2128

Chairman Dever and Members of the Committee:

For the record, my name is Claire Ness. I am the Chief Deputy Attorney General, and I am here on behalf of the Attorney General's Office in support of Senate Bill 2128.

To start, I'd like to draw your attention to the fact sheets about the bill and the information on which it is founded. The Attorney General's Office has found that several inaccurate narratives about the bill have been circulating. In order for you to assess the appropriateness of the fiscal note, we wanted to ensure you have an honest accounting of what the bill does and does not do, based on documented data and information.

We also need to consider the costs of the current criminal justice system. SB 2128 resulted from intensive research, meetings, and discussions with law enforcement officers, State's Attorneys, DOCR administrators and employees, and others. The key findings from that work were distilled into the packet of materials provided to you. What we found is that – over the many years of investing heavily in the expensive “Norway” model – the DOCR has received a tremendous amount of discretion in how they carry out their responsibilities. In return for that investment and autonomy, the Legislative Assembly – and the state as a whole – should receive objective measurements of success. But we don't have them. Instead:

- Violent crime and violent crime rates have increased¹;

¹ See the annual crime and homicide reports documenting crime statistics reported by North Dakota law enforcement agencies at <https://attorneygeneral.nd.gov/public-safety/crime-data/crime-and-homicide-reports/>.

- Drug use and addiction rates are increasing²;
- More than 40% of prisoners recidivate,³ costing the state and counties money for repeat arrests, investigations, prosecutions, trials, and sentencing hearings;
- Law enforcement officers and prosecutors are frustrated by the expensive and dangerous revolving door of criminals who are on our streets and recommitting crimes before their previous sentences are served⁴; and
- Our neighbors are concerned about the prevalence of crime in their communities.

When evaluating SB 2128, the Attorney General's Office urges you to consider the comparative costs, savings, and returns from both the state's current investment in corrections and rehabilitation and the investment that would be made under this bill. Buying a bicycle is not a good investment if you need a car.

Inaccurate assumptions are the basis for the fiscal note.

The first fiscal note prepared by DOCR was based on an assumption that parole would be eliminated under SB 2128. After the parole issue was clarified, the fiscal note should have decreased as a result. However, the second fiscal note is about 37% higher than the first. A careful review of the second fiscal note reveals that most of its costs are based primarily on 3 inaccurate assumptions:

² The rate of illegal substance use in North Dakota, as reported by the ND DHHS, rose again between the 2023 report and the 2025 report. The rate of illegal drug use (other than marijuana) increased from 2.83% to 3.46%, and the rate of marijuana use increased from 10.4% to 11.97%. ND DHHS's *Behavioral Health in North Dakota: Data Book 2023* and *Behavioral Health in North Dakota: Data Book 2025*, at <https://www.hhs.nd.gov/behavioral-health/data>.

³ DOCR testified it defines recidivism as returning to DOCR facility within 3 years of release. **DOCR's website states 40% of offenders released from ND state prison facilities were returned to those prisons within 3 years. If you add the number of those offenders who were returned to federal prison, county jails, and other states' prisons, the total recidivism rate exceeds 40% and likely exceeds it by a significant margin. DOCR has not provided data on the exact recidivism rate when those facilities are included.**

⁴ See, e.g., the testimony of Dennis Ingold and the testimony of Jason Stugelmeyer in support of SB 2128 to the Senate Judiciary Committee on January 21, 2025.

1. DOCR will have to return inmates who currently reside in transitional facilities back to prison.
2. Parole will not be available for inmates.
3. Inmate labor will have to be replaced by civilians.

The second fiscal note contains other presumptions that do not seem to be supported by data, but this testimony will focus on those three main faulty assumptions.

(1) DOCR will not have to return inmates who currently reside in transitional facilities back to prison.

In the first sentence of the second fiscal note, DOCR says the “bill removes DOCR’s authority to house inmates in transitional facilities, requiring residents to return to prison.” This is not accurate for at least two reasons.

One, during the first hearing on the bill, this office presented an amendment (which is still available on the legislative website for SB 2128 as document 30506) as well as written and oral testimony describing each section of the bill. The amendment contains an Application clause showing the bill is prospective only. It will not impact current inmates, and it will affect DOCR only gradually as new inmates serve their sentences. The Application clause also was described on page 13 of my testimony, which I read during that first hearing. My testimony also stated that the bill probably would be prospective even without the Application clause (because of Due Process and other considerations). To avoid any confusion, however, the Application clause was always part of the amendment that the Senate Judiciary Committee adopted.

Two, inmates can still reside in transitional facilities, as can individuals on parole and probation. Inmates who committed the nonviolent crimes exempted from the 85% requirement can be transferred to transitional facilities at any time during their sentences, provided they meet DOCR’s criteria. Other inmates who committed violent crimes can be transferred to transitional

facilities after they have safely served 85% of their sentences. To say that inmates cannot be housed in transitional facilities under the bill is not correct.

Late last week, Senator Castaneda and I discovered that Legislative Council had removed the Application clause from the amendment and the engrossed version of the bill that they posted online. I understand that Senator Castaneda and Senator Larson had the Legislative Council replace that clause. To the extent this incident caused confusion for DOCR, I would ask the committee to request an updated fiscal note adjusting the costs accordingly.

(2) and (3) Parole will be available, and civilians will not have to replace inmate labor.

DOCR estimates that approximately \$67 million for FY 25-27 and \$155 million for FY 27-29 will be incurred because inmates will not be eligible for parole. This is not accurate. Parole will not be eliminated. Also, DOCR's first fiscal note - based on the assumption that parole was eliminated – had a total cost that was tens of millions of dollars less than the amount in the second fiscal note that DOCR attributes to the supposed lack of parole.

SB 2128 says inmates are eligible for parole after serving 50% of their sentences. (This is significantly less than our more liberal neighbor, Minnesota, which requires inmates to serve 2/3 of their sentences.⁵) DOCR's argument seems to be that work, education, and rehabilitation programs will not be allowed in DOCR facilities under SB 2128 – and that this will make inmates poor candidates for parole even after they have served 50% of their sentences. DOCR then uses a model suggesting that only 5% of parole-eligible inmates will be paroled. DOCR also adds almost \$17 million to the second fiscal note for replacing inmate labor with civilian labor. Additionally,

⁵ See Minnesota Department of Corrections website on Community Supervision, at www.mn.gov/doc/community-supervision/. ("Individuals serve two-thirds of their prison sentence incarcerated and the remaining third on supervised release.")

DOCR states about \$2.5 million will be incurred by housing parolees in transitional facilities to participate in programs after they are released from prison.

Throughout the weeks of testimony and discussion on Senate Bill 2128, the Attorney General's Office has consistently stated that the bill:

“will not take away any offender's opportunity to participate in rehabilitation programs or programs that help an offender prepare for reentry to the community. Those programs can continue to be offered in prison and other correctional facilities. The Attorney General's Office supports these types of programs and for years has offered to support requests for the resources to ensure they can continue.”⁶

Senate Judiciary Committee members also understood these programs would continue to be available in the prison and other DOCR facilities.

There was no indication that DOCR believed work, education, and rehabilitation programs would be eliminated in correctional facilities until they issued the second fiscal note – after the Senate Judiciary Committee had closed the proceedings on the bill. Had DOCR believed a clarification in the bill language was necessary, they should have raised that issue to the committee so the clarification could be made. Everyone involved intended for the programs to continue, and a clarification would have been simple and easily approved by the committee.

By waiting until after the committee's work concluded, **DOCR is adding approximately \$242 million to the second fiscal note based on an argument that the bill will have an impact that absolutely no one thought it would have and no one intended.** The Attorney General's

⁶ Testimony of Claire Ness in support of Senate Bill 2128 to the Senate Judiciary Committee on January 21, 2025.

Office asks that the Appropriations Committee either adopt a minor, clarifying amendment to satisfy DOCR's concerns or disregard the \$242 million in costs DOCR says will be attributable to the alleged elimination of parole and these programs.

SB 2128 also will result in savings.

As noted above, our current system has produced a recidivism rate that is higher than 40% and has not slowed the rate of substance abuse that contributes to our crime rate. That means close to half of all inmates return to a correctional facility within 3 years. The cost to the state and our counties from these repeated arrests, investigations, prosecutions, trials, and sentencing hearings must be tremendous. Although DOCR says it does not have data on this, a significant amount of those crimes would not occur while inmates serve their sentences in secure settings. Moreover, inmates who are able to participate in treatment and rehabilitation programs for longer periods of time may be less likely to recidivate at all. Finally, the deterrent effect of actually having to serve at least half of a sentence may reduce the incidence of violent crime.

The other costs to society – the impact on public safety and security – also should be considered when determining the value of SB 2128.