



STATE OF DELAWARE  
**STATE COUNCIL FOR PERSONS WITH DISABILITIES**  
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**MEMORANDUM**

DATE: April 30, 2014

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. 256 (Sexual Solicitation of Child)

The State Council for Persons with Disabilities (SCPD) has reviewed H.B. 256, which is designed to facilitate prosecution of individuals who solicit a child to engage in a prohibited sexual act. A "prohibited sexual act" is defined at Title 11 Del.C. §1100(7) as including a host of activities ranging from intercourse to nudity and sexual contact. "Sexual contact" is defined at Title 11 Del.C. §1161(f) and includes touching personal body parts either uncovered or covered by clothing. There is an attached, modest fiscal note which predicts that only three (3) persons would be imprisoned annually based on the legislation. This legislation was introduced on March 13, 2014. It was released from the House Judiciary Committee on March 26.

Some of the pros and cons of the legislation are presented in the attached March 17, 2014 News Journal article. The Attorney General's Office touts the advantages of mandatory sentencing and disallowance of a "fantasy" defense. Defense Counsel counters that mandatory sentencing demeans the role of Delaware's judiciary and that overzealous undercover officers can press individuals who otherwise have no intention of arranging an encounter.

The SCP is not taking a position on the legislation, but would like to share two (2) observations.

First, consistent with the attached March 31, 2014 News Journal article, mandatory minimum sentencing is becoming increasingly unpopular among the states.

Second, Delaware criminal law has historically acknowledged that older teens can consent to some sexual acts. See, e.g., Title 11 Del.C. §§767 and 761. For example, §761 provides as follows:

§761. Definitions generally applicable to sexual offenses.

... (k) A child who has not reached that child's sixteenth birthday is deemed unable to consent to a sexual act with a person more than 4 years older than said child. Children who have not reached their twelfth birthday are deemed unable to consent to a sexual act under any circumstances.

[emphasis supplied]

H.B. No. 256 departs from the "4 years older" approach in favor of a "2 years older" approach for even 16-17 year olds (line 33). Thus, if a 20 year old college junior sends a phone message to a 17 year old college freshman girlfriend/boyfriend encouraging a tryst, a felony has been committed. The same result occurs if an 18 year old high school senior sends the same message to a 15 year old high school sophomore girlfriend/boyfriend. Reasonable persons may differ on the prudence of criminalizing such conduct which could often occur among consenting teens and young adults.

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

cc: Mr. Brian Hartman, Esq.  
Governor's Advisory Council for Exceptional Citizens  
Developmental Disabilities Council

HB 256 sexual solicitation of child 4-30-14

**147TH GENERAL ASSEMBLY**

**FISCAL NOTE**

**BILL:** HOUSE BILL NO. 256

**SPONSOR:** Representative Heffernan

**DESCRIPTION:** AN ACT TO AMEND TITLE 11 OF THE DELAWARE CODE RELATING TO THE OFFENSES OF SEXUAL SOLICITATION OF A CHILD AND PROMOTING SEXUAL SOLICITATION OF A CHILD.

ASSUMPTIONS:

1. This Act makes changes to the current Sexual Solicitation of a Child statute and increases the penalties when a solicitor meets or attempts to meet in person with a child.
2. The Statistical Analysis Center (SAC) has reviewed this Act for potential bed-space impact on the Department of Correction. Analyzing arrest and sentencing data, SAC estimates an impact is 3 DOC beds per year. Full bed impact will be realized within the first year of implementation.
3. The annual cost of housing a Level V inmate is approximately \$8,000 for medical and food costs only. The total cost per bed is \$36,000 when all costs, such as staffing and utilities, are included.
4. The annual cost (medical and food) for housing 3 inmates is \$24,000. The total cost (including fixed costs, such as staffing and utilities) for 3 inmates is \$108,000.
5. No inflation is assumed.

Cost:

Fiscal Year 2015	\$24,000
Fiscal Year 2016	\$24,000
Fiscal Year 2017	\$24,000

Office of Controller General  
March 21, 2014  
en:en  
1201470018

(Amounts are shown in whole dollars)

# Bill to strengthen state's child predator laws introduced

Sean O'Sullivan, The News Journal 10:49 p.m. EDT March 17, 2014



(Photo: GARY EMEIGH/THE NEWS JOURNAL)

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TWEE

A bill introduced in the General Assembly is set to strengthen the state's child sexual predator laws to make it easier to convict offenders and keep them in prison longer.

The measure, introduced last week by Kids Caucus co-chairs Rep. Debra Heffernan, D-Brandywine Hundred South, and Sen. Harris McDowell, D-Wilmington, would also fund a new investigator and a prosecutor in the attorney general's Child Predator Unit.

Heffernan said the proposals came from an October retreat with Delaware prosecutors about how to better protect kids online. "It used to be you only had to worry about them walking through the park alone, now they are online and they can be solicited when they are sitting in their room at home," she said.

The measure, HB-256, both updates the existing statute to include new forms of online communication and increases penalties for predators who attempt to meet with children after soliciting them online.

A key feature of the legislation, according to Deputy Attorney General Abigail Layton, is to take away the defense of "fantasy," where an alleged predator claims that their online solicitation was role-playing and that they never had any intention of following through on improper acts.

Layton said the state recently lost a child solicitation case in Kent County because the defendant made that very argument at trial and a jury acquitted him.

She said the proposed law makes clear that the act of sexually soliciting a child – whether or not the recipient is an actual child or an undercover officer – is a crime and no further overt action is required for a conviction.

Layton said the proposal seeks to raise the penalties if an alleged predator meets a child, they would face a mandatory two-year sentence and up to 25 years in prison.

Under the current law, Layton said "travelers" face no additional punishment and some convicted "travelers" have been sentenced of probation.

Defense attorney Joe Hurley, who won the acquittal in the Kent County case, said if the state and prosecutors trust Delaware judges, then there is no need to increase the penalties and set a minimum mandatory sentence.

"No judge on the bench in Delaware would fail to recognize when someone ought to go to prison for two years for trying to mess with kids," he said, adding the proposed changes take discretion away from judges and further crowd state prisons.

Hurley said in the case where a man he represented was acquitted, the jury recognized from the evidence and testimony that the man had no intention of ever touching a child and was engaging in fantasy. Hurley said the undercover officer in the case, posing as an underage child, tried again and again to arrange a meeting with the man but the man repeatedly made excuses to call them off.

"Actions speak louder than words," Hurley said, adding the appropriate decision was reached by the jury.

"The whole thing is baloney," said Hurley, adding the changes smell of politics.

The other change seeks to clarify that online solicitation can involve any electronic communication through a number of devices, including phones, and is not limited to computers and email.

Heffernan said the bill has a good chance of passing. "I think that we will do whatever we can to make sure we can protect Delaware children," she said.

Sen. Greg Lavelle, R-Sharples, said it is a difficult issue to be against "because to oppose it implies you are somehow for this activity."

Contact Sean O'Sullivan at (302) 324-2777 or sosullivan@delawareonline.com or on Twitter @SeanOSullivan

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April 2, 2014, 5:41 p.m.



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April 2, 2014, 6:32 p.m.



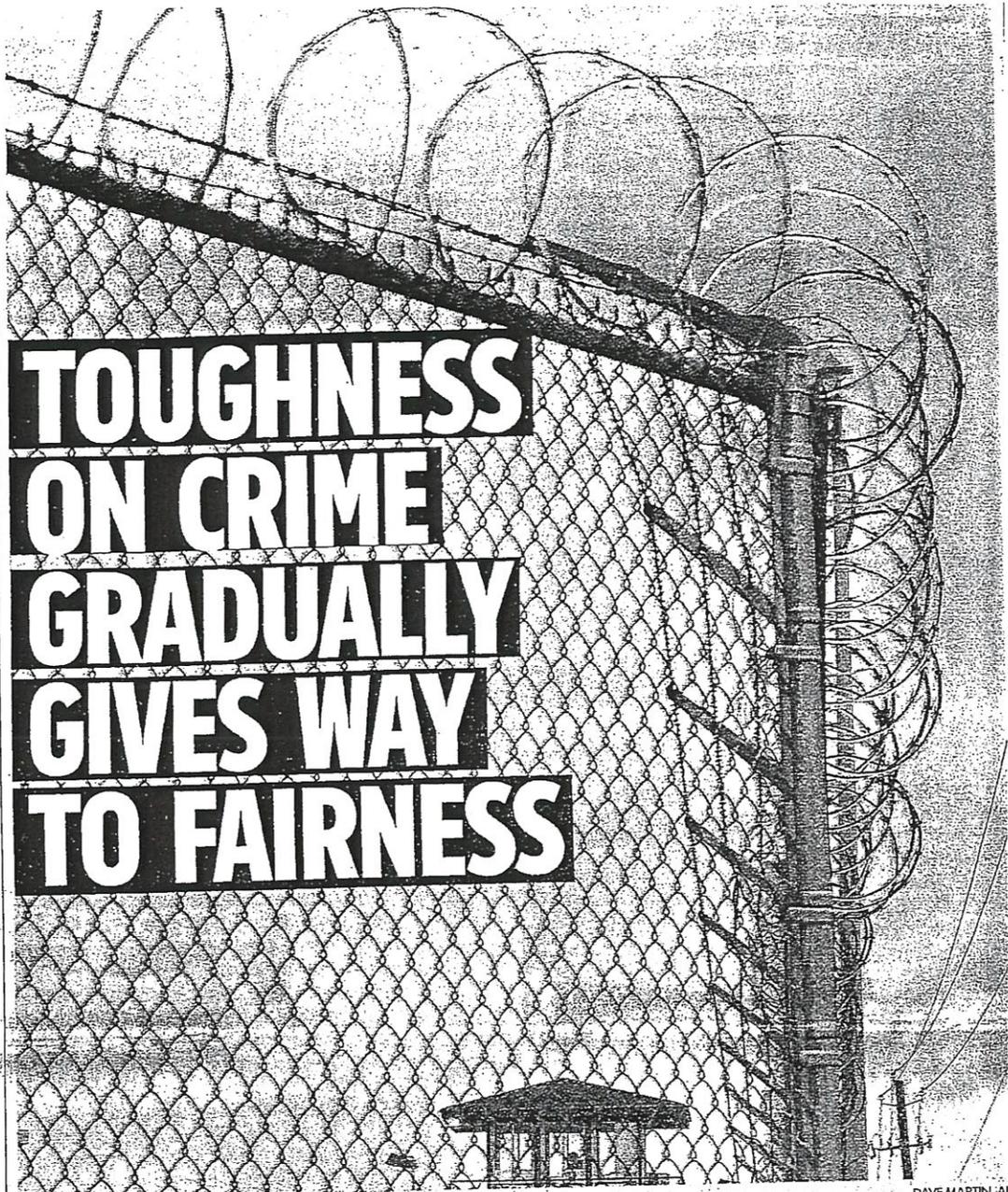
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April 2, 2014, 6:59 p.m.

3-31-14



# TOUGHNESS ON CRIME GRADUALLY GIVES WAY TO FAIRNESS

DAVE MARTIN, AP

**Kevin Johnson**  
USA TODAY

WILTON, N.Y. For more than three decades, the only people who could appreciate the most dramatic views in Saratoga County near the mountain cottage where former president Ulysses S. Grant drew his last breath have been convicts and the uniformed officers who ensured their prisoners never strayed from the gated summit of Mount McGregor.

Few blinked at the idea of the state commandeering such prized real estate when Mount McGregor opened in 1981 as a medium-security state prison, a precursor to a corrections boom that lasted for nearly 20 years as New York's inmate population soared to

Costly facilities to back law and order are being taken apart

71,600 and punitive crime policies swept the nation.

"We could not build new prisons fast enough," acting New York Corrections Commissioner Anthony Annucci told state lawmakers last month, describing the chaotic period when offenders flooded the criminal justice system.

In recent weeks, busloads of McGregor inmates have taken the opposite route down the steep mountain road as part of an unprecedented prison exodus that is helping to permanently alter the face of the nation's criminal justice system. By July, when McGregor and three other state lockups close for good, New York will have shuttered 24 prison fa-

▶ STORY CONTINUES ON 25

# Support keeps eroding for hard-line justice

► CONTINUED FROM 1B

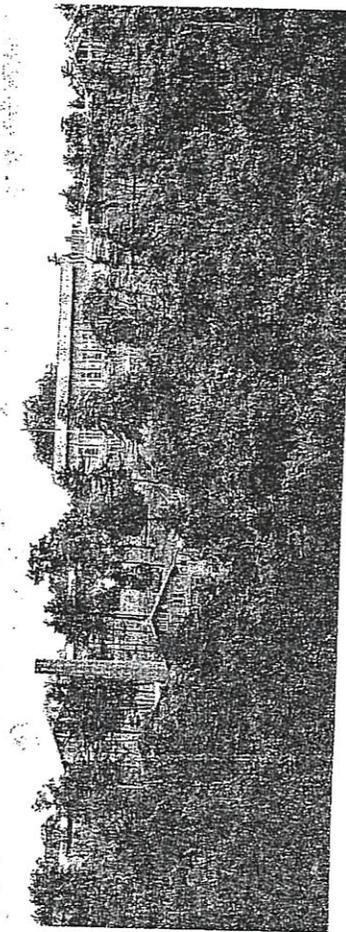
ilities since 2011. During that same time, 16 other states have either closed or proposed prison closings of their own in a bid to slice about 30,000 beds — more than the entire Ohio inmate population — from the vast penal system nationwide.

Prisons represent only one pillar of the costly justice system being dismantled or rolled back. Drug addicts, swept up en masse in the aftermath of New York's so-called Rockefeller Drug Laws of 1973 and the federal Anti-Drug Abuse Act of 1986, are being treated as medical patients rather than criminals. Marijuana, once regarded as the gateway substance in the drug war, is increasingly being decriminalized. Stiff sentences for repeat offenders, meted out in dozens of states, have been eased, as has the application of solitary confinement.

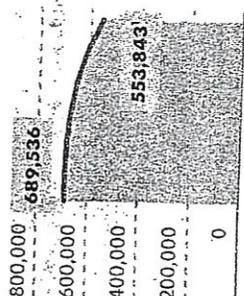
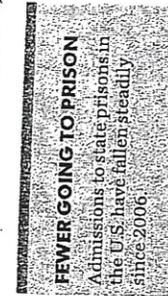
In perhaps the most symbolic development in this erosion of support for hard-line justice policies, six states have abolished the death penalty in the past seven years. It is a movement fueled in part by the exonerations since 2008 of 20 people who had been languishing on death row for crimes they did not commit. The latest one: Glenn Ford, freed this month after 30 years awaiting death at the Louisiana State Penitentiary at Angola.

What happened? Dwindling public resources jump-started a movement as stressed government budgets were unable to keep pace with the rates of prosecution and incarceration. It costs the U.S. about \$80 billion per year to house more than 2 million in jails and prisons.

Lawmakers, criminal justice officials and analysts say there is a growing philosophical component to this seismic shift that is raising fundamental questions of fairness. The vanguard of the movement — which includes such unlikely partners as Sen. Rand Paul, R-Ky, and Sen. Patrick Leahy, D-Vt., — for the first time in a generation is collectively ac-



JOHN CARL D'ANNUNALE (ALBANY, N.Y.) TIMES UNKON  
**Mount McGregor Correctional Facility is one of four New York prisons which will close in July.**



1 — Lowest number of admissions since 1997  
 Source: Bureau of Justice Statistics  
 VAR, GENRES, USA TODAY

corrections is not really limited to incarceration." Indeed, the state's prison population has been plummeting since 1999, dropping from 72,649 to 54,196 last year. The decline has been accelerated by a decline in violent crime, along with a continued emphasis on diverting non-violent drug and other low-risk offenders from the costly confines of prison to treatment or other outside supervision.

At the same time, state officials have pledged to restructure the use of solitary confinement, a form of extreme internal discipline used across the country.

In an agreement announced last month with the New York Civil Liberties Union, state authorities will remove juveniles, pregnant offenders and the mentally ill from isolation.

The settlement — reached after a class-action lawsuit brought by the NYCLU — makes New York the largest prison system in the nation to ban juveniles from disciplinary solitary confinement.

"New York is taking a substantial step in the right direction, and we hope it will ultimately join the many other states who have recognized that lengthy isolation sentences cause serious harm while accomplishing little, if any, goals of a rational corrections system," said Alexander Reinert, a Benjamin Cardozo School of Law professor who was

part of the legal team that brought the lawsuit.

Reinert referred in part to Colorado, as well as the federal Bureau of Prisons, the nation's largest prison system, which is rethinking the use of solitary confinement.

Beyond the changes in penal philosophy, New York officials project that their actions will save huge amounts of money.

Thomas Abt, the state's deputy secretary for public safety, said New York will bank \$221 million in savings a year from closing 24 prisons, including Mount McGreggor.

## NATIONAL FOCUS

Last summer, when he announced a plan to do away with mandatory minimum sentences that had condemned scores of non-violent offenders to lengthy federal prison terms, Attorney General Eric Holder brought a national focus to the debate about punitive criminal justice policies that had been largely playing out in state capitals.

Holder's entry into the national discussion thrust the issue to the top tier of the Justice agenda.

Last month, Holder continued the campaign of highlighting what he described as "unnecessarily punitive" policy when he called for the repeal of state laws that restrict the voting rights of millions of former inmates.

He cited the estimated 5.8 million Americans banned from voting because of felony convictions.

Holder is not the only high-profile figure calling attention to inequities, some them potentially deadly, in the justice system.

Washington Gov. Jay Inslee, a Democrat and former proponent of capital punishment, surprised some of his own supporters last month when he imposed a moratorium on executions. Last year, Maryland became the sixth state in as many years to abolish capital punishment.

"There have been too many doubts raised about capital punishment," Inslee said. "There are too many flaws in the system."