



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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MEMORANDUM

DATE: April 26, 2016

TO: All Members of the Delaware State Senate
and House of Representatives

FROM: Ms. Daniese McMullin-Powell, Chairperson
State Council for Persons with Disabilities

RE: H.B. 214 (Nurse Workplace Violence Protection]

The State Council for Persons with Disabilities (SCPD) has reviewed H.B. 214 which includes an assault on a nurse performing a work-related duty as a second degree assault. While the proposed legislation is well-intentioned, is ostensibly authorizes a penalty disproportionate to the offense and may unnecessarily "criminalize" a large number of vulnerable patients. SCPD has the following observations.

Under current law, if a person intentionally causes "physical injury" to a member of the general public, the crime is a misdemeanor A punishable by up to 1 year in prison. See attached 11 Del.C. §§611 and 4206. There is special statute [11 Del.C. § 612] which elevates the misdemeanor to a felony D if a person intentionally causes "physical injury" to a nurse "while [the nurse] is rendering emergency care". The penalty for a class D felony is up to 8 years in prison. See attached 11 Del.C. §4205(b). The definition of "physical injury" is "impairment of physical condition or substantial pain". See attached 11 Del.C. §222(23). Therefore, the current law elevates the maximum 1 year prison term to a maximum 8 year term for an assault on a nurse providing emergency care with no significant injury apart from "pain". H.B. 214 would expand the application of the 8-year prison term to nurses in non-emergency contexts, i.e., while "performing a work-related duty" (lines 17-18). While well intentioned, SCPDs concern is that authorizing a prison term not double, triple, or quadruple but 8 times in length for an assault resulting only in some pain seems disproportionate to the offense. One compromise would be to elevate the offense against a nurse to a felony F or G which carry 2 and 3 year prison terms respectively.

Authorizing excessive prison term runs counter to recent, high-publicized legislative initiatives to deter sentences disproportionate to the offense. See attached March 27, 2016 and April 3,

2016 News Journal articles. The March article highlights the following information:

Nationally, lawmakers are revisiting the tough sentencing laws that made the United States the world's number 1 jailer. In recent years, voices from the left and right have joined together in challenging the scale of incarceration. Delaware has engaged in similar efforts too, but lags behind the country in downscaling its prison population....The growth of incarceration in Delaware resulted from the choices of lawmakers to increase the use and severity of prison sentences. Delaware's correctional population has grown by more than 207 percent since 1980; taxpayers spend more than \$32,900 to incarcerate each prisoner.

Policymakers may wish to consider unintended consequences. The bill could easily result in prosecution of patients with compromised capacity at the time of the alleged crime. For example, individuals with urinary tract infections may display symptoms akin to mental illness. Individuals with an intense fear of needles may defensively strike out at a nurse attempting to perform an injection. An elderly patient may strike out defensively at a nurse attempting to impose wrist or mechanical restraints on the patient to prevent the patient from removing tubes or aggravating wounds. Medications or a high fever may compromise executive functioning and self-control. A patient who does not speak English may defensively try to block an injection or push a nurse away out of a lack of understanding. A patient may experience involuntary movements or seizures which a nurse could misinterpret as voluntary acts of aggression. A patient with an undiagnosed TBI may strike out as a function of brain injury. The "unintended consequence" of the bill may be to unnecessarily "criminalize" a large number of vulnerable patients.

Finally, SCPD is dubious that there would be any practical deterrent effect if the legislation were enacted. It is unlikely that aggressive or disoriented patients will deliberate and gauge their behavior based on whether an assault is a misdemeanor versus a felony under the Delaware Code.

Thank you for your consideration and please contact SCPD if you have any questions regarding our observations on the proposed legislation.

cc: The Honorable Matthew Denn
Mr. Brendan O'Neill, Public Defender's Office
Ms. Kathleen MacRae, ACLU
Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

HB 214 nurse workplace violence protection 4-19-16



Governor's Advisory Council for Exceptional Citizens (GACEC)
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302-739-4553 (voice) 302-739-6126 (fax) <http://www.gacec.delaware.gov>

MEMORANDUM

DATE: March 24, 2016

TO: The Honorable Members of the Delaware General Assembly

FROM: Robert D. Overmiller, Chairperson
GACEC

RE: House Bill No. 214 (Nurse Workplace Violence Protection)

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed House Bill No. 214, which will upgrade an assault on a nurse performing a work-related duty to a second degree assault or class D felony. Council would like to share the following observations.

Under current law, if a person intentionally causes "physical injury" to a member of the general public, the crime is a misdemeanor A punishable by up to one year in prison. See 11 Del.C. Secs. 611 and 4206. There is a special statute [11 Del.C. Sec. 612] which elevates the misdemeanor to a felony D if a person intentionally causes "physical injury" to a nurse "while [the nurse] is rendering emergency care". The penalty for a class D felony is up to eight years in prison. See 11 Del.C. Sec. 205(b). The definition of "physical injury" is "impairment of physical condition or substantial pain". See 11 Del.C. Sec. 222(23). Therefore, the current law elevates the maximum one year prison term to a maximum eight year term for an assault on a nurse providing emergency care with no significant injury apart from "pain". House Bill No. 214 would expand the application of the eight-year prison term to nurses in non-emergency contexts, i.e., while "performing a work-related duty" (lines 17-18). While well intentioned, the concern of the Council is that authorizing a prison term not double, triple, or quadruple but eight times in length for an assault resulting only in some pain seems disproportionate to the offense. One compromise would be to elevate the offense against a nurse to a felony F or G which carry two and three year prison terms respectively.

Council suggests that policymakers consider the unintended consequences of this legislation. The bill could easily result in prosecution of patients with compromised capacity at the time of the alleged crime. For example, individuals with urinary tract infections may display symptoms similar to mental illness. Individuals with an extreme fear of needles may defensively strike out

at a nurse attempting to perform an injection. An elderly patient may strike out defensively at a nurse attempting to impose wrist or mechanical restraints on the patient to prevent the patient from removing tubes or aggravating wounds. Medications or a high fever may compromise executive functioning and self-control. A patient who does not speak English may defensively try to block an injection or push a nurse away out of a lack of understanding. A patient may experience involuntary movements or seizures which a nurse could misinterpret as voluntary acts of aggression. A patient with an undiagnosed traumatic brain injury (TBI) may strike out as a function of brain injury. While well intentioned, the unintended consequences of this bill may be to unnecessarily "criminalize" a large number of vulnerable patients and Council reiterates that the penalties seem extreme in relation to the offense.

Thank you for your time and consideration of our observations. Please feel free to contact me or Wendy Strauss should you have any questions.

COMMITTEE REPORT

HB 214

Sponsor: Keeley

Long Title: AN ACT TO AMEND TITLE 11 OF THE DELAWARE CODE RELATING TO ASSAULT.

Committee: PUBLIC SAFETY & HOMELAND SECURITY

**Number of
Committee
Members:** 11

Date of Report: 03/23/2016

Committee Vote: Favorable:	On Its Merits:	Unfavorable:
2	5	0

Purpose of the Bill : Currently, for an assault to rise to the level of assault in the second degree against a nurse, the nurse must be rendering emergency care. This bill raises the level for an assault on a nurse performing a work-related duty to the second degree.

Committee Findings: The committee found that the language in this bill needs to be reworked in order to address punishments for individuals who are mentally handicapped.

§ 611 Assault in the third degree; class A misdemeanor.

A person is guilty of assault in the third degree when:

- * (1) The person intentionally or recklessly causes physical injury to another person; or
- (2) With criminal negligence the person causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

Assault in the third degree is a class A misdemeanor.

11 Del. C. 1953, § 611; 58 Del. Laws, c. 497, § 1; 67 Del. Laws, c. 130, § 8; 70 Del. Laws, c. 186, § 1.;

§ 4206 Sentence for misdemeanors.

- ~~*~~ (a) The sentence for a class A misdemeanor may include up to 1 year incarceration at Level V and such fine up to \$2,300, restitution or other conditions as the court deems appropriate.

§ 4205 Sentence for felonies.

(a) A sentence of incarceration for a felony shall be a definite sentence.

(b) The term of incarceration which the court may impose for a felony is fixed as follows:

(1) For a class A felony not less than 15 years up to life imprisonment to be served at Level V except for conviction of first degree murder in which event § 4209 of this title shall apply.

(2) For a class B felony not less than 2 years up to 25 years to be served at Level V.

(3) For a class C felony up to 15 years to be served at Level V.

(4) For a class D felony up to 8 years to be served at Level V.

(5) For a class E felony up to 5 years to be served at Level V.

(6) For a class F felony up to 3 years to be served at Level V.

(7) For a class G felony up to 2 years to be served at Level V.

(c) In the case of the conviction of any felony, the court shall impose a sentence of Level V incarceration where a minimum sentence is required by subsection (b) of this section and may impose a sentence of Level V incarceration up to the maximum stated in subsection (b) of this section for each class of felony.

(d) Where a minimum, mandatory, mandatory minimum or minimum mandatory sentence is required by subsection (b) of this section, such sentence shall not be subject to suspension by the court.

(e) Where no minimum sentence is required by subsection (b) of this section, or with regard to any sentence in excess of the minimum required sentence, the court may suspend that part of the sentence for probation or any other punishment set forth in § 4204 of this title.

(f) Any term of Level V incarceration imposed under this section must be served in its entirety at Level V, reduced only for earned "good time" as set forth in § 4381 of this title.

(g) No term of Level V incarceration imposed under this section shall be served in other than a full custodial Level V institutional setting unless such term is suspended by the court for such other level sanction.

(h) The Department of Correction, the remainder of this section notwithstanding, may house Level V inmates at a Level IV work release center or halfway house during the last 180 days of their sentence; provided, however, that the first 5 days of any sentence to Level V, not suspended by the court, must be served at Level V.

(i) The Department of Correction, the remainder of this section notwithstanding, may grant Level V inmates 48-hour furloughs during the last 120 days of their sentence to assist in their adjustment to the community.

(j) No sentence to Level V incarceration imposed pursuant to this section is subject to parole.

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(23) "Physical injury" means impairment of physical condition or substantial pain.

(24) "Public transit operator" means a person in control or in charge of a transportation vehicle for public use, in exchange for a fee or charge, offered by any railroad, street railway, traction railway, motor bus, or trolley coach. Specifically excluded are:

- a. Transportation to and from any school or school-sponsored event when such transportation is under the regulation of the Department of Education; and
- b. Transportation to and from a church, synagogue or other place of worship;
- c. Shuttle-type transportation provided by business establishments without charge to customers of the businesses offering such shuttle transportation between fixed termini; and
- d. Limousine services.

(25) "Serious mental disorder" means any condition of the brain or nervous system recognized as defective, as compared with an average or normal condition, by a substantial part of the medical profession.

(26) "Serious physical injury" means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ, or which causes the unlawful termination of a pregnancy without the consent of the pregnant female.

Delaware can lead the way on sentencing law reform

DELAWARE VOICE
KIRSTIN CORNELL

Nationally, lawmakers are revisiting the tough sentencing laws that made the United States the world's number one jailer. In recent years, voices from the left and the right have joined together in challenging the scale of incarceration. Delaware has engaged similar efforts too, but lags behind the country in downscaling its prison population. This year, state lawmakers have an opportunity to revisit excessive punishment by scaling back the state's "three strikes" out law.

The growth of incarceration in Delaware resulted from the choices of lawmakers to increase the use and severity of prison sentences. Delaware's correctional population has grown by more than 207 percent since 1980; taxpayers spend more than \$32,900 to incarcerate each prisoner. According to the Delaware Criminal Justice Council more than 500 prisoners were serving life terms at the end of 2015.

Delaware legislators are revisiting the state's harsh sentencing frameworks with Senate Bill 163. The modest proposal would change the statute that

governs habitual offenders including eliminating mandatory life in prison for a third criminal conviction. Specifically, under the proposed law a person would be declared a habitual criminal after being convicted of a third violent felony or a fourth felony of any kind. The bill is retroactive and would allow for a sentencing modification for persons convicted under the old law.

State law enforcement leaders like Attorney General Matt Denn have called for changes to the "three strikes" law, specifically challenging life in prison as a mandatory sentencing option.

Any serious crime, is a crime too many. But doing something and solving the problem are not always the same. Despite their intent, mandatory minimum laws like "three strikes" do little to reduce crime. They do, however, help drive growth in incarceration and demand substantial spending on a state's prison system. Those are among the key reasons there is growing consensus to reform harsh sentencing laws and restore judicial discretion to judges.

More important, after years of experience, legislators and policy-makers

across the country are recognizing these one-size-fit-all laws don't increase public safety. In California, voters revisited their "three strikes" law year and allowed for resentencing. Legislators in Mississippi scaled back that state's mandatory sentencing scheme for violent offenses to address prison overcrowding. Last year, Alabama lawmakers revisited that state's harsh sentencing laws and expanded alternatives to incarceration. This year, New Mexico lawmakers rejected efforts to toughen that state's "three strikes" laws.

Delaware's adoption of SB 163 could help to move the country even farther. And much more could be done.

In recent years, legislators in Rhode Island and Utah repealed mandatory minimums for certain offenses. Officials in at least 29 states have adopted reforms designed to scale back the scope and severity of their mandatory sentencing policies over the past decade. Criminal justice reform should prioritize law enforcement, judicial and corrections resources towards preventing crime from happening in the first place - rather than clogging up the system due to a lack of judicial dis-

cretion and an inability in imposing criminal penalties that are fair and just. It is tempting to believe mandatory minimum sentencing and "three strikes" laws will make Delaware safer. But in reality, there is little proof to show that such laws accomplish that. The contrary, studies suggest that recidivism may actually increase with longer sentences. Officials motivated to improve public safety should prioritize evidence-based practices known to deter crime rather than rely on harsh penalties demonstrated to have little impact on future offending.

Revisiting harsh sentencing laws will recognize that the state's rate of incarceration has produced diminishing returns for public safety. Scaling back sentencing laws retroactively should help to control the prison population and free up resources.

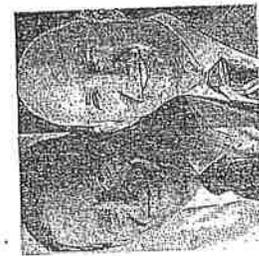
Those resources could be directed into interventions known to reduce crime like quality education, health care, and job training programs.

Kirstin Cornell works with the Delaware Center for Justice, and Nicole Porter is with The Sentencing Project

3-27-16 27

COMMENT

Prison reforms protect public safety



DELAWARE VOICE
JACK MARKELL
& MATT DENN

Sen. Bonini's opinion regarding the habitual offender reform bill passed by a bipartisan majority in the Delaware State Senate illustrated two unfortunate traits of current politics:

misinformation and demonization.

Both merit response.

To correct the facts, the intent of Senate Substitute 1 to Senate Bill 163 is to address some irrational and disproportionate minimum mandatory jail sentences that have been imposed on those designated habitual offenders under Delaware's law. Under current law, many people who burglarize houses receive the same minimum mandatory sentences as people who commit their first violent felony receive minimum mandatory sentences of decades in jail. Certainly, many offenders should receive long jail sentences - including those who have committed crimes such as carjacking and rape mentioned by Sen. Bonini. But the disproportionate sentences deserve discussion.

Under the bill, everyone who is considered a "habitual offender" currently will remain a habitual offender, subject to up to life in prison. And with the exception of some drug offenses, everyone who receives a minimum mandatory jail sentence now will continue to receive a minimum mandatory jail sentence.

However, rather than every person who has committed three violent felonies receiving mandatory life

in prison, the mandatory sentences will be based on the seriousness of the crime. If the third violent felony is first degree rape, to use Sen. Bonini's example, the minimum mandatory sentence will still be life. But if it is first degree burglary, the minimum sentence will be fifteen years - though a judge will always be able to impose up to life in prison. For habitual offenders who have committed only one violent felony, they will receive lower minimum mandatory sentences than they currently receive - but again, a judge will always be able to impose up to life in prison.

It is only fair that changing the sentencing law going forward means the state should give some consideration to those sentenced under the old law. Under SS 1 to SB 163, a limited number of current inmates whose specific situations match the changes in the law will be able to ask a court to revisit their sentences once they have served the new minimum sentences for their crimes. Contrary to the implication in Sen. Bonini's article, no one will receive an automatic change to their sentence; no jail doors will automatically swing open.

Once they have served any otherwise applicable minimum sentence, inmates can ask to appear before a judge. The Attorney General's office, correctional officials and victims will all weigh in. The judge will have to review a current assessment of the risk the inmate poses to the community, and the judge will have to make a record of the reasons for any change he or she may make in the sentence. The petition process is designed to ensure that public safety is not jeopardized. Moreover, the first set of petitions would be from inmates serving time for drug offenses, followed by inmates serving time for property offenses. Long before any person who has harmed another

person is able to file a petition, we will be able to see if the courts are handling these petitions responsibly - we are confident that they will, but if not, we will be the first ones to ask the legislature to change this part of the law.

The state has always had provisions that allowed it to review the sentences of current inmates. Since 1897, the state has had a Board of Pardons that could recommend commutations of sentences to the governor. For decades, the state has had a law that allows the Department of Correction to petition the court to modify the sentences of current inmates. The provisions in SS 1 to SB 163 allowing for limited sentence reviews are an extension of longstanding practice in Delaware.

Unfortunately, Sen. Bonini - who heard all this when the bill was presented to the Senate - has chosen to demagogue the issue and impugn the motives of those seeking to impart what they see as some fairness to the system. Such demonization is not necessary or typical. Sen. Bonini sponsored a bill in 2010 (SB 187) that allowed murderers on death row to bypass the Board of Pardons in pursuit of a gubernatorial commutation. He voted against legislation in 2014 (HB 408) to ensure the solvency of the state's victim compensation fund. He voted against a bill in 2012 making home invasion a separate crime (HB 277). We recall no one suggesting he was for coddling murderers, punishing crime victims, or approving of home invasions.

We have disagreed on criminal justice issues in the past without denigrating one another, and a return to respectful, fact-based dialogue when discussing them would be a service to our state.

Jack Markell is the Governor of Delaware, and Matt Denn is the state's Attorney General.