

INCARCERATION ISSUES COMMITTEE AND COMMISSION ON ALTERNATIVES TO INCARCERATION

INCARCERATION ISSUES COMMITTEE

The Incarceration Issues Committee was created by Section 4 of 2015 House Bill No. 1015. That section required the Legislative Management to select the Chairman and Vice Chairman of the committee and provided for the membership of the committee as follows:

1. Two members of the House Appropriations Committee;
2. Two members of the Senate Appropriations Committee;
3. One member of the House Judiciary Committee;
4. One member of the Senate Judiciary Committee; and
5. Other members serving in a nonvoting capacity:
 - a. Two district court judges appointed by the Chief Justice of the Supreme Court;
 - b. The Chief Justice of the Supreme Court, or a designee of the Chief Justice;
 - c. One local law enforcement official appointed by the Governor from a city with a population greater than 10,000 based on the most recent decennial census;
 - d. One local law enforcement official appointed by the Governor from a city with a population less than 10,000 based on the most recent decennial census;
 - e. One state's attorney appointed by the Attorney General from a county with a population of 10,000 or more based on the most recent decennial census;
 - f. One state's attorney appointed by the Attorney General from a county with a population less than 10,000 based on the most recent decennial census;
 - g. The Attorney General, or designee of the Attorney General;
 - h. The Director of the Department of Corrections and Rehabilitation (DOCR); and
 - i. One member appointed by the Director of DOCR.

The committee was directed to study pretrial services, sentencing alternatives, treatment options, and other related issues. Section 3 of House Bill No. 1015 appropriated \$50,000 to the Legislative Council for consulting services to assist with the study of incarceration issues.

In addition to the study responsibilities provided in 2015 House Bill No. 1015, the Legislative Management directed the committee to undertake the study provided for under 2015 House Bill No. 1165. That bill provided for a study, in conjunction with representatives of the executive and judicial branches and other stakeholders, of justice reinvestment reforms to seek cost-effective and evidence-based strategies to enhance public safety and properly manage corrections and supervision populations. The bill required the committee to seek technical assistance as appropriate from the United States Bureau of Justice Assistance, The Pew Charitable Trusts, and the Council of State Governments (CSG) Justice Center to conduct the reform initiative.

Committee members were Senators Ron Carlisle (Chairman), John Grabinger, and Terry M. Wanzek; Representatives Ron Guggisberg, Kim Koppelman, and Jon O. Nelson; Citizen members were Director of the Department of Corrections and Rehabilitation Leann K. Bertsch and the Director's appointee Thomas Erhardt; Attorney General Wayne Stenehjem and the Attorney General's appointees Rozana Larson and Aaron Roseland; Chief Justice Gerald W. VandeWalle and the Chief Justice's appointees Judge Douglas Mattson and Presiding Judge Frank Racek; and the Governor's appointees Scott Steele and Randy Ziegler. James D. Gion served as a member of the committee and as an appointee of the Attorney General before his appointment as a district judge.

BACKGROUND

According to a report by the United States Bureau of Justice Statistics, an estimated 6,899,000 people were under the supervision of adult corrections systems in the United States at the end of 2013. Inmate counts documented by DOCR indicated that after an average inmate decline between 2011 and 2012, the state has experienced an increase in average prison population since 2013.

The 2015 Legislative Assembly appropriated \$177,774,343 from the general fund and \$37,612,899 from other funds to DOCR for the 2015-17 biennium. The appropriation for DOCR provided for an increase of 22 full-time equivalent (FTE) positions, which increased the total number of FTE positions within DOCR to 836.29.

Justice Reinvestment

In 2010 Congress appropriated funds to the Bureau of Justice Assistance to launch the Justice Reinvestment Initiative (JRI) in partnership with The Pew Charitable Trusts. The Justice Reinvestment Initiative convenes the stakeholders in a state's justice system along with local policy leaders to devise data-driven approaches to criminal justice reform designed to generate cost-savings that can be reinvested in high-performing public safety strategies. Since the JRI began, 17 states have participated in the program and with technical support from The Pew Charitable Trusts and the CSG Justice Center, the states have implemented JRI legislation and policy solutions in addition to developing systems for tracking the impact of the reinvestment strategies.

States participating in a JRI first establish bipartisan, interbranch teams of elected and appointed state and local officials to work with researchers and criminal justice policy experts. States also engage a wide variety of stakeholders, such as judges, prosecutors, defense attorneys, victims' advocates, corrections staff, law enforcement agencies, local officials, and service providers. Participating states then develop policy solutions that target corrections population and cost drivers identified through systemwide data analyses that determine the key causes of a state's correctional costs and populations and the main barriers to enhanced public safety. Through legislation and other policy modification, these solutions are incorporated into the state's criminal justice operations. Upon passage of JRI legislation, reforms are implemented and a portion of the resulting savings is reinvested in evidence-based efforts to support additional public safety improvements. Projected savings vary across states and time periods, ranging from \$7.7 million over 5 years to \$875 million over 10 years. Total project savings amount to \$3.3 billion, and states are projected to reinvest a total of \$374 million in public safety initiatives.

Reports

In conducting its study, the committee received reports from representatives of numerous state agencies, local government officials, and other entities including the CSG Justice Center. The representatives of CSG conducted meetings with stakeholders throughout the state and gathered data from the various entities throughout the criminal justice system. Representatives of CSG provided the committee regular updates regarding its justice reinvestment initiative as well as recommendations for proposed legislation.

Department of Corrections and Rehabilitation

A representative of DOCR indicated since 1992 the probation and parole caseload has increased 217 percent and the inmate population day count has increased 134 percent. According to the report, about 85 percent of inmates in jail are incarcerated because of an inability to make bond as a result of the state not having standard pretrial detention practices.

Department of Public Instruction

The committee received testimony from a representative of the Department of Public Instruction which indicated many schools have programs to target at-risk students. The graduation rate goal for the state is 90 percent, and the state is at 89 percent. Alternative education settings provide opportunities for students who may not thrive in a traditional school environment.

North Dakota Association of Counties

A representative from the North Dakota Association of Counties reported county jails house 56 percent of the state's inmates, whereas nationally 35 percent of inmates are housed in local facilities. Planned county jail expansions across the state will increase bed capacity by 840 beds.

Department of Human Services

A representative of the Department of Human Services (DHS) indicated the treatment system in the state is acute, meaning an individual is diagnosed, sent to treatment for a specified period of time, and considered fixed, which is no longer the best practice. Because addiction is chronic, chronic-based treatment must to be used to cover a continuum of care.

Indian Affairs Commission

A representative of the Indian Affairs Commission indicated that although Native Americans comprise about 5 percent of the population of the state, Native Americans represent 25 percent of inmates in the state. The rate of revocation of parole for the Native American population is 21 percent.

Dakota Women's Correctional and Rehabilitation Center

A representative of the Dakota Women's Correctional and Rehabilitation Center reported the majority of female inmates at the center have substance abuse issues. Although inmates may receive treatment at the Tompkins Rehabilitation and Corrections Center, inmates must have a minimum custody level to be eligible for treatment. Testimony further indicated women of Native American heritage make up 40 percent of the female inmate population.

Office of the Attorney General

The Attorney General reported the overall crime rate has continued to increase. Although the 2015 crime report indicated increases in most crime statistics, there has been a significant decrease in the number of arrests and convictions related to driving under the influence.

Minority Justice Implementation Committee

A representative of the Supreme Court's Minority Justice Implementation Committee provided information that indicated a disproportionate representation of minorities in the state's criminal justice system. Because data collection has proven to be difficult, it was argued establishing a retrieval mechanism for county data would allow for a more long-term detailed analysis of each aspect of the criminal justice system.

CSG Justice Center

A representative from the CSG Justice Center indicated although the overall prison population in the state is low, the state is experiencing some of the largest rates of prison population growth in the country. The impact on the criminal justice system of increased crime and the resulting significant increase in the prison population was partly due to the population growth in the state during the first half of the decade.

Because courts do not always use the same offense codes and some records are missing race and gender information, the data collection and analysis by CSG proved to be a challenge that affected the ability to develop recommendations to address specific issues. Data collected indicated felony sentence events doubled between 2011 and 2014, with drug offenses being the primary driver of those sentences. The felony sentence events for drug offenses increased two and one-half times between 2011 and 2014, with 40 percent related to drug offenses and 79 percent of those cases related to possession. Class C felonies, the lowest level felony, comprise 83 percent of felony sentence events in the state. Between 2010 and 2014, new prison admissions for property and drug offenses increased 42 percent. In 2014, 72 percent of individuals who were sentenced to the custody of DOCR, were sentenced for either a new property offense, a drug offense, or a revocation of probation.

A representative of CSG indicated a smaller proportion of felony offenses in this state result in probation than the national average and most other states involved in justice reinvestment. Furthermore, offenders in 41 percent of misdemeanor cases are sentenced to incarceration, with 83 percent of misdemeanor sentencing events involving a period of suspended sentence and supervised probation.

According to CSG, a common theme among stakeholders in the state was a concern regarding a lack of treatment options to address mental health and substance abuse needs. Testimony indicated the majority of judges have sentenced individuals to prison to connect the individuals with mental health or drug and alcohol programming.

Representatives of CSG reported that maintaining the current incarceration trend will result in 1,200 more prison beds being used at a cost of about \$485 million, which does not include any building costs to accommodate the anticipated 3,000 incarcerated individuals over the next decade. The state spends about \$25 million incarcerating low-level property and drug offenders and individuals whose probation or parole has been revoked. In addition, individuals at higher supervision levels are revoked at higher rates, which representatives of CSG contended suggests additional support and services are needed earlier in the supervision period. According to data analysis by CSG, probation revocations cost the state more than \$9 million each year in state prison costs.

A representative of CSG contended supervision, programs, and treatment adhering to evidence-based practices are able to reduce recidivism at a lower cost than prison. To reduce recidivism, supervision and programs must be focused on offenders with higher risks and needs. Representatives of CSG indicated the state would need to ensure that risk levels are used to prioritize access to community programs and treatment while moving felony probationers from an active caseload to a diversion type caseload based on risk level and demonstrated compliance. In general, the only programming provided through probation is at transitional centers because access to treatment through regional human service centers or private providers is very limited. It was contended probation and parole officers lack sanction and treatment options to respond to violations in a swift and cost-effective manner. Although nearly 75 percent of offenders on supervision are in need of substance abuse treatment, there are long wait times to access services and most communities lack the trained workforce and services necessary.

The recommendations from CSG included an array of community interventions for higher-risk individuals. Representatives of CSG suggested the first step is to bring representatives of DHS and DOCR together to develop and adopt standards for the implementation of community behavioral health services tailored for moderate- and high-risk offenders with serious behavioral health disorders. In addition, it was contended the state may consider adopting approaches to services and supports across all the human service centers, streamline interstate transfers, expand existing rural health care workforce initiatives to include behavioral health workers, and encourage the utilization of behavioral health assessments across agencies. The proposed policy solutions are intended to further the justice reinvestment, decrease incarceration, and improve behavioral health outcomes for individuals by averting growth through diversion of offenders convicted of low-level drug and property offenses to probation rather than prison or jail; reducing recidivism in a cost-effective manner by holding supervision violators accountable with swift, certain, and proportional sanctions followed by supervision and treatment as needed; increasing public safety by focusing supervision and program resources on probationers and parolees at a high risk for reoffending; and reinvesting in the expansion of effective behavioral health treatment for probationers and parolees with substance use and mental health needs.

Committee Considerations

The committee considered a bill draft which would have implemented presumptive probation, created a pretrial services program, changed the conditions of parole, created a batterers intervention standards oversight board, developed a risk and needs assessment tool, and created a new class of felony offenses. Proponents of the bill draft contended the proposal would address the majority of the issues facing the criminal justice system. Opponents of the bill draft contended the concepts in the bill draft were attempting to address a problem that does not exist. There was concern with respect to creating an entire class of offenses and whether reducing penalties for certain offenses is an evidence-based practice.

Based on recommended amendments by representatives of CSG and DOCR, the committee considered a bill draft that would shift the authority to allow sentence reduction credit from the judiciary to the facility administrator of the correction facility in which an individual is held; authorize the use of sentence reduction credit for time spent in custody; allow the parole board to consider medical parole for offenders who are not otherwise eligible for parole; remove the court's authority to excuse an offender from completing a domestic violence offender treatment program; create a new Class AA misdemeanor offense; require the use of presumptive probation for first-time, low-level offenses; reclassify ingestion, possession, and paraphernalia offenses; reduce the proximity to a school before an increased penalty for a drug offense is warranted; authorize additional mental health professionals to provide addiction counseling services; remove the prohibition against individuals who have a felony substance abuse conviction from being eligible for various supplemental nutrition assistance programs; and create a pilot project for pretrial services. The bill draft was discussed at a joint meeting of the committee and the Commission on Alternatives to Incarceration.

Proponents of the bill draft contended a legislative proposal is needed to provide the 2017 Legislative Assembly a starting point to begin consideration of criminal justice system reform. Members of both the committee and the Commission on Alternatives to Incarceration supported the portions of the bill draft which allow for medical paroles, create a pretrial pilot project, and increase access to nutrition assistance programs with the addition of access to all types of nutrition benefits. Members of both the committee and the commission supported amendments to the provisions in the bill draft relating to good-time reduction credits to remove sentence reduction credit for sentences shorter than 60 days in a local jail or up to 6 months in the custody of DOCR.

Some committee and commission members raised the question whether it is appropriate to develop a Class AA misdemeanor offense level in the Criminal Code. Proponents of the idea argued the concepts would receive further scrutiny during the 65th Legislative Assembly and eliminating too many proposed reforms would defeat the purpose of justice reinvestment. However, sections providing for a Class AA misdemeanor offense were removed from the bill draft to avoid conflict with the federal definition of a felony offense.

Proponents of removing a court's authority to excuse an offender from completing a domestic violence offender treatment program argued anger management programming does not address the issue of domestic violence. However, there were concerns with respect to the lack of domestic violence treatment options in the rural areas of the state. Committee and commission members generally agreed it would be appropriate to require a court to order an offender to receive a treatment evaluation.

Proponents of amending the theft offense statute argued the inclusion of an automobile, aircraft, or other motor-propelled vehicle is no longer necessary as the value of those types of vehicles generally exceed \$2,500. Therefore, committee and commission members supported an amendment to remove the unnecessary language.

Opponents creating a presumptive probation sentencing requirement argued most of the inmates at the State Penitentiary are imprisoned as a result of a probation revocation. However, some committee and commission members questioned the data provided by CSG, which indicated the state underutilizes probation. Members of the Commission

on Alternatives to Incarceration agreed to remove the provisions relating to presumptive probation while members of the Incarceration Issues Committee agreed to create a concept of presumptive probation for individuals convicted for a Class A misdemeanor drug offense.

The bill draft proposed to reduce from 85 to 70 percent of a sentence certain dangerous offenders are required to serve before becoming eligible for release. Opponents of the proposal questioned the costs associated with recalculating each inmate's sentence and the potential litigation based on errors in those calculations. Although representatives of DOCR argued the requirement has done nothing to enhance public safety, members of both the committee and the commission generally agreed the proposal likely was not feasible.

Opponents of a section reclassifying ingestion of a controlled substance from a Class A misdemeanor to an infraction questioned the ability to correct behavior if the offense level for ingestion of a controlled substance is reduced to an infraction. Proponents of the proposal argued ingestion statutes have been repealed in many states and have proven to be counterproductive. Members of both the committee and the commission agreed to reduce the level of offense to a Class B misdemeanor for a first offense.

Committee and commission members agreed reducing offense classifications for possession of a controlled substance and possession of drug paraphernalia, reducing the enhanced penalties for aggravating factors in a drug offense, and reducing the distance from a school from 1,000 feet to 500 feet before a court can use the proximity to a school as an aggravating factor for a drug offense were areas worthy of further consideration by the Legislative Assembly.

Proponents of allowing additional health care professionals to provide addiction counseling services contended the lack of treatment professionals could be addressed by allowing licensed independent clinical social workers and professional clinical counselors to provide addiction counseling. Members of both the committee and the commission supported the concept of expanding the spectrum of professionals allowed to provide addiction counseling.

Recommendation

The committee [recommends a bill](#) to shift the authority to allow sentence reduction credit from the judiciary to the facility administrator of the correction facility in which an individual is held; authorize the use of sentence reduction credit for time spent in custody; allow the parole board to consider medical parole for offenders who are not otherwise eligible for parole; to require the use of presumptive probation for individuals convicted of Class A misdemeanor drug offenses; reclassify ingestion, possession, and paraphernalia offenses to a lower-level criminal offense; reduce the proximity to a school before an increased penalty for a drug offense is warranted; authorize additional mental health professionals to provide addiction counseling services; remove the prohibition against individuals who have a felony substance abuse conviction from being eligible for various supplemental nutrition assistance programs; and create a pilot project for pretrial services.

COMMISSION ON ALTERNATIVES TO INCARCERATION

The Commission on Alternatives to Incarceration was created by 2005 House Bill No. 1473. The bill, which was codified as North Dakota Century Code Section 54-35-24, required the Chairman of the Legislative Management to select the Chairman and Vice Chairman of the commission and provided for the membership of the commission as follows:

1. Three members appointed by the Governor, one of whom must be an academic researcher with specialized knowledge of criminal justice sentencing practices and sentencing alternatives;
2. The Attorney General or the Attorney General's designee;
3. Two members appointed by the Chief Justice of the Supreme Court;
4. The Director of DOCR;
5. The Director of DHS;
6. Two local law enforcement officers appointed by the Attorney General;
7. One state's attorney appointed by the North Dakota State's Attorneys' Association;
8. Three members of the House of Representatives, two of whom must be selected by the leader representing the majority faction of the House of Representatives and one of whom must be selected by the leader representing the minority faction of the House of Representatives;
9. Three members of the Senate, two of whom must be selected by the leader representing the majority faction of the Senate and one of whom must be selected by the leader representing the minority faction of the Senate; and
10. One representative of the North Dakota Association of Counties appointed by the association.

Section 54-35-24 requires the commission to study sentencing alternatives, mandatory sentences, treatment options, the expanded use of problem-solving courts, home monitoring, and other related issues. That section requires the commission to provide to the Governor information and recommendations for the Governor's consideration in time for inclusion of the recommendations in the biennial executive budget.

In addition to its statutory directive, the Legislative Management directed the commission to receive a report and recommendations from the CSG Justice Center relating to justice reinvestment in the state. The commission met with the Incarceration Issues Committee to receive a report and participated in consideration of a bill draft.

Commission members were Senators Ron Carlisle (Chairman), John Grabinger, and Terry M. Wanzek; Representatives Ron Guggisberg, Kim Koppelman, and Jon O. Nelson; Citizen members were Governor's appointees Dan Donlin, Mark A. Friese, and Dr. Gary Rabe; Attorney General Wayne Stenehjem; Chief Justice Gerald W. VandeWalle and Chief Justice's appointee Justice Lisa McEvers; Director of the Department of Corrections and Rehabilitation Leann K. Bertsch; Director of the Department of Human Services Maggie D. Anderson; Attorney General's law enforcement officer appointees Paul D. Laney and Jason T. Olson; North Dakota State's Attorneys' Association's appointee Meredith Huseby Larson; and North Dakota Association of Counties' appointee Duane Johnston.

Recommendation

The committee [recommends a bill](#) to shift the authority to allow sentence reduction credit from the judiciary to the facility administrator of the correction facility in which an individual is held; authorize the use of sentence reduction credit for time spent in custody; allow the parole board to consider medical parole for offenders who are not otherwise eligible for parole; reclassify ingestion, possession, and paraphernalia offenses; reduce the proximity to a school before an increased penalty for a drug offense is warranted; authorize additional mental health professionals to provide addiction counseling services; remove the prohibition against individuals who have a felony substance abuse conviction from being eligible for various supplemental nutrition assistance programs; and create a pilot project for pretrial services.

The recommended bill differs from the bill recommended by the Incarceration Issues Committee by removing provisions to require the use of presumptive probation for individuals convicted of Class A misdemeanor drug offenses.