



Ninety-Eighth Legislature - First Session - 2003
Introducer's Statement of Intent
LB 46

Chairperson: Kermit A. Brashear
Committee: Judiciary
Date of Hearing: February 13, 2003

The following constitutes the reasons for this bill and the purposes which are sought to be accomplished thereby:

Nebraska is facing its second inmate population crisis in a decade. Even after the completion and occupancy of the new Tecumseh State Correctional Institution, the Department of Correctional Services (DCS) is at 133 percent of design capacity. If current policies remain unchanged, it is projected that DCS will be at 153 percent of capacity by 2005 and at 176 percent of capacity by 2008.

The United States Constitution has been interpreted by the federal courts to require minimum standards for the treatment of prisoners in order to prevent "cruel and unusual punishment." Failure to address inmate overcrowding will result in federal litigation that will be expensive for the state to defend and could result in very costly remedies imposed by the courts.

When the state faced a similar inmate population crisis in the mid-1990s, both the funds and the political will to "build our way out" existed. The new Tecumseh State Correctional Institution was authorized and paid for during a time of fiscal surplus. A serious inmate population crisis was averted by the Tecumseh State Correctional Institution coming "on-line" in 2001.

The coming inmate population crisis, however, is arriving at a time when there are neither the funds nor the political will to "build our way out." Even if the state had the desire to build another "Tecumseh" facility, it does not now have the capital construction funds available, nor will it in the near future.

Rather than attempting to "build our way out," of the impending inmate population crisis, it is necessary for the state to "plan our way out". The Community Corrections Working Group (Working Group), initially convened by Governor Mike Johanns, undertook the task of developing a proposal to reduce reliance on incarceration and to encourage the development and use of "community corrections" or incarceration alternatives based in the community. The Working Group's mandate was to propose a plan that will maintain and enhance justice, reduce taxpayer cost, and ensure that public safety remains protected. It also sought to educate the public as to the value and cost-savings of such a plan.

To those ends, Legislative Bill 46 incorporates the Working Group's proposal. LB 46 contains enhanced community corrections programs as its centerpiece. LB 46 endeavors to limit the use of incarceration (the most expensive sentencing option) to those cases in which it is the best use of state resources. The average cost per incarcerated inmate within DCS has reached \$22,750 per year. Compared to the average cost of \$330 per probationer and \$3,103 per parolee, incarceration costs the most in terms of correctional supervision. In those cases in which incarceration is not the best use of resources, community-based programs should be utilized, with appropriate regard for public safety.

Sentencing practices in Nebraska should address the public's demand for punishment and the need for public safety while emphasizing accountability before offenders are incarcerated, while offenders are incarcerated, and as offenders re-enter society. Offenders should be sentenced as individuals, and judges should use the realm of resources available when sentencing an offender. A differentiation should exist between those offenders the community is "mad at" (for which intermediate sentences are most appropriate) and those the community is "scared of" (for which a sentence of incarceration is the most appropriate). Sentencing practices should take into consideration retribution, deterrence, rehabilitation, and restitution.

LB 46 includes implementing a sentencing structure, through the use of probation, parole, and sentencing guidelines, that utilizes the most secure and most expensive prison beds for the most dangerous and most violent offenders while diverting low-level, non-violent offenders to a suitable community corrections program or facility. The objective is to increase the certainty of an offender's prison sentence, address punishment and the need for public safety, and emphasize accountability while using an array of intermediate or graduated sanctions for non-violent offenses to decrease overall correctional costs.

COMPONENTS OF LEGISLATIVE BILL 46

Key components of the LB 46 include strategies to reduce reliance on incarceration and encourage the use of alternatives through probation and parole. Central to LB 46 is the creation of a Community Corrections Council to oversee and ensure that a continuum of community corrections is developed for use by probationers and parolees. Probation and parole fees are proposed for the support of enhanced programming and services. Sentencing guidelines are to be created, a criminal justice data reporting and analysis process is to be developed, and the Board of Parole is given additional discretion in granting parole. Finally, a Correctional System Overcrowding Emergency Act will allow a planned process of inmate release on parole when the prison population is sufficiently over capacity in order to preempt federal court intervention.

Specifically, changes under LB 46 are divided into five categories: 1) Probation, 2) Parole, 3) the Community Corrections Act, 4) the Commission on Law Enforcement and Criminal Justice, and 5) the Department of Correctional Services.

Probation

Probation Violations

Currently in Nebraska, when a probationer commits a technical or minor violation of his or her probation, the only choice a probation officer has in recognizing the violation is to make a formal report to the sentencing court and the county attorney. Official action is then taken to revoke probation, and the offender is re-sentenced—in many instances to expensive incarceration at DCS. In 2001, 243 adult offenders revoked from probation were sentenced to prison. Of those sentenced to prison, 64% were due to technical violations, or failure to complete a term of probation such as reporting, completion of a treatment program, payment of fines, or positive urinalysis.¹

Instead of every violation requiring a court appearance, LB 46 authorizes the probation officer to implement certain administrative sanctions with the offender's requisite knowledge and consent, without formally reporting to the sentencing court. Administrative sanctions include, but are not limited to, increased substance abuse testing, imposing a curfew, and requiring community service hours. When a probationer is reprimanded by a probation officer with additional sanctions, it is the expectation that the process will help probationers be successful, and avoid subsequent incarceration.

Administrative sanctions will enable probation officers to respond swiftly, certainly, and consistently to non-compliant behavior. The number of official revocations reported to the sentencing court will be reduced thereby allowing the sentencing court to concentrate on law violation revocations and higher risk offenders. Administrative sanctions promote effective community supervision in an efficient and effective manner.

Presentence Investigations

To encourage efficiency and proper use of resources, LB 46 prohibits courts ordering presentence investigations in minor misdemeanor cases. In 2001, a total of 16,936 presentence investigations were completed by the Office of Probation Administration (Probation).² If Probation spends less time on minor misdemeanor cases, more attention can be given to high grade offender presentence investigations and on high risk offender supervision.

In order to ensure assessments within the presentence investigation report are made available to all of those involved with an offender's supervision, authority to receive a copy of the presentence investigation by the Board of Parole or Parole Administration is clarified under LB 46.

Probation Programming Fee and Fund

In this state of fiscal crisis, Nebraska must "think smarter" about how to effectively provide cost savings in managing offenders throughout the criminal justice system. LB 46

¹ Office of Probation Administration, Biennial Report, 2000-2001

² *Id.*

creates a fund to enhance programming within Probation. The objective of the fund is to enhance existing supervision of offenders in the community in order to keep more offenders in the community instead of prison. The fund is supported by Probation supervision fees. An enrollment fee of thirty dollars will be required of all probationers when the probation term begins. Thereafter a monthly programming fee is imposed. Fees are set at twenty-five dollars per month for probationers placed on traditional probation and thirty-five dollars per month for probationers placed on intensive supervised probation. Probation programming fees are in addition to any service fee required paid by the probationer such as fees imposed for drug testing or electronic monitoring.

Payment of fees by the probationer shall be a condition of probation and may be waived by the court during periods that the requirement of payment would result in an undue hardship based on limited income, employment or school status, or physical or mental handicap.

Incarceration Work Camp

Difficulties arise when an offender is expected to find transportation to the incarceration work camp on his or her own. To ensure the offender arrives at the designated incarceration work camp in a safe and timely fashion, LB 46 requires counties to be responsible for offenders' transportation to the incarceration work camp.

Parole

Parole Programming Fee and Fund

Like the probation programming fund, LB 46 implements a similar *parole* programming fund to enhanced programming within Parole Administration (Parole). This will improve Parole's ability to develop programming, allowing more offenders back into the community. Under LB 46, parolees are required to pay a monthly programming fee of twenty-five dollars per month to support the fund. Fees may be waived by a determination by the Board of Parole that payment constitutes an undue hardship because of limited income, employment or school status or physical or mental handicap. In lieu of payment of program fees, the parolee may perform community service as agreed upon by the supervising parole officer.

Parole Eligibility

Several amendments are made under LB 46 to current statutes regarding parole eligibility, giving the Board of Parole additional discretion in the granting of parole.

Restrictions are lifted on whether the Board of Parole may grant parole to an offender on re-parole. The decision to re-parole is left to the discretion of the Board of Parole.

The Board of Parole, in its discretion, is allowed to discharge an out-of-state offender from parole in Nebraska when such offender has reached his or her discharge date in Nebraska, under LB 46. By clarifying the language in statute, the Board of Parole may forego requiring the

state to expend resources to bring an offender back to Nebraska from a state that is providing housing and programming to the offender through its correctional system.

LB 46 removes the requirement that inmates convicted of certain drug violations must complete treatment prior to becoming eligible for parole. This allows offenders to be paroled, complete treatment as a term of parole, and live in and be supported by the community in which he or she lives. The requirement that a prisoner with a drug or alcohol violation not be eligible for parole for 12 months is also removed. It would be discretionary whether the Board of Parole grants parole release in those situations.

Community Corrections Act

The current Community Correctional Facilities and Programs Act is stricken in its entirety under LB 46 and the “Community Corrections Act” (Act) is created. The Act places the administration of a Community Corrections Council (Council) within the Commission on Law Enforcement and Criminal Justice. Because the Council would not be “housed” under any agency currently providing offender services, it would have the independence and objectivity to effectively establish a continuum of community corrections for use by Probation and Parole.

The Council would be made up of criminal justice leaders and would provide coordination of community corrections facilities and programs across the state. It would have the authority to contract with entities to offer a wider array of community corrections services for offenders on probation and parole. The intent is that more community corrections facilities and programs will be established thereby giving judges more options in sentencing and giving the Board of Parole more options in granting parole. Thus, expensive prison beds would remain for those offenders determined to be unlikely candidates for successful community supervision.

Within the Act is a requirement that the Supreme Court develop **sentencing guidelines** by court rule. The intent is the sentencing guidelines will reduce disparity in punishments, improve consistency, and help to efficiently manage public and correctional resources by encouraging the use of community corrections.

Guidelines for the sentencing of felony drug offenses will be developed first, followed by other felony offenses. An advisory committee comprised of law enforcement representatives, county attorneys, district court judges, defense bar members, and others the Supreme Court deems appropriate will assist in the development of the sentencing guidelines.

Commission on Law Enforcement and Criminal Justice (Crime Commission)

The Act under LB 46 includes the creation of a fund to support the development and implementation of a process for criminal data unification by assessing an additional \$1 court fee. The process for criminal data unification will be developed and maintained by the Crime Commission. Unification of data is needed within the criminal justice system. The current nonintegrated criminal justice data components from the several agencies are inconsistent and often incompatible. This restricts the meaningful exchange of information and makes it impossible to effectively analyze data to shape informed decisions. Though agencies, like DCS,

Probation, Parole, the courts, and the Crime Commission may keep sound data, many challenges exist when trying to analyze the data across the agencies. A process for criminal data unification would help address these challenges. It is crucial that competent data across the criminal justice system is available so the policymakers can make informed decisions.

Department of Correctional Services (DCS)

Correctional System Overcrowding Emergency Act

Before prison overcrowding results in federal litigation, the State should impose its own set capacity of offenders within DCS. The procedure will provide for a *planned* process that preempts federal court intervention.

LB 46 creates a legislatively imposed prison cap requiring the Governor to declare an overcrowding emergency when the correctional system population is above 140% of *design* capacity. The Board of Parole is then to consider or reconsider those eligible for parole, and parole those deemed most appropriate. The Board of Parole stops operating under the Correctional System Overcrowding Emergency Act when the correctional system population is at 100% of operational capacity, which is the same as 125% of design capacity.

Principal Introducer:

_____ **Senator Kermit A. Brashear**