

Members

Sen. Richard Bray, Chairperson
Sen. Randall Head
Sen. Greg Taylor
Sen. Lindel Hume
Rep. Ralph Foley
Rep. Greg Steuerwald
Rep. Matt Pierce
Rep. Linda Lawson
Judge John Marnocha
Judge Lance D. Hamner
Professor Craig Bradley
Attorney General Greg Zoeller
Commissioner Bruce Lemmon
David Powell
Larry Landis
Chief Justice Randall Shepard



CRIMINAL CODE EVALUATION COMMISSION

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Authority: P.L. 182-2009(ss)

MEETING MINUTES¹

Meeting Date: September 9, 2011
Meeting Time: 1:00 P.M.
Meeting Place: State House, 200 W. Washington St.,
Room 431
Meeting City: Indianapolis, Indiana
Meeting Number: 5

Members Present: Sen. Richard Bray, Chairperson; Sen. Lindel Hume; Rep. Ralph Foley; Rep. Matt Pierce; Rep. Linda Lawson; Judge John Marnocha; Judge Lance D. Hamner; Professor Craig Bradley; Attorney General Greg Zoeller; Commissioner Bruce Lemmon; David Powell; Larry Landis.

Members Absent: Sen. Randall Head; Sen. Greg Taylor; Rep. Greg Steuerwald; Chief Justice Randall Shepard.

Senator Bray, Chairperson of the Commission, called the meeting to order at 1:10 p.m. After introduction of the Commission members, Senator Bray announced that Deborah Daniels would be the first person on the agenda to present to the Commission.

Deborah Daniels distributed a handout (Exhibit A) to the Commission members showing the topics that the Legislative Council requested the Commission to study during the interim.

She also distributed a copy of a slide presentation (Exhibit B) to the Commission members with analysis and recommendations concerning these topics.

¹ These minutes, exhibits, and other materials referenced in the minutes can be viewed electronically at <http://www.in.gov/legislative>. Hard copies can be obtained in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for hard copies may be mailed to the Legislative Information Center, Legislative Services Agency, West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for hard copies.

Andrew Cullen distributed to the Commission members a chart titled "Current Sex Crimes in Indiana Code" (Exhibit C), which included each crime, the aggravators and mitigators, whether the crime could be suspended, and the felony class of the crime.

Child Solicitation – The first issue that the Commission members discussed was whether child solicitation penalties should be enhanced if the perpetrator used a computer. The Commission members also discussed whether the felony should be enhanced if the perpetrator is over 21 years of age and the child is under 14 years of age. The Commission members made no recommendations to change child solicitation laws.

Added Request of Study Group – Senator Bray also asked Ms. Daniels and the study group to examine all sex crimes and assemble a series of comprehensive recommendations on how these crimes might be rewritten.

Statute of Limitations – Ms. Daniels indicated that the research group did not recommend any changes in the current statute on statute of limitations.

Enhancing Penalties When Sex Crimes Against Children Involves an Adult in a Position of Trust – Ms. Daniels indicated that courts have broad discretion under both IC 35-42-4-7 and existing case law to enhance sex crimes against children when the adult is in a position of trust. The penalties for child molesting felonies are sufficiently severe so that the courts can raise the penalty to a sufficiently high level.

Child Trafficking – Staff in the office of the Attorney General is currently addressing this issue as part of the human trafficking law review.

The next person to testify was Dr. Adam Deming, Executive Director of the Indiana Sex Offender Management and Monitoring Program (SOMM).

Senator Bray asked Dr. Deming to distinguish between sexual behavior among offenders that is likely to be a one-time occurrence as opposed to persons who are likely to be habitual offenders, particularly toward children. Representative Pierce indicated that sharper distinctions between these two groups might help the members of the General Assembly to better identify sex offenders who need longer incarceration and more intense monitoring once they are released from prison.

Dr. Deming made the following points in his discussion with the Commission members:

- Sexual predators are likely to be offenders who plan and repeatedly commit new crimes as opposed to those offenders who engage in a one-time offense.
- Current law that identifies sexually violent predators is quite broad, defining many sex offenders as sexually violent predators after the first conviction.
- Civil commitments generally require that a qualified expert witness will testify that offenders have either a diagnosable mental illness or cannot control or manage their sexual behaviors.

- Offenders younger than 25 years of age are less likely to be repeat offenders.
- Twenty states have civil commitment laws specifically pertaining to sexual offenders. In general, individuals qualify as sexually violent predators when they demonstrate a prior history of criminal sexual behavior, a mental disorder that creates a propensity for sexual recidivism, and are determined to be likely to repeatedly offend.
- When victims of sex crimes are male, the likelihood of committing new crimes is increased.

Andrew Cullen, Legislative Liaison, Indiana Public Defender Council, told the Commission members that the Legislative Council had assigned the Criminal Law and Sentencing Policy Study Committee with developing a criminal information packet that would contain all relevant information that pertains to an offender's criminal record.

Randy Koester, Deputy Commissioner, Reentry / Executive Office, Department of Correction (DOC), told the Commission members that DOC is working on a risk assessment procedure with the Indiana Judicial Center and standardizing a presentence investigative report that would be used by all courts with criminal jurisdiction. He also noted that when courts suspend a person's sentence for a felony offense, state law does not require that a presentencing report be prepared. However, if the person violates any rules while on probation, the person can be sentenced to DOC but will not have a presentence report.

Senator Bray announced that the next meeting would be held on October 4 at 10:30 a.m.

The Commission members adjourned the meeting at 3:15 p.m.

Exhibit A

LEGISLATIVE COUNCIL RESOLUTION 11-01 (As Adopted June 7, 2011)

BE IT RESOLVED BY THE INDIANA LEGISLATIVE COUNCIL:

SECTION 1. Any interim study committee created by statute, and required to operate under the rules of the Council, unless otherwise provided by statute, and any interim committee created by the Legislative Council shall be composed of twelve (12) voting members, with six (6) appointed from the Senate by the Chairman of the Council, and six (6) appointed from the House by the Vice-Chairman of the Council. Appointments from each chamber shall be divided equally between the two major political parties. The Chairman and Vice-Chairman of the Council may each appoint non-legislators to serve as non-voting members of a committee. Except as provided by statute, the Chairman of the Council, with the advice of the Vice-Chairman, shall designate the chairman of each committee, and may in the same manner designate a vice-chairman of each committee.

SECTION 2. The committee identified in this SECTION is established and shall study and make findings and recommendations concerning the topics assigned to it.

INTERIM STUDY COMMITTEE ON REDISTRICTING (SB 401)

THE COMMITTEE IS CHARGED WITH STUDYING THE FOLLOWING TOPICS:

- A. Redistricting and make recommendations on ways to improve the redistricting process;
- B. Proposals to amend the Constitution of the State of Indiana to establish an independent commission to draw legislative and congressional district boundaries, beginning with the 2021 redistricting;
- C. The successes and failures of redistricting commission in other states and analyze the results of the 2010 election in Indiana and other states to make recommendations to the general assembly; and
- D. Certain standards for drawing legislative and congressional districts.

This committee is authorized to meet up to four times during the 2011 interim.

SECTION 3. The Legislative Council charges the following entities to study the topics indicated, and to submit findings and recommendations to the Council before November 1, 2011:

1. CRIMINAL CODE EVALUATION COMMISSION (SEA 90, HEA 1083)

THE COMMISSION IS CHARGED WITH STUDYING THE FOLLOWING TOPICS:

- A. Child solicitation (IC 35-42-4-6), including whether or not there should be an increased penalty for a person who is at least twenty-one years of age to knowingly or intentionally solicit a child less than fourteen years of age, or an

individual the person believes to be a child less than fourteen years of age (HEA 1083);

- B. Child trafficking, including whether the general assembly should enact a crime of promotion of child trafficking and if promotion of child trafficking should be added to the list of sex offenses under IC 11-8-8-4.5 (HEA 1083);
- C. Sex crimes against children, including whether there should be an increased penalty, or creation of a new crime, for the commission of a sex crime by a person at least twenty-one years of age with whom the child victim has a relationship of trust or emotional dependence, including a school employee, school volunteer, counselor, therapist, member of the clergy, and medical personnel (HEA 1083);
- D. The appropriate statute of limitations for sex crimes against children, including child molesting (IC 35-42-4-3), child exploitation (IC 35-42-4-4(b)), and sexual misconduct with a minor (IC 35-42-4-9) (HEA 1083);
- E. Whether to elevate the offense of the following:
 - (1) child molesting from a Class C felony to a Class B felony if the child is compelled to submit to the fondling or touching by force or the threat of force; and
 - (2) child solicitation:
 - (a) from a Class D felony to a Class C felony if a person solicits a child and performs an overt act demonstrating an intent to physically meet the child;
 - (b) from a Class C felony to a Class B felony if a person solicits a child by means of a computer and performs an overt act demonstrating an intent to physically meet the child; and
 - (c) to a Class A felony if a person solicits a child by means of a computer and has a previous conviction for soliciting a child by means of a computer;(HEA 1324);
- F. The provisions in IC 4 and IC 5 addressing and governing the conduct of state workers and determine if these provisions should be reorganized and potentially recodified to promote clarity and understanding (Speaker Bosma); and
- G. Recodification of the criminal code.

2. CRIMINAL LAW AND SENTENCING POLICY STUDY COMMITTEE (IC 2-5-32.5)

THE COMMITTEE IS CHARGED WITH STUDYING THE FOLLOWING TOPICS:

- A. The laws relating to:
 - (a) the investigation of crimes;
 - (b) the prosecution of crimes;
 - (c) criminal procedures;

CRIMINAL CODE EVALUATION COMMISSION

Review of Certain Sex Crime Statutes
Referred to Commission

August 18, 2011

Charge to Commission: A.

- A. Child solicitation (IC 35-42-4-6), including whether or not there should be an increased penalty for a person who is at least twenty-one years of age to knowingly or intentionally solicit a child less than fourteen years of age, or an individual the person believes to be a child less than fourteen years of age (HEA 1083).

Charge to Commission: E.

- E. Whether to elevate the offense of the following:

* * * * *

(2) Child solicitation:

- (a) From Class D to Class C felony if a person solicits a child and performs an overt act demonstrating an intent to physically meet the child;
- (b) From Class C to Class B felony If the same person uses a computer to solicit the child; and
- (c) Enhance to Class A felony if a person solicits a child via computer and has a prior conviction for doing so

(HEA 1324)

Charge to Commission: E. *(continued)*

- Whether to enhance penalty
 - Class D to Class C
 - Class C to Class B
- . . . if the person performs an overt act demonstrating an intent to physically meet the child
- Whether to enhance penalty to a Class A felony if a person uses a computer to solicit and has a prior conviction for soliciting a child by means of a computer

(HEA 1324)

Existing definition of “child solicitation” in IC 35-42-4-6:

...“solicit” means to command, authorize, urge, incite, request, or advise an individual . . . to engage in:

- (1) sexual intercourse;
- (2) deviate sexual conduct; or
- (3) any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person . . .

Child Molesting Statute (IC 35-42-4-3)

- Commission of intercourse or criminal deviate conduct with child under 14 = Class B felony

Class A felony if :

- Perpetrator over age 21
- Use of deadly force or armed with deadly weapon
- Results in serious bodily injury
- Facilitated by using a drug/narcotic

Child Molesting Statute

(continued)

- Commission of touching/fondling of child under age 14 is a Class C felony
 - Class A felony if:
 - Use of deadly force or armed with deadly weapon
 - Results in serious bodily injury
 - Facilitated by using a drug/narcotic
- but not if perpetrator over age 21 (statute silent)

Questions:

- Is there a gap in the child solicitation law with regard to perpetrators over age 21?
- Should the child solicitation statute mirror the child molest statute with regard to penalties/enhancements?
- Should the child solicitation statute require, beyond the definition of solicitation (“command, authorize, urge, incite, request, or advise”) the commission of “an overt act demonstrating an intent to physically meet the child?”

Questions

(continued)

Question #1: Is there a gap in the child solicitation law with regard to perpetrators over age 21?

Staff recommendation: Yes, a gap exists that would be filled by enhancing the penalty from a Class D felony to a Class C felony if the perpetrator is age 21 or older.

Further: stair-stepping upward from Class C to B for use of a computer network and Class A for use of a computer with a prior conviction for same would align with the existing statute. *(However, see next question.)*

- Question #2: Should the child solicitation statute mirror the Child Molest statute with regard to penalties/enhancements?
- Staff recommendation: Yes, at one level below the penalties in the Child Molest statute.
 - Case law: Child Solicitation is a precursor crime to Child Molest and even to Attempted Child Molesting
 - Should not the entire Child Solicitation statute remain a step below Child Molesting in terms of actual penalties?

- Question #3: Should the child solicitation statute require, beyond the definition of solicitation (“command, authorize, urge, incite, request, or advise”) the commission of “an overt act demonstrating an intent to physically meet the child?”

- *LaRose v. State of Indiana*, 820 N.E.2d 727 (Ind. Ct. App. 2005):
 - Crime of child solicitation is the act of an adult urging a child to have sex and is “an inherent evil *in and of itself* that causes harm to the . . . child *regardless of whether the . . . act is consummated.*”
 - “The crime . . . *is completed* at the time of the utterance.”

- Reminder: Definition of “Solicitation”

...“solicit” means to command, authorize, urge, incite, request, or advise an individual . . . to engage in:

(1) sexual intercourse;

(2) deviate sexual conduct; or

(3) any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person . . .

- Staff recommendation:

Based on the Indiana Appellate Court's decision in *LaRose*, there is no need to require an "overt act" in furtherance of the crime of child solicitation. *The act of "urging" a child to engage in explicit sexual acts completes the crime.*

Charge to Commission: E.

E. Whether to elevate the offense of the following:

Child molesting from a Class C felony to a Class B felony if the child is compelled to submit to the fondling or touching by force or the threat of force.

- Analysis:

- Child molesting (fondling/touching) is a Class C felony.

- It becomes a Class A felony if deadly force is threatened or used, or a deadly weapon is possessed by the perpetrator.
 - There is no enhancement for use of (non-deadly) force or the threat of (non-deadly) force.

- Staff recommendation:

This proposal would be reasonable and proportionate.

Charge to Commission: D.

D. The appropriate statute of limitations for sex crimes against children, including child molesting (IC 35-42-4-3), child exploitation (IC 35-42-4-4(b)), and sexual misconduct with a minor (IC 35-42-4-9).

(HEA 1083)

- Indiana's Statute of Limitations (IC 35-41-4-2)
 - 5 years: Class B, C or D felony (*Subsection (a)(1)*)
 - No statute of limitations: Class A felony (*Subsection (c)*)
 - Victim reaches age 31 (13 years after attaining majority) (*Subsection (e)*):
 - Child Molesting
 - Vicarious Sexual Gratification
 - Child Solicitation
 - Child Seduction
 - Incest

- Comparison with other states:
 - Most common: 10 years beyond maturity
 - 8 states and D.C. use “age of maturity” as the beginning of the running of the statute (w/ 5-year SOL = age 23)
 - 11 states use same SOL as for all other crimes
 - 14 states have no SOL at all for these crimes (like Indiana’s Class A felony and murder exceptions)

- Staff recommendation:
 - No change recommended for non-Class A felony versions of the listed offenses
 - Indiana already has age 31 limit

- Staff recommendation (continued)
 - Need to exempt Class A felony child molesting, etc. from operation of IC 35-41-4-2(e), so that the “prosecution may be commenced at any time” language of IC 35-41-4-2(c) applies to Class A felony versions of the listed offenses

– Proposal: Revise IC 35-41-4-2(e) to read:

“Except as provided in subsection (c), a prosecution for the following offenses is barred unless commenced before the date that the alleged victim of the offense reached thirty-one years of age”

- Secondary proposal: Remove reference to subsection (a) of Child Molest statute from IC 35-41-4-2(e)
 - Current statute includes only sexual intercourse, deviate sexual conduct portion of child molest statute and not fondling in the “age 31” SOL
 - But also listed within subsection is child solicitation, which constitutes mere urging of a child to engage in either of these acts or fondling
 - Actual touching/fondling is certainly more serious and should also be exempt from 5-year SOL

Charge to Commission: C.

- C. ...whether there should be an increased penalty, or creation of a new crime, for the commission of a sex crime by a person at least twenty-one years of age with whom the child victim has a relationship of trust or emotional dependence, including a school employee, school volunteer, counselor, therapist, member of the clergy, and medical personnel. (HEA 1083)

Analysis:

- The trial court is granted wide discretion to determine whether advisory sentence can be increased based on aggravating factors (IC 35-38-1-7.1(a), (b))

Analysis (continued):

- Case law is clear that courts can appropriately add time above the advisory sentence when there is a relationship of trust between the victim and the perpetrator
 - *Stout v. State*, 834 N.E. 2nd 707 (Ind. Ct. App. 2005) – defendant was father figure to victim
 - *Middlebrook v. State*, 593 N.E. 2nd 212 (Ind. Ct. App. 1992) – defendant was in position of unusual trust with victims, his daughter and stepdaughter

Analysis (continued):

- Child Seduction (IC 35-42-4-7) is specific to individuals in positions of trust with regard to sexual intercourse, deviate sexual conduct or fondling/touching with child of any age (Class D felony)
 - Definition of “position of trust” broadened in 2009
- Child Molesting statute (IC 35-42-4-3) covers children under age 14 (starts at Class C felony, goes to Class A)
- Sexual Misconduct with a Minor (IC 35-42-4-9) covers children between 14 and 16 (starts at Class C felony, goes to Class A)

Staff recommendation:

The staff suggests that such an amendment is not necessary based on:

1. the broad discretion permitted the Court;
2. existing case law making it clear that the existence of a position of trust provides a reasonable basis for a sentence in the applicable felony range; and

3. The fact that the penalties that exist for Child Molesting and other related crimes are sufficiently severe as to provide the opportunity for enhancement by the Court for the existence of a position of trust.

Other Charges to Commission

- Trafficking issues are being addressed by the Office of the Attorney General
- State worker conduct (Charge F) is outside the purview of the Criminal Code Review staff

- Questions?

- Comments?

Current Sex Crimes in Indiana Code

Crime	Aggravator/Mitigator	Suspendible/ Enhancement	IC Site	2010 Class	1977 Class (Title 35)
Child Molesting	fondling while use of drug or controlled substance	Non-Suspendible	35-42-4-3	A Felony	none
Child Molesting	fondling while using deadly force or deadly weapon	Non-Suspendible	35-42-4-3	A Felony	A Felony
Child Molesting	intercourse committed by person at least 21	Non-Suspendible	35-42-4-3	A Felony	none
Child Molesting	intercourse results in serious bodily injury	Non-Suspendible	35-42-4-3	A Felony	none
Child Molesting	intercourse with use of deadly force or deadly weapon	Non-Suspendible	35-42-4-3	A Felony	A Felony
Child Molesting	intercourse with use of drug or controlled substance	Non-Suspendible	35-42-4-3	A Felony	none
Child Molesting	attempt	Non-Suspendible	35-41-5-1	A Felony	none
Criminal Deviate Conduct	deadly weapon	Non-Suspendible	35-42-4-2	A Felony	A Felony
Criminal Deviate Conduct	serious bodily injury	Non-Suspendible	35-42-4-2	A Felony	none
Criminal Deviate Conduct	use of deadly force	Non-Suspendible	35-42-4-2	A Felony	A Felony
Criminal Deviate Conduct	use of drug or controlled substance	Non-Suspendible	35-42-4-2	A Felony	none
Rape	attempt (deadly force, weapon, SBI)	Non-Suspendible	35-41-5-1	A Felony	A Felony
Rape	deadly weapon	Non-Suspendible	35-42-4-1	A Felony	A Felony
Rape	serious bodily injury	Non-Suspendible	35-42-4-1	A Felony	none
Rape	use of deadly force	Non-Suspendible	35-42-4-1	A Felony	A Felony
Rape	use of drug or controlled substance	Non-Suspendible	35-42-4-1	A Felony	none
Sexual Misconduct with a Minor	intercourse with deadly force, weapon, SBI, drugs	Suspendible	35-42-4-8	A Felony	none
Vicarious Sexual Gratification	directed fondling results in serious bodily injury	Suspendible	35-42-4-5	A Felony	none
Vicarious Sexual Gratification	directed intercourse results in serious bodily injury	Suspendible	35-42-4-5	A Felony	none
Vicarious Sexual Gratification	directs intercourse while using deadly force/weapons/drugs	Suspendible	35-42-4-5	A Felony	none
Child Molesting	intercourse with child <14	Non-Suspendible	35-42-4-3	B Felony	B Felony
Child Molesting	attempt (intercourse with child <14)	Non-Suspendible	35-41-5-1	B Felony	B Felony
Child Solicitation	prior conviction & use of a computer network	Suspendible	35-42-4-6	B Felony	none
Criminal Deviate Conduct		Suspendible	35-42-4-2	B Felony	B Felony
Rape		Suspendible	35-42-4-1	B Felony	B Felony
Rape	attempt	Suspendible	35-41-5-1	B Felony	B Felony
Sexual Misconduct with a Minor	fondling with deadly force, weapon, SBI, drugs	Suspendible	35-42-4-8	B Felony	none
Sexual Misconduct with a Minor	intercourse with offender >21 and victim >14 but <16	Suspendible	35-42-4-8	B Felony	none
Vicarious Sexual Gratification	directs fondling while using deadly force/weapon/drugs	Suspendible	35-42-4-5	B Felony	none
Vicarious Sexual Gratification	directs intercourse with child <14	Suspendible	35-42-4-5	B Felony	none
Child Exploitation		Suspendible	35-42-4-4	C Felony	none
Child Molesting	fondling of child <14	Suspendible	35-42-4-3	C Felony	C Felony
Child Solicitation	use of a computer network	Suspendible	35-42-4-6	C Felony	none

Updated 9/9/2011 by Indiana Public Defender Council Staff

I:\Legislation\crim code eval comm\All Crimes Spreadsheet

Exhibit C

Current Sex Crimes in Indiana Code

Crime	Aggravator/Mitigator	Suspendible/ Enhancement	IC Site	2010 Class	1977 Class (Title 35)
Sexual Battery	deadly weapon	Non-Suspendible	35-42-4-8	C Felony	none
Sexual Battery	use of deadly force or drugs or controlled substance	Suspendible	35-42-4-8	C Felony	none
Sexual Misconduct with a Minor	fondling with offender >21 and victim >14 but <16	Suspendible	35-42-4-8	C Felony	none
Sexual Misconduct with a Minor	intercourse with offender >18 and victim >14 but <16	Suspendible	35-42-4-8	C Felony	none
Unlawful Employment near Children by a Sexual Predator	prior conviction	Suspendible	35-42-4-10	C Felony	none
Vicarious Sexual Gratification	directs fondling with child <14	Suspendible	35-42-4-5	C Felony	none
Vicarious Sexual Gratification	directs intercourse	Suspendible	35-42-4-5	C Felony	none
Child Exploitation (repealed as D Felony, now all C Felonies)		Suspendible	35-42-4-4	D Felony	none
Child Seduction		Suspendible	35-42-4-7	D Felony	none
Child Solicitation		Suspendible	35-42-4-6	D Felony	none
Performing Sexual Conduct in Presence of Minor		Suspendible	35-42-4-5	D Felony	none
Possession of Child Pornography		Suspendible	35-42-4-4	D Felony	none
Sex Offender Internet Offense	prior conviction	Suspendible	35-42-4-12	D Felony	none
Sex Offender Residency Offense	prior conviction	Suspendible	35-42-4-12	D Felony	none
Sexual Battery		Suspendible	35-42-4-8	D Felony	none
Sexual Misconduct with a Minor	fondling with offender >18 and victim >14 but <16	Suspendible	35-42-4-8	D Felony	none
Unlawful Employment near Children by a Sexual Predator		Suspendible	35-42-4-10	D Felony	none
Vicarious Sexual Gratification	directs fondling	Suspendible	35-42-4-5	D Felony	none
Inappropriate Communication with a Child	by using a computer network	Suspendible	35-42-4-13	Misd - A	none
Sex Offender Internet Offense		Suspendible	35-42-4-12	Misd - A	none
Sex Offender Residency Offense		Suspendible	35-42-4-11	Misd - A	none
Inappropriate Communication with a Child		Suspendible	35-42-4-13	Misd - B	none