



STATE OF MICHIGAN  
**Department of  
Human  
Services**

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Maura Corrigan, Director

**MICHIGAN DOMESTIC  
AND SEXUAL VIOLENCE  
PREVENTION AND  
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September 23, 2014

Jane Wilensky, Executive Secretary  
Michigan Law Revision Commission  
B.O. Box 30036  
Lansing, MI 48909-7536  
Sent via Email to: [jwilensky@comcast.net](mailto:jwilensky@comcast.net)

Re: Request for public comment on CSG legislative recommendations and draft legislation

Dear Michigan Law Revision Commission members:

In response to your Aug. 7, 2014 request for public comment, I am writing on behalf of the Michigan Domestic & Sexual Violence Prevention & Treatment Board (MDSVPTB), to express the Board's concerns about legislative recommendations and draft legislation prepared by the Council of State Governments Justice Center (CSG). The MDSVPTB is a 7-member, legislatively created, governor-appointed body that is charged in part with advising the Governor and Legislature regarding changes in state statutes, policies, and standards addressing domestic violence, sexual assault, and stalking. At its Sept. 19, 2014 meeting the MDSVPTB identified the following CSG proposals of particular concern to survivors of domestic violence, sexual assault and stalking:

1. Amend the Code of Criminal Procedure to permit felony offenders who have not been convicted of a prior felony to obtain a discharge and dismissal.
2. Provide for statutory mitigating factors to govern judicial discretion in departing downward from a jail or prison sentence recommended under the revised Guidelines.
3. Limit judicial discretion by providing for:
  - a. "Probation only" sentences for some assaultive offenses, absent a judicial finding of substantial and compelling reasons to impose jail or prison time, and
  - b. Predetermined sanctions for probation and parole violations.

The Board is opposed to all of the above proposals in the first draft of legislation that was presented to you by the CSG. The rest of this letter will explain the reasoning behind the Board's opposition to these proposals.



RICK SNYDER, Governor

1. *Amend the Code of Criminal Procedure to permit felony offenders who have not been convicted of a prior felony to obtain a discharge and dismissal*

In carrying out the duties that the Michigan Legislature has entrusted to it,<sup>1</sup> the MDSVPTB seeks to promote survivor safety, confidentiality, and autonomy, and to hold perpetrators of domestic violence, sexual assault, and stalking accountable through consistent, graduated legal consequences for their behavior. Enactment of the CSG deferral and dismissal proposal would undermine both goals by giving felony perpetrators of these crimes shorter probation terms than the probation terms that are currently imposed on misdemeanants who commit similar offenses. Under the statute governing discharges and dismissals for first-time misdemeanor domestic assault offenders, the maximum probation period is two years.<sup>2</sup> A person convicted of a misdemeanor stalking can be placed on probation for up to 5 years.<sup>3</sup> Under the CSG proposal, qualifying felons would receive a maximum of 6 months on probation, which could be increased to one year if treatment is ordered. Serious felonies would qualify for this more lenient treatment, including second-degree child abuse, felony stalking, and serious assaults (including strangulation). Moreover, in contrast to the misdemeanor domestic assault discharge/dismissal statute:

- No exclusion is provided for persons who have previously been granted first-time offender status.
- For persons who re-offend after receiving a first-time offender discharge, no provision is made for the court to consider the prior “first-time offender” proceeding when sentencing for the new offense.

Accordingly, the Board is opposed to the Aug. 7, 2014 CSG proposal permitting felony offenders to obtain a discharge and dismissal, based on the following general principles:

- Perpetrators of felony crimes involving domestic violence, sexual assault and stalking tend to be serial offenders whose behavior has escalated to serious levels. Many of these offenders have committed multiple, sometimes uncharged crimes against their intimate partners and others. Deferral, discharge, and dismissal proceedings are not appropriate for felony perpetrators of domestic violence, sexual assault, and stalking because they do not provide adequate accountability, and put their victims and the general public at risk.
- Sentences for felony perpetrators of domestic violence, sexual assault, and stalking should not be more lenient than sentences for misdemeanants convicted of similar, less serious offenses. Absent compelling circumstances, any statutory disproportionality in sanctions between similar felony and misdemeanor crimes should be addressed by way of more stringent felony sanctions rather than by more lenient misdemeanor penalties.

2. *Provide for statutory mitigating factors to govern judicial discretion in departing downward from a jail or prison sentence recommended under the revised Guidelines.*

The CSG proposal would amend MCL 769.34 to permit courts to depart downward from recommended sentencing ranges upon a finding by a preponderance of evidence that mitigating factors justify a departure. Examples of mitigating circumstances are listed without limitation. Proposed mitigating circumstances of most concern to MDSVPTB are these:

- “To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.” The MDSVPTB is concerned that determinations regarding a victim’s role in initiating or taking part in a crime could easily turn into re-traumatizing trials of the victim, particularly in sexual assault or domestic violence cases.
- “The defendant or the defendant’s children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.”

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<sup>1</sup> MCL 400.1504.

<sup>2</sup> MCL 769.4a, MCL 771.2.

<sup>3</sup> MCL 750.411h, MCL 771.2a.

- “The current offense involved domestic violence and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control or abuse.”

Regarding the latter two circumstances above, the MDSVPTB recognizes that inquiries into a use of force in response to abuse may be helpful for some survivors charged with crimes against an abuser. However, the Board is also concerned that these proposed factors could be manipulated by domestic violence perpetrators who accuse their partners of abuse.

Accordingly, the Board is opposed to the CSG Aug. 7, 2014 proposal for mitigating factors as written, based on a general principle that mitigating factors incorporated into statutes governing sentencing for domestic violence, sexual abuse, and stalking should focus on the perpetrator’s behavior and motivations rather than the survivor’s, to avoid blaming survivors for perpetrators’ choices to engage in criminal behavior. Such victim-blaming re-traumatizes survivors, and enables perpetrators to escape criminal accountability. In general, the Board believes that mitigating factors are more appropriately addressed at the time of prosecutors’ charging decisions. Additionally, the Board believes that legislation regarding mitigating factors is not necessary because judges already have discretion to consider them.

3. *Limit judicial discretion by providing for: a) “Probation only” sentences for some assaultive offenses, absent a judicial finding of substantial and compelling reasons to impose jail or prison time, and b) Predetermined sanctions for probation and parole violations.*

- a. Board concerns about “probation only” sentences

The CSG proposal would limit judicial discretion to order “probation only” for some perpetrators of domestic violence, sexual assault or stalking who do not have extensive criminal histories. Given the serial nature and infrequent prosecution of these offenses, however, offenders’ criminal histories will often provide an incomplete picture of their behavior. Thus, the proposal could result in lenient penalties for dangerous individuals, potentially putting their victims and others at risk. Offenders of particular concern would be those convicted of the following offenses, listed by class:

- Class C: second degree criminal sexual conduct.<sup>4</sup>
- Class D:<sup>5</sup>
  - Assault with intent to commit sexual penetration.<sup>6</sup>
  - Assault by suffocation or strangulation.<sup>7</sup>
- Class E:<sup>8</sup>
  - Assault with intent to commit sexual contact.<sup>9</sup>
  - Domestic assault and aggravated domestic assault with prior convictions.<sup>10</sup>
  - Stalking of a minor and aggravated stalking.<sup>11</sup>
- Class G: fourth degree criminal sexual conduct.<sup>12</sup>

Additionally, the Board notes that Const 1963, Art I, sec. 24 grants crime victims the right to make a statement to the court at sentencing. The Board shares concerns expressed by the Michigan Judges’

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<sup>4</sup> MCL 777.64, MCL 750.520c.

<sup>5</sup> MCL 777.65.

<sup>6</sup> MCL 750.520g(1).

<sup>7</sup> MCL 750.84(1)(b).

<sup>8</sup> MCL 777.66.

<sup>9</sup> MCL 750.520g(2).

<sup>10</sup> MCL 750.81(4) and 750.81a(3).

<sup>11</sup> MCL 750.411h(2)(b) and 750.411i(3)(a).

<sup>12</sup> MCL 750.520e, MCL 777.68.

Association that restrictions on jail sentences under the CSG proposal would render victim participation in sentencing hearings meaningless, in violation of this constitutionally-protected right.

Accordingly, the MDSVPTB is opposed to “probation only” intermediate sanctions for felony offenses involving domestic violence, sexual assault, and stalking, based on a general principle that judges should have the full range of sentencing options to sanction felony offenders convicted of crimes involving domestic violence, sexual assault, and stalking on a case-by-case basis.

b. Board concerns about predetermined sanctions for probation and parole violations

Under the CSG proposal, courts would set forth predetermined sanctions for probation and parole violations at an offender’s initial sentencing by way of “sanction terms” to be used in the event of non-compliance.<sup>13</sup>

The length of the sanction term the judge may impose would be limited to:

- One year in the county jail for a sentence under grids F, G, and H. (Grid F includes felonious assault. Grid G includes fourth degree criminal sexual conduct)
- Two years in prison for a sentence under grids C, D, and E. (Grid C includes second-degree criminal sexual conduct. Grid D includes strangulation and assault with intent to commit sexual penetration. Grid E includes assault with intent to commit sexual contact, domestic assault and aggravated domestic assault with prior convictions, stalking of a minor, and aggravated stalking.)
- Five years in prison for a sentence under grids M2, A, and B. (Grid M2 includes second-degree murder. Grid A includes first-degree criminal sexual conduct. Grid B includes third-degree criminal sexual conduct.)

The above sanction terms represent the maximum time of imprisonment that a court or the Parole Board may impose during the entire time of an offender’s release on probation or parole, no matter how many violations occur. Thus, parole or probation violations would subject the offender to statutorily prescribed short prison or (in the case of probationers) jail sentences. Each term of imprisonment would be credited to reduce the amount of sanction time, so that in theory, an offender with multiple violations could reach the maximum sanction term before the expiration of his/her period of parole or probation. Given the serial nature of domestic violence, sexual assault, and stalking, the MDSVPTB is concerned that offenders who serve their full sanction terms before the expiration of their periods of probation or parole might not be imprisoned for violations occurring after the sanction term is exhausted. Moreover, the inflexible short terms of imprisonment that would be imposed in response to probation/parole violations may not adequately protect survivors or hold perpetrators accountable, because they do not permit a tailored response to individual perpetrators’ serial and/or serious behavior.

The MDSVPTB also has concerns that the proposed CSG scheme for characterizing violations as “low severity” does not adequately account for behavior that appears benign to outsiders, but is highly threatening to survivors in the context of their relationships with perpetrators. For example, a perpetrator’s gift of flowers to a survivor of domestic assault may seem like an act of reconciliation to those outside the relationship. To the survivor, however, this act may be a death threat if the perpetrator has vowed to only send her flowers at her funeral.

Additionally, the Michigan Judges Association has stated that the requirement to impose sanction terms at the time of sentencing is “extraordinarily involved,” and that such predetermined sanctions limit the incentive for felons to follow their terms of probation and/or parole. The MDSVPTB shares this concern.

Accordingly, the MDSVPTB opposes predetermined sanctions for probation and parole violations committed by perpetrators of domestic violence, sexual assault and stalking, based on a general principle that judges

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<sup>13</sup> Amending MCL 769.34.

should have the full range of sentencing options to sanction felony offenders convicted of crimes involving domestic violence, sexual assault, and stalking on a case-by-case basis.

Thank you for your consideration of the above concerns. If you have any questions about the comments in this letter or would like further discussion of any of the issues raised, please feel free to contact me or Mary Lovik, an attorney in my office. My telephone number is 517-241-5114, and my email address is [caind@michigan.gov](mailto:caind@michigan.gov). Ms. Lovik's telephone number is 517-241-7591, and her email address is [lovikm@michigan.gov](mailto:lovikm@michigan.gov).

In closing, I'd also like to express my regret at sending the Board's comments later than the deadline stated in your Aug. 7 request. The Board did not meet in August, and so did not have an opportunity to review and comment on the CSG recommendations and draft legislation until its meeting on Sept. 19. Please note, however, that Ms. Lovik and I expressed concerns similar to the Board's in a Sept. 8 telephone conference with Carl Reynolds and Ellen Whelan-Wuest on the CSG staff.

Yours truly,

A handwritten signature in blue ink that reads "Debi Cain". The signature is written in a cursive, flowing style.

Debi Cain, Executive Director

cc: MDSVPTB members  
Angela Madden