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HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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Senate Bill 833

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House Judiciary Subcommittee
on Crime and Corrections

Main Capitol Building
Room 8-E-A, East Wing
Harrisburg, Pennsylvania

Wednesday, April 1, 1998 - 1:05 p.m.

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BEFORE:

- Honorable Jerry Birmelin, Majority Chairperson
- Honorable Brett Feese
- Honorable Al Masland
- Honorable Robert Reber
- Honorable Harold James, Minority Chairperson
- Honorable Babette Josephs
- Honorable Thomas Caltagirone

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1 ALSO PRESENT:

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6 Judy Sedesse
7 Majority Administrative Assistant

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8 David Bloomer
9 Majority Research Analyst

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1 CHAIRPERSON BIRMELIN: Good afternoon.
2 Welcome to the Pennsylvania House of
3 Representatives Judiciary Committee Hearing
4 today. This is the Subcommittee on Crime and
5 Corrections.

6 I'm the Chairman of this Subcommittee,
7 Representative Jerry Birmelin hailing from Wayne
8 and Pike Counties. And I will ask the Members of
9 the Committee that are with us today to introduce
10 themselves. And as Members come later throughout
11 this hearing, I will introduce them as best as
12 I'm able to.

13 And seated immediately to my right is
14 Representative Babette Josephs from Philadelphia
15 County. And to my immediate left is the
16 Chairman -- the Democratic Chairman of this
17 Committee, Representative Tom Caltagirone. Would
18 the rest of the Members please introduce
19 themselves?

20 REPRESENTATIVE MASLAND: I'm
21 Representative Al Masland from Cumberland and
22 York Counties.

23 REPRESENTATIVE FEESE:
24 Representative Brett Feese from Lycoming County.

25 MR. PRESKI: Brian Preski, Chief Counsel

1 to the Committee.

2 CHAIRPERSON BIRMELIN: Well, we welcome
3 you on this bright and sunny day today. For our
4 viewers, this is actually a day in which it's
5 raining profusely outside, so you're not really
6 missing anything by not being outside and by
7 being here today.

8 And hopefully the two hours that we'll
9 be spending here discussing the Bill that is
10 before us with the amendments that have been
11 introduced to it by Representative Josephs will
12 be constructive, if nothing else for you.

13 This hearing is dealing with Senate Bill
14 833 and two of the amendments that have been
15 introduced to it, amendments by Representative
16 Babette Josephs who I've previously introduced is
17 seated to my right.

18 And it deals with the subject of sexual
19 assault on prisoners who are under the care and
20 custody of prison officials while not actually in
21 prison. They could be in a hospital for
22 treatment or some other institution where they
23 are under the security of the prison officials
24 but not actually in the prison.

25 Apparently from the sponsor of the

1 legislation, Senator Greenleaf, we understand
2 that there is a bit of a loophole in the law that
3 allows for some indiscretionary activity on the
4 part of prison officials in areas in
5 which -- these are not occurring in the actual
6 prisons which they've been assigned as employees.

7 And Representative Josephs has two
8 amendments. And before we talk about the Bill
9 itself and before I call our first witness, I'm
10 going to ask Representative Josephs if she would
11 give us a brief summary of those two amendments.
12 Representative Josephs.

13 REPRESENTATIVE JOSEPHS: Thank you,
14 Mr. Chairman. I guess the reasons why I
15 introduced the amendment -- or both amendments
16 have more to do with what I think was the problem
17 with this Bill than my commitment to actually
18 seeing these become part of the law.

19 My problem with Senate Bill 833 is that
20 I think it doesn't help us in getting and
21 obtaining convictions where you have a kind of
22 situation in which there is a sexual assault and
23 the subject of that assault is much, much more
24 powerless than the alleged perpetrator which, of
25 course, is the case of inmates whether they

1 are -- wherever they are in custody, whether they
2 are in custody in the correctional institution or
3 in some other setting.

4 I believe that our definition of
5 forcible compulsion which is already in our
6 statute does what it's meant to do and that
7 amending it not only doesn't make it any
8 stronger, but I can see situations in which it
9 will make it weaker or make it more difficult to
10 obtain convictions.

11 My objection to it was getting more
12 detailed, talking about a person who has
13 supervisory or disciplinary authority over the
14 complainant instead of looking at that term
15 "forcible compulsion," which is variable and
16 which I think covers situations in which a person
17 has supervisory or disciplinary authority over
18 the complainant.

19 And in order to make my point, in my
20 amendments mentions some names of people, names
21 of professions that -- in which people might be
22 practicing and come into contact with inmates and
23 be accused of or convicted of or involved in a
24 sexual assault.

25 I think probably more -- rather than go

1 on, I should let the -- turn the chair back over
2 to the Chair, go on with the hearing. And I
3 think more discussion will come up as I get a
4 chance to ask questions and people get a chance
5 to present their testimony before us.

6 CHAIRPERSON BIRMELIN: Representative
7 Josephs, your two amendments as I read them deal
8 with sexual assault by psychotherapy specialists
9 and healers -- I want to use your terminology so
10 I don't make a mistake -- practitioners of the
11 healing arts.

12 Maybe as we go through we might want to
13 add a little definition to that as we discuss
14 this before the Committee. Our first testifiers
15 are the Honorable Martin Horn, Commissioner of
16 the Department of Corrections of Pennsylvania.

17 He'll be joined by Calvin Lightfoot, who
18 is the Warden of the Allegheny County Prison.
19 Gentlemen, if you would please come forward. My
20 understanding is that, Commissioner Horn, you
21 have written testimony that you want to present
22 to us.

23 And if any Members have that before them
24 and that -- Mr. Lightfoot, you will be available
25 to answer some questions. And if you feel you

1 need to make some comments, we'll certainly be
2 very willing to listen to what you have to say.

3 And before you gentlemen begin, I would
4 like to introduce Representative Reber who has
5 joined us from Montgomery County. He's a Member
6 of the Committee as well. And Mr. Horn, whenever
7 you're prepared to begin, you may do so.

8 MR. HORN: Thank you very much,
9 Mr. Chairman. And I do appreciate your offering
10 the opportunity to my good friend and colleague,
11 Calvin Lightfoot, to join me here at the table
12 today and speak to the issue from the perspective
13 of county prisons.

14 Representative Birmelin, Members of the
15 Subcommittee on Crime and Corrections, I
16 appreciate this opportunity to testify in support
17 of Senate Bill 833.

18 The amendments proposed in Senate Bill
19 833 provide the technical corrections needed to
20 restore the statutes on offenses of sexual
21 assault and indecent assault with respect to
22 persons in custody to their pre-1995 state.

23 Prior to 1995, the statute regarding
24 consensual sexual intercourse charged an
25 individual with a second-degree misdemeanor if

1 found guilty. In 1995, this section was repealed
2 and replaced with a provision that addressed
3 sexual intercourse without consent and failed to
4 address situations in which there is consent by
5 the victim.

6 The proposed amendment to this statute
7 as provided in Senate Bill 833 includes language
8 which is intended to incorporate the pre-1995
9 language regarding consensual situations.

10 In 1995, section 3126 regarding indecent
11 assault was also amended and the language, quote,
12 in custody of law, close quote, was removed from
13 the statute.

14 Senate Bill 833 proposes to restore this
15 missing language and find a person guilty of
16 indecent assault if the victim is in custody of
17 law or detained in a hospital or other
18 institution where the perpetrator has supervisory
19 or disciplinary authority over the victim.

20 The Department of Corrections forbids
21 any form of sexual contact between staff and
22 inmates. Our code of ethics specifically
23 directs that there is to be no fraternization or
24 private relationships between staff and inmates.

25 The Department's training program on

1 Professionalism and Ethics for Correctional Staff
2 which was adopted in 1997 explicitly states that
3 sexual relationships between staff and inmates
4 are never consensual.

5 The training also directs employees that
6 inappropriate relationships between staff and
7 inmates will not be tolerated. Since 1995, the
8 Department has dismissed or accepted resignations
9 in lieu of a dismissal from 15 employees for
10 sexually related fraternization.

11 In prison, the relationship between
12 keeper and kept is inherently coercive. Consent
13 cannot be a defense to sexual acts between a
14 prison employee and an inmate. The unequal
15 nature of the custodial relationship between
16 inmates and corrections staff presumes some type
17 of pressure on the prisoner exists.

18 It is therefore unnecessary to inquire
19 into the victim's consent. Moreover, the
20 opportunity for inmates to assert control over
21 staff through manipulative consensual sexual
22 activity must be explicitly closed off.

23 Thirty-two states and the federal
24 government have statutes prohibiting the sexual
25 abuse of prisoners. Twelve of these statutes

1 specifically assert that consent is not a
2 defense. For example, New York's statute passed
3 in 1996 and signed into law defines an inmate in
4 a correctional facility as legally incapable of
5 consenting to a sexual act with a correctional
6 employee.

7 I believe that this is the proper view
8 of the matter. Sexual misconduct is most often a
9 felony offense. Twenty-one states and the
10 District of Columbia define sexual misconduct as
11 a felony while five states define sexual
12 misconduct as a misdemeanor.

13 In three states and the federal prison
14 system, specifics of each case determine whether
15 the sexual misconduct was prosecuted as either a
16 felony or misdemeanor.

17 Under Senate Bill 833, voluntary sexual
18 activity in the form of sexual intercourse or
19 deviate sexual intercourse would be prosecuted as
20 a felony, while indecent contact would be
21 prosecuted as a misdemeanor.

22 This seems to be a reasonable
23 distinction. Therefore, I request your support
24 of Senate Bill 833. Thank you for your time in
25 allowing me to testify regarding this matter.

1 I'd be happy to answer any questions.

2 CHAIRPERSON BIRMELIN: Mr. Lightfoot, do
3 you have any comment you'd like to add --

4 MR. LIGHTFOOT: No, not at this time.
5 But I would -- I'm standing by for any questions
6 that you would like to ask me.

7 CHAIRPERSON BIRMELIN: As I mentioned
8 earlier, the Warden of the Allegheny County
9 Prison -- is that located in the City of
10 Pittsburgh?

11 MR. LIGHTFOOT: Yes, it is.

12 CHAIRPERSON BIRMELIN: How far is it
13 from Pittsburgh SCI?

14 MR. LIGHTFOOT: I guess, mile and a
15 half, close.

16 CHAIRPERSON BIRMELIN: I will turn to
17 the Members of the Committee now, and we'll give
18 them the opportunity to ask questions if they
19 would like to make comments. And I'll begin with
20 the Democratic Chairman of this Committee,
21 Representative Caltagirone.

22 REPRESENTATIVE CALTAGIRONE: Thank you,
23 Mr. Chairman. Commissioner Horn, we have a
24 chart -- and I don't know if you have a copy of
25 this. If Counsel would share one of these copies

1 with the Commissioner. On the back of this
2 packet it starts out with Purdens, chapter 31
3 defining sexual offenses.

4 There is a chart that I was looking at
5 as I came in. I want to find out as far as
6 Pennsylvania's concerned, I was just noting on
7 this chart at the top of this table 4 it says
8 that evidently these are policies that are
9 utilized in the various states with their
10 Department of Corrections.

11 And they said the Policies Covered in
12 Specific Training Presentation -- I would imagine
13 that would be for employees -- Pennsylvania is
14 not checked. And then it says Policies Covered
15 in Standard Inmate Orientation; and again,
16 Pennsylvania's not checked.

17 The third column, Policies Covered in
18 the Inmate Handbook, Pennsylvania is not checked.
19 And then the fourth column, Pennsylvania is
20 checked for Policies are Available in the
21 Inmates' Library.

22 I was just curious, is there any reason
23 why -- and maybe it is and this hasn't been
24 updated -- as to why, let's say, at least
25 employees that are trained as corrections

1 personnel or if any type of staff would not be
2 covered under specific training, No. 1; and No.
3 2, I would imagine that might also hold true for
4 the counties as to the policy or inmate
5 orientation, and then, of course, the handbook.

6 I would think that any one of those
7 three that are not covered and/or all of them
8 might go a little bit further in educating both
9 staff and inmates as to the policies and how
10 those policies are to be enforced.

11 MR. HORN: Yes. I quite agree. Well,
12 actually, the preceding page relates to staff
13 training. And I think the back page, table 4,
14 relates to how inmates are informed. And I
15 think -- I really can't speak to this.

16 This document came out in November of
17 1996, probably based on data that was collected
18 in 1995 given the way these things typically have
19 been put together. And I really don't know who
20 responded to the questionnaire.

21 But typically, inmates do receive our
22 inmates handbook. It does indicate what the
23 rules are. We are in the process of revising it.
24 Absolutely this statement should appear there.
25 With respect to staff, if you turn to the

1 preceding page, it clearly indicates that the
2 first column is marked all staff receive
3 training.

4 REPRESENTATIVE CALTAGIRONE: You're
5 right. You're right.

6 MR. LIGHTFOOT: While I can't speak for
7 the other counties, I can tell you that in
8 Allegheny County we -- in our orientation and in
9 our inmate handout, we do explicitly speak to the
10 prohibitions of sexual activities in the jail as
11 well as no-tolerance policies that are given to
12 in-service training as well as the preservice
13 training to all the employees.

14 REPRESENTATIVE CALTAGIRONE: Thank you.
15 Thank you, Commissioner. Thank you, Warden.
16 Thank you.

17 CHAIRPERSON BIRMELIN: Representative
18 Masland.

19 REPRESENTATIVE MASLAND: I just had one
20 brief question to start off with, and then I'll
21 pass the microphone along. It was my
22 understanding, Commissioners, that during
23 discussions when this Bill first came up in
24 committee that one of the reasons that it was
25 needed was to basically assist the Department in

1 situations where there were sexual relations in
2 terms of getting that corrections officer or
3 employee to resign.

4 It was my impression that one of the
5 reasons this was needed was that it could be used
6 as leverage if there was something specifically
7 in there to convince them that it would be better
8 off for them to resign as opposed to being
9 prosecuted.

10 But it sounds like from your testimony
11 that you've had a number of individuals who have
12 been dismissed or resigned in lieu of a dismissal
13 without this -- without this in effect.

14 I guess what I'm getting at is, is that
15 one of the reasons you need this because you know
16 it's going on and you want to get people to
17 resign? And if that's the case, is it really
18 necessary to add something to the law that some
19 of us think is covered anyhow?

20 MR. HORN: Mr. Masland, I would never
21 suggest to the General Assembly that we pass a
22 law just to enable this Department to have
23 leverage over employees to get them to resign.
24 If they've done wrong, we ought to go after them
25 with everything we can.

1 I think that the reason why this statute
2 is necessary is because, with all due respect, I
3 don't agree that it is covered by current law.
4 Presently -- and I've had the occasion where
5 members of this body have said to me, What's the
6 problem if the inmate gives consent?

7 I think we must recognize as a
8 Commonwealth that much as there are other
9 individuals in our community who we say by law
10 are incapable of giving consent, we should say
11 the same thing with respect to inmates.

12 I think that the movement in the country
13 as clearly demonstrated by the data that we
14 provided to you is in the direction of that. And
15 I would hate to think that Pennsylvania is
16 marching in the opposite direction having removed
17 this provision when other states are including
18 it.

19 And, finally, while we have obtained
20 terminations of employees or obtained
21 resignations in 15 cases, that is far fewer than
22 the number of cases where the behavior may have
23 occurred where we have not been successful.

24 As you know because of the way the
25 process works, an arbitrator is entirely capable

1 as things now stand to find that an
2 employee -- and I want to make it clear that this
3 behavior is not limited to corrections
4 officers. Employees of all job classifications
5 and both genders have engaged in this
6 behavior -- that an arbitrator will find that
7 despite the fact that it has occurred that the
8 employee, nonetheless, should be allowed to
9 continue in their employment.

10 That is reprehensible. If, however, the
11 employee were charged with and convicted of a
12 crime which could occur despite the fact that the
13 inmate gave consent, which is all this is about,
14 despite the fact that the inmate said yes, we
15 would be saying to staff, That is not a defense.

16 It is always wrong in every
17 circumstance. We would then be better able to
18 obtain the dismissal irrespective of the
19 employee's willingness to resign before an
20 arbitrator based upon the conviction for the
21 crime.

22 Finally, I think that people are more
23 often willing to jeopardize their job than they
24 are willing to jeopardize the possibility of a
25 jail sentence and a criminal record.

1 I think the important point to make here
2 is that this is about a situation where an inmate
3 entices an officer or gives the officer or other
4 employee the appearance of granting consent, and
5 I think the law of the state should be that that
6 inmate is incapable of granting consent.

7 REPRESENTATIVE MASLAND: In these 15
8 cases since 1995, have any of them been
9 prosecuted for any offenses?

10 MR. HORN: Yes.

11 REPRESENTATIVE MASLAND: Do you know
12 what percentage?

13 MR. HORN: Um, three individuals were
14 prosecuted. But I believe they were prosecuted
15 based on the law prior to 1995 because these were
16 dismissals and terminations since 1995. In those
17 three cases, the behavior occurred before the law
18 was changed in 1995.

19 REPRESENTATIVE MASLAND: Thank you.

20 MR. LIGHTFOOT: And I can tell you that
21 in the county when I bring cases like this before
22 the prosecutor, he's not willing to go forward
23 with the prosecutorial end of it because of this
24 law. But I will tell you that this is an abuse
25 of power.

1 When you have inmates under the
2 authority of the warden and all of the people
3 that work for the warden or that person that runs
4 the institution, there's a statutory
5 responsibility as well as a moral responsibility.

6 If we're going to maintain
7 professionalism, if we're going to keep order
8 within that facility, you have to have those
9 stringent rules; and it should be backed up by
10 the law. The abuse of power should not be
11 tolerated in any of our agencies.

12 It doesn't have to be the correctional
13 institutions. It can be hospitals; it can be
14 churches; it can be schools. But when we have
15 that kind of authority over these people, the
16 ultimate in how we treat them is the quality of
17 the professionalism and the law that backs us up.

18 REPRESENTATIVE MASLAND: Let me just say
19 before passing to Representative Feese, I want to
20 make it clear that we're not condoning abuse of
21 power, and nobody has done that.

22 And we did not pass a law in 1995 which
23 specifically permitted this kind of behavior lest
24 anybody out there think that is the case. It is
25 very far from the case. I'll pass to

1 Representative Feese.

2 CHAIRPERSON BIRMELIN: Representative
3 Feese.

4 REPRESENTATIVE FEESE: Thank you,
5 Mr. Chairman. And to add to what
6 Representative Masland said, nor did we repeal a
7 law in 1995 which changed the law.

8 You gentlemen probably are aware that in
9 1980, some 15 years before the Legislature took
10 that statute off the books, the Pennsylvania
11 Superior Court and the Pennsylvania Supreme Court
12 declared that statute unconstitutional. So we
13 were merely removing a statute from the books
14 which was already declared unconstitutional.

15 MR. HORN: Nonetheless, Senate Bill 833
16 would explicitly make that behavior illegal.

17 REPRESENTATIVE FEESE: Senate Bill 833.
18 But contrary to your testimony, we only repealed
19 the statute which was already unconstitutional --

20 MR. MARTIN: I accept that correction.

21 REPRESENTATIVE FEESE: -- not in effect
22 for 15 years prior to the time of the --

23 MR. HORN: I accept that correction.

24 REPRESENTATIVE FEESE: -- Legislature
25 took that action. I'm trying to understand out

1 of 15 employees that were dismissed or
2 resignations that were accepted, you indicated
3 that some were prosecuted?

4 And I'm assuming then that was
5 prosecution for either an actual rape as we would
6 know it with forcible compulsion or an
7 involuntary deviate sexual intercourse. Is that
8 the crimes that they would have been prosecuted
9 for?

10 MR. HORN: I believe it was indecent
11 sexual assault.

12 REPRESENTATIVE FEESE: Do you know how
13 many out of that 15 were actually prosecuted?

14 MR. HORN: I only know of three that
15 were prosecuted. As I say, these are 15 cases
16 since 1995 when I became Secretary of
17 Corrections.

18 And some of these persons who resigned
19 or were terminated -- resigned or terminated
20 based on investigations that came to fruition in
21 1995 of behavior that occurred in 1993 and '94.

22 REPRESENTATIVE FEESE: Do we have an
23 average number of cases that occurs in the
24 Department during this time frame per year? I
25 mean, is it 10 a year? 15? Do you know?

1 MR. HORN: I'm not sure what -- I'm not
2 sure what the category is that we're talking
3 about.

4 REPRESENTATIVE FEESE: In your written
5 testimony it said, 15 employees for sexual
6 related fraternizations.

7 MR. HORN: That have, in fact, been
8 terminated. There are other employees who we
9 brought on charges but for whom we did not
10 sustain a termination. The arbitrator may have
11 ruled against us sometimes on evidentiary grounds
12 and sometimes despite a finding of guilt may have
13 ordered us to reinstate the employee.

14 It's not uncommon for an arbitrator to
15 find that an employee with, say, ten or more
16 years of exemplary service is guilty of a
17 transgression and says, Well, you shouldn't throw
18 their whole career away because of this
19 transgression.

20 Our position is that this particular
21 type of transgression goes to the very root of
22 the integrity of the corrections service and,
23 therefore, cannot be tolerated.

24 REPRESENTATIVE FEESE: But what I'm
25 trying to understand is how widespread the

1 problem is. You're saying that since 1995, 15
2 were dismissed; or is that -- do you have any
3 idea of the number of cases that are brought to
4 your attention each year for disciplinary action?
5 Do you have any idea at all?

6 MR. HORN: The -- I don't want to hazard
7 a number. I could provide that information to
8 you. I want to be clear that it is not
9 widespread and rampant. People should not think
10 that this is going on with regularity in the
11 prisons.

12 I want the public to be assured that
13 that is not the case. On the other hand, while
14 it occurs infrequently, it happens often enough
15 to be a matter of concern. If we've got 15 that
16 were dismissed over a three-year period, that's
17 five a year on average. And that's far too many.

18 REPRESENTATIVE FEESE: No, I agree. I
19 think any coercive situation is far too many,
20 just one is far too many. What I'm trying to
21 understand is in making policy decision, we look
22 at how severe the problem is, what the language
23 is, will the language catch people that we don't
24 want to catch that we would -- all of us would
25 believe should not be prosecuted?

1 And that's why I'm trying to get an
2 understanding of the scope of the problem. One
3 other question I have, Representative Caltagirone
4 was reviewing the staff training chart. And
5 under the amount of training provided preservice
6 hours and annual in-service hours for
7 Pennsylvania, it had an NA, not applicable. And
8 I wasn't --

9 MR. HORN: Well, again --

10 REPRESENTATIVE FEESE: -- sure what that
11 meant. Do we provide in-service hours regarding
12 this issue?

13 MR. HORN: Yes. We now since August of
14 1997 mandate all employees to take a three-hour
15 course entitled Professionalism in Ethics. And
16 that course explicitly deals with these
17 issues.

18 REPRESENTATIVE FEESE: That's all the
19 questions I have. Thank you very much.

20 MR. LIGHTFOOT: We also have that on the
21 county level where we do the same. But with the
22 implementation of my no-tolerance policy, some of
23 those acts have either gone underground or have
24 been curtailed.

25 But any one act like that is something

1 that you really have to deal with and in a very
2 iron-hand manner to get it -- to get it
3 eradicated out of your system.

4 REPRESENTATIVE FEESE: Thank you.

5 CHAIRPERSON BIRMELIN:

6 Commissioner Horn, I just want to ask you two
7 brief questions. No. 1, how many total employees
8 are there working for the Department of
9 Corrections?

10 MR. HORN: Roughly 13,000, sir.

11 CHAIRPERSON BIRMELIN: And of those
12 13,000, how many are in a position where they may
13 be affected by this legislation; that is, they
14 would be in contact with prisoners to the effect
15 that they might be guilty of the crime that we
16 are now trying to make illegal?

17 MR. HORN: 12,700, all but those who
18 work in the central offices of the Department
19 and perhaps even some of them.

20 CHAIRPERSON BIRMELIN: Most of them?

21 MR. HORN: Yes.

22 CHAIRPERSON BIRMELIN: About 98 percent
23 of them?

24 MR. HORN: Yes, sir.

25 CHAIRPERSON BIRMELIN: Representative

1 Josephs, do you have any questions?

2 REPRESENTATIVE JOSEPHS: Yes, I do.

3 Thank you. I also want to make it clear that I
4 agree entirely with your policy and I agree
5 entirely with your statement that even someone
6 with a long period of employment without
7 complaint who is found guilty of one of these
8 kinds of assaults ought to be terminated
9 immediately. I agree with that.

10 I think that you're absolutely right,
11 both of you, in saying that this kind of behavior
12 strikes to the heart of the system and really
13 corrupts it in a way that very few other kinds of
14 behaviors can.

15 And that's what was my concern with this
16 amendment because I think that it's going to be
17 harder, as I said before. For instance, you have
18 almost 13,000 people who are in some sort of
19 contact with inmates.

20 Who is to define and what are we going
21 to say is meant by supervisory -- which is in
22 this amendment -- or disciplinary? For instance,
23 as I was suggesting -- well, let me back up.

24 Because I should have said, in Senate
25 Bill 833, we are adding a phrase which points to

1 people, which says that if a person has
2 supervisory or disciplinary authority over the
3 complainant, that a criminal act has been
4 perpetrated.

5 Who is to say, for instance, if again
6 referring to my amendment, there is some sort of
7 psychologist or a therapist or a medical
8 provider or a food service person or any of those
9 kinds of people who don't fit into, neatly into
10 the definition of having supervisory or
11 disciplinary authority over the complainant, why
12 should it be easier to prosecute a person under
13 this new statute which is being proposed than
14 under the statute which we -- which really, I
15 guess, depends on a very broad definition which
16 is forcible compulsion?

17 MR. HORN: I'm not a lawyer, so it's
18 difficult for me to answer the specifics of that
19 last part of your question. I appreciate your
20 support for the concept.

21 First of all, with respect to the use of
22 the terms supervisory or disciplinary authority
23 over the inmate, with respect to all of our
24 employees in the H-1 AFSME (phonetic) bargaining
25 unit, it is very clear that those employees as

1 part of their job duties, as part of their job
2 description, have care, custody, and control
3 responsibilities over the employees.

4 So that covers 8,000 corrections
5 officers and a couple of thousand additional
6 noncorrection officer uniformed staff, food
7 service employees, maintenance employees,
8 correctional industry employees, power plant
9 employees and so on.

10 Additionally, all of our employees have
11 disciplinary authority. Even a secretary working
12 in a correctional institution can cite an inmate
13 for a disciplinary violation.

14 So I would suggest to you that the
15 language encompasses all employees who are in a
16 position to initiate disciplinary action against
17 an inmate in a correctional institution.

18 With respect to the issue of whether
19 forcible compulsion is a better term of art to
20 use in this, I'm not an attorney. Other than to
21 say the point that I think we're trying to make
22 here is that when you use forcible compulsion,
23 there is this sense that there has to be some
24 overcoming of the will of the victim through
25 force or the threat of the use of force that

1 there is some compulsion.

2 It is very difficult to prove that there
3 has been force or compulsion when the victim, if
4 you will, the inmate in this case, was not only
5 a willing participant, but more often an
6 instigator.

7 When we allow inmates to engage in this
8 behavior and we say to staff that because you
9 didn't use force, because you did not overcome
10 resistance in any way, it's okay, we allow staff
11 to be manipulated by inmates, inmates who want
12 favors, whether it is for a blind eye to be
13 turned to some in-prison misbehavior, whether
14 it's to an inappropriate assignment that can
15 compromise security, whether it is bringing drugs
16 or alcohol into the prison.

17 And so I think to my mind the use of the
18 term forcible compulsion is exactly not what we
19 are trying to get at. We are not suggesting that
20 force is used in its common sense meaning or that
21 there is compulsion. And, indeed, in many of
22 these cases, the relationship has been instigated
23 by the inmate.

24 REPRESENTATIVE JOSEPHS: Thank you.
25 Thank you, Mr. Chairman.

1 CHAIRPERSON BIRMELIN: Counsel Preski
2 has a question.

3 MR. PRESKI: Commissioner, I guess to
4 build upon Representative Josephs' question, one
5 of the things that was brought up in the
6 discussion of the Committee was that forcible
7 compulsion can occur because you have a
8 corrections officer, someone who has the moniker
9 of an officer attached to their position, and an
10 inmate.

11 Of the situations that you have had,
12 either the 15 that have led to dismissals or the
13 others that you know have, are these all
14 correctional officers? You talk about them as
15 employees. You shake your head. I assume the
16 answer is no?

17 MR. HORN: No. In many cases, it has
18 been a counselor; it has been a food service
19 employee; it has been a teacher.

20 MR. PRESKI: So these aren't uniformed
21 people. They could be in civilian clothes where
22 there would not be the appearance of power or the
23 appearance of supervision or the appearance of
24 disciplinary just by the manner in which they
25 dress?

1 MR. HORN: That is correct.

2 MR. PRESKI: I guess my next question is
3 for you, Warden. You're here from the county.
4 Can you give us the county perspective of this?
5 You've talked about the zero-tolerance policy
6 that you've adopted, I assume, within the
7 Allegheny County Prison.

8 Can you tell us briefly about that and
9 what your experience is from the county level?

10 MR. LIGHTFOOT: Well, much in the same
11 way that the state is experiencing from the
12 various classifications of abuse, I agree that I
13 don't think that "officer" has to be behind your
14 title for you to have had authority over the
15 persons.

16 And it can be consensual. In fact,
17 we're only talking consensual here because
18 anything other than that is a crime. I had to
19 bring in no-tolerance policies because of the
20 other classifications as well as the officers.

21 They were engaging in acts of sexual
22 misconduct on a consensual basis without any
23 impunity. They would -- they had no corrections
24 or -- let me say they had no philosophies around
25 what it takes to be a professional in

1 corrections. And that had to be brought under
2 control.

3 But I do think that they knew that they
4 were doing something wrong. And once that
5 no-tolerance policy came about, of course, I
6 couldn't catch people if they were not doing it
7 merely on what someone said that they thought
8 they did.

9 But those people who were engaging in
10 those acts were subjected to these no-tolerance
11 policies and they were dismissed. Their
12 employments were terminated.

13 MR. PRESKI: I guess the second part of
14 my question is, as you talked to your brethren
15 around the state and in the county facilities, is
16 this a topic of conversation? I mean, is it a
17 widespread problem? Is it something that you
18 talk about?

19 MR. HORN: Not only -- yes, it is among
20 all of the wardens in the state system and among
21 the county prisons as well. I think all of us
22 have seen it and experienced it.

23 And I think I've read newspaper accounts
24 of it in counties throughout the state where
25 employees have engaged in illicit sexual

1 relationships with inmates.

2 MR. LIGHTFOOT: And I would like to just
3 add that I was the Warden at the Baltimore City
4 Jail, Secretary for Maryland. I was with
5 SMARTY (phonetic) in New York. And I was the
6 Head of Corrections of Montgomery County.

7 This is not just in Pennsylvania. In
8 fact -- and if you've talked to your colleagues
9 at the conferences, American Jail Association
10 Conference and the Correctional -- the
11 ACA, the American Correctional Association of
12 Conferences, you find that this is something
13 that's practiced throughout the country.

14 And most of us have the same problem
15 that many of the employees win those cases once
16 they take it as far as arbitration. And we need
17 something stronger in order to bring the system
18 into check.

19 MR. PRESKI: Thank you, Mr. Chairman.

20 CHAIRPERSON BIRMELIN: Representative
21 Caltagirone has a follow-up question.

22 REPRESENTATIVE CALTAGIRONE:

23 Commissioner -- and I pose the same question to
24 the Warden -- the numbers that you have in your
25 testimony of 15, I was just curious, male, female

1 employees?

2 MR. HORN: Both.

3 REPRESENTATIVE CALTAGIRONE: Both. Male
4 and male relationships, female and female
5 relationships?

6 MR. HORN: Both.

7 MR. LIGHTFOOT: Both.

8 REPRESENTATIVE CALTAGIRONE: Same?

9 MR. HORN: Same.

10 REPRESENTATIVE CALTAGIRONE: Thank you.

11 MR. HORN: That too.

12 CHAIRPERSON BIRMELIN: For the record,
13 male/female relationships?

14 MR. HORN: Yes, sir.

15 CHAIRPERSON BIRMELIN: And sometimes the
16 females were the corrections people?

17 MR. HORN: Yes, sir.

18 MR. LIGHTFOOT: You mean employees?

19 CHAIRPERSON BIRMELIN: Employees.

20 MR. HORN: Yes, sir.

21 CHAIRPERSON BIRMELIN: Representative
22 Feese has a follow-up question.

23 REPRESENTATIVE FEESE: Thank you,
24 Mr. Chairman. Gentlemen, in leafing through some
25 of the material, I see some of the states have

1 very similar language already in statute as is in
2 Senate Bill 833. In talking to your colleagues
3 throughout the country, any anecdotal evidence or
4 statistical evidence that their statutes have had
5 an impact as far as behavior within the prison?

6 MR. HORN: Oh, absolutely, sir.

7 Absolutely. First of all, with respect to
8 enabling you to terminate the employee who
9 commits the transgression, everyone that I've
10 spoken to in the State Directors Association
11 who has a statute like this says that it's
12 ironclad because what you do is you basically
13 forestall your disciplinary action.

14 You go for the criminal, and then you
15 obtain your termination based upon a criminal
16 conviction. And from a deterrent point of view
17 as I indicated earlier -- I'd like to make two
18 points:

19 One is that an individual might be
20 tempted when faced with this sort of seduction or
21 when the compulsion, in fact, comes from the
22 inmate, the compulsion, the force and the
23 compulsion can be initiated by the inmate.

24 If it's just your job at stake and not
25 the rest of your future, not the prospect of

1 future employment anywhere, not the prospect of
2 yourself becoming an inmate, one might succumb to
3 the temptation if you just think, well, the worst
4 that will happen is I will lose this job. I can
5 always resign before they come after me.

6 But if you know that you run the risk of
7 a conviction and that conviction will follow you
8 throughout your life and compromise your ability
9 to obtain other jobs, then your resistance is
10 that much greater.

11 I think also it can serve to protect the
12 employees. It can give them help in saying no to
13 inmates who are attempting to seduce them by
14 saying, You know I can't do this. It's against
15 the law.

16 MR. LIGHTFOOT: This is not the same
17 situation, but it renders some of the same
18 results. I have managed two facilities that were
19 nonsmoking facilities. No one smoked in the
20 facilities.

21 And I've learned over a period of time
22 that those employees who smuggled in drugs in a
23 no-smoking institution, it almost virtually
24 disappeared, the drug part of it because they
25 could get almost the same money for bringing in

1 cigarettes.

2 So if they brought in cigarettes, they
3 could be fired but not locked up. If they
4 brought in marijuana, they would be subjected to
5 the law as well as losing their jobs. This is
6 the same thing. This law would do the same in
7 this particular case.

8 If now a person can have a sexual
9 relationship with a inmate and only be subjected
10 to losing his or her job, it's much more enticing
11 to get into that kind of act than if there was
12 law -- there were a law that would prohibit that
13 kind of thing. It's comparable to the cigarette
14 analogy as this.

15 CHAIRPERSON BIRMELIN: Commissioner
16 Horn, how many of our state prisons are smoke
17 free?

18 MR. HORN: As of today, none of them
19 are.

20 CHAIRPERSON BIRMELIN: I would suggest
21 that this might be a good avenue to pursue that
22 might help solve some of the drug problem.

23 MR. LIGHTFOOT: I didn't want to start a
24 problem with the Commissioner.

25 CHAIRPERSON BIRMELIN: Thanks for

1 telling about it.

2 MR. HORN: We recognize the potential
3 utility of smoke-free prisons and we've
4 established a departmental work group consisting
5 of medical experts, security personnel,
6 psychiatrists, psychologists.

7 And we are working with the collective
8 bargaining agents to develop a plan to move the
9 Department towards a smoke-free environment. But
10 we think that in a department with 24 inmates
11 where we have inmates in mental health units for
12 whom smoking is a large part of their life that
13 we have to proceed carefully.

14 We have to work things through. We have
15 employees who come out on both sides of the
16 issue, and we have to respect their interests as
17 well. So we've begun the process. And I think
18 it's inevitable that we will get there, but it
19 will take us three to five years.

20 MR. LIGHTFOOT: Just let me say it's
21 very difficult to convert a facility over. If
22 you're going to build a facility and you start it
23 off with no smoking, you have a much better
24 chance.

25 But I've done both. Convert one over as

1 well as bring in a new facility that's
2 nonsmoking. The conversion is much more
3 difficult. And I know what problems Secretary
4 Horn would be up against to convert his system
5 over.

6 CHAIRPERSON BIRMELIN: Well, we want to
7 thank you, Warden Lightfoot and
8 Commissioner Horn, for your testimony today and
9 for your willingness to be here. Thank you very
10 much. Our next testifiers are Larry Frankel, the
11 Executive Director of the American Civil
12 Liberties Union.

13 And with him is Shelley Klein, who is
14 legislative intern with the American Civil
15 Liberties Union. If you two folks would come up
16 forward. Before you give your testimony, I have
17 a letter that I want to read into the record.

18 The letter is from William F. Ward,
19 who's the Chairman of the Pennsylvania Board
20 of Probation and Parole. It's addressed to the
21 Honorable Thomas P. Gannon, Chairman of the House
22 Judiciary Committee.

23 Dear Chairman Gannon, it's my
24 understanding that the House Judiciary Committee
25 will hold a public hearing on Senate Bill 833 on

1 April 1st, 1998. I write in support of Senate
2 Bill 833.

3 The Bill would amend the Title 18
4 offenses of sexual assault and indecent assault
5 to include situations where the complainant was
6 in the custody of law or detained in a hospital
7 or other institution and the person has
8 supervisory or disciplinary authority over the
9 complainant.

10 It will also correct a change in the
11 statute made in 1995 restoring the original
12 intent of the legislation. The Warden's Code of
13 *Conduct absolutely prohibits any sexual activity*
14 between the warden's staff and parolee.
15 Accordingly, I support passage of this
16 legislation. Very truly yours, William F. Ward,
17 Chairman.

18 The testimony that is to be presented
19 next is, I mentioned earlier, by the American
20 Civil Liberties Union. And, Shelley, I think you
21 are presenting it?

22 MR. FRANKEL: If I can make an
23 introductory comment, Mr. Chairman?

24 CHAIRPERSON BIRMELIN: Yes, you may.

25 MR. FRANKEL: My name is Larry Frankel.

1 I'm the Executive Director for the ACLU of
2 Pennsylvania. I want to thank all of you for
3 holding this hearing today and asking us to
4 testify.

5 I must say when this Bill came up in
6 committee I was encouraged by the discussion and
7 concerned whether this was a matter that was
8 already covered by existing law.

9 Frankly, at times I think there are
10 other bills where such discussion is probably
11 worth pursuing and welcome the opportunity to
12 offer our views on whether existing law covers
13 the situation or whether an additional statute
14 may be necessary.

15 As you know, Ms. Klein is a law
16 student at the University of Pennsylvania Law
17 School participating in the Legislative Clinical
18 Program. And she has really done the bulk of the
19 research in preparation of the testimony today.
20 And I now turn the microphone over to her.

21 MS. KLEIN: Good afternoon. My name is
22 Shelley Klein. I'm a second-year law student at
23 the University of Pennsylvania interning with the
24 ACLU this semester. I want to thank you for
25 inviting the ACLU to speak about Senate Bill 833.

1 In my testimony, I will review three
2 recent court decisions that shed light on the
3 question of whether existing law adequately
4 covers cases where a person in custody has been
5 subjected to sexual contact by one who has
6 supervisory or disciplinary power over them.

7 I will analyze whether a custodial
8 situation, per se, establishes the element of
9 forcible compulsion. It is my conclusion that
10 current law provides only a limited basis for
11 arguing that a person in authority necessarily
12 engages in forcible compulsion when he has
13 indecent contact with a person in custody.

14 Pennsylvania court decisions indicate
15 that the concept of forcible compulsion is by no
16 means shaped to respond to what occurs in
17 institutions where people are held against their
18 will.

19 In 1986, the Supreme Court of
20 Pennsylvania in Commonwealth v. Rhodes held that
21 forcible compulsion may be accomplished by
22 psychological coercion. According to the court,
23 the phrase "forcible compulsion" clearly connotes
24 more than the existence of sheer physical force
25 or violence.

1 The phrase also connotes the act of
2 using superior force, moral, psychological or
3 intellectual to compel a person to do a thing
4 against that person's volition and/or will.

5 In Rhodes, the defendant was charged
6 with rape, statutory rape, and other offenses.
7 The victim was an 8-year-old girl, and the
8 defendant was a 20-year-old male. The question
9 before the Supreme Court was whether there was
10 sufficient evidence to sustain a finding of
11 forcible compulsion.

12 The court listed several factors that
13 should be considered in determining whether
14 forcible compulsion has occurred. Among the
15 factors are: The respective ages of the victim
16 and the accused; the respective mental and
17 physical conditions of the victim and the
18 accused; the atmosphere and physical setting in
19 which the alleged incident took place; the extent
20 to which the accused may have been in a position
21 of authority, domination or custodial control
22 over the victim; and whether the victim was under
23 duress.

24 Rhodes does indicate that sexual
25 relations between a person in custody and a

1 person in power can be considered forcible
2 compulsion. However, in Rhodes the court relied
3 on the age difference between the accused and the
4 victim and not on a concept of custodial control.

5 Thus, the extension of Rhodes to
6 institutional settings is uncertain. The
7 Pennsylvania Supreme Court addresses the issue of
8 whether psychological duress can constitute
9 forcible compulsion in Commonwealth v. Mlinarich.

10 In that case, the defendant was
11 an adult guardian of a 14-year-old female. The
12 defendant threatened to have the 14-year-old girl
13 returned to a detention home if she did not
14 submit to his sexual demands.

15 The court found that there was no
16 forcible compulsion because the victim had the
17 choice of refusing the demands and returning to
18 the detention home.

19 In concluding that there was
20 insufficient evidence to establish forcible
21 compulsion, the court wrote: The critical
22 distinction is where the compulsion overwhelms
23 the will of the victim in contrast to a situation
24 where the victim can make a deliberate choice to
25 avoid the encounter even though the alternative

1 may be an undesirable one.

2 Indeed, the victim in this instance
3 apparently found the prospect of being returned
4 to the detention home a repugnant one. Not
5 withstanding, she was left with a choice. And
6 therefore, the submission was the result of a
7 deliberate choice and was not an involuntary act.

8 This is not in any way to deny the
9 despicable nature of appellee's conduct or even
10 to suggest that it was not criminal. We are
11 merely constrained to recognize that it meets
12 (sic) the test of forcible compulsion.

13 The court did concede that there may be
14 cases where psychological coercion can be applied
15 with such intensity that it may overpower the
16 will to resist as effectively as physical force.

17 Although Mlinarich contains
18 language which indicates that sexual relations
19 between a person in custody and a person who has
20 power over the person in custody may be
21 considered forcible compulsion, the opinion sets
22 an extremely high standard of proof of forcible
23 compulsion.

24 In fact, this standard may be too high
25 to cover many cases of sexual assault on

1 prisoners by guards. Then there is the infamous
2 decision of Commonwealth v. Berkowitz, the case
3 that spurred the General Assembly to revamp its
4 sexual assault law.

5 In that case, both the complainant and
6 the defendant were college students. The
7 complainant testified that the defendant had
8 engaged in sexual relations with her without her
9 consent.

10 The legal question before the Supreme
11 Court was whether the fact that the victim stated
12 "no" throughout the sexual encounter was
13 sufficient evidence of forcible compulsion.

14 The Supreme Court held that where there
15 was a lack of consent but no showing of physical
16 force, physical violence, or psychological
17 coercion, the forcible compulsion requirement is
18 not met. The opinion in Berkowitz then clearly
19 demonstrates the limits of the concept of
20 forcible compulsion.

21 Senate Bill 833 will amend the law of
22 sexual assault by making it a strict liability
23 crime for an individual who while holding
24 supervisory or disciplinary power over another
25 engages in sexual activity with a person in

1 custody. There can be no defense that the person
2 in custody consented to the sexual activity.

3 While the current statute and case law
4 criminalize sexual assault by forcible
5 compulsion, it's not clear that courts would
6 automatically consider any sexual activity
7 between supervisors and persons in custody a
8 crime. Thus, Senate Bill 833 appears to go
9 beyond existing law.

10 The ACLU believes that consideration of
11 this legislation will require the General
12 Assembly to decide whether there should be
13 created a new criminal statute prohibiting any
14 and all sexual contact between guards and
15 inmates.

16 On this specific issue, the ACLU takes
17 no position. While the ACLU generally opposes
18 the concept of strict liability crimes, we
19 certainly believe that female and male prisoners
20 should not be subjected to sexual assault by
21 guards.

22 If the evidence demonstrates that there
23 are a number of incidents of sexual assault by
24 prisoners and guards and that existing laws and
25 disciplinary procedures are ineffective in

1 dealing with this problem, then there may be a
2 justification for this legislation. Thank you
3 for allowing me to testify today. I'll be happy
4 to answer any questions that you might have.

5 MR. FRANKEL: I would like to add one
6 observation based on what I heard from the
7 previous testimony and looking at the proposed
8 language which is merely putting back in language
9 that was taken out.

10 I think when we read the Bill and based
11 on some of the questions I heard, most of us
12 assume this language refers to prison guards, not
13 other employees of the Corrections Department.

14 And I understand from the
15 Commissioner's testimony that there are other
16 employees who engage in the kind of contact that
17 at least the Department seeks to prohibit.

18 And I certainly think that if this case
19 were to go to a jury, a jury might find it
20 difficult no matter what the contract language
21 is to say that a food worker or some clerical
22 person is someone who has supervisory or
23 disciplinary authority.

24 Therefore, I think there's another
25 policy question to be asked. And if, indeed, you

1 want to prohibit any employee of the Department
2 of Corrections from having sexual relations with
3 anybody who is in custody, I don't know that you
4 merely want to reenact the language that was
5 repealed because I don't think you'll cover all
6 the employees necessarily.

7 I can certainly see as a defense
8 attorney if I were representing that food worker,
9 I would make every argument and, I think,
10 hopefully, fairly compelling to a jury that they
11 don't have supervisory or disciplinary authority
12 over these people. They're not covered under the
13 statute. So if that is the direction you want to
14 go, you may want to revisit this language.

15 CHAIRPERSON BIRMELIN: I would disagree
16 with you. I have been in many prisons. I have a
17 prison in -- virtually in my backyard that I have
18 been in as a visitor on many occasions; and
19 maintenance people and food service people do
20 have direct supervisory control and disciplinary
21 of their employees.

22 I don't have a problem with that
23 language being as inclusive as it is because I
24 know personally some of our maintenance workers
25 who have supervisory and control functions. And

1 some of them take our work details out of the
2 prison, and sometimes things happen that
3 shouldn't happen in those cases. But for the
4 most part, they do have direct authority over
5 them.

6 MR. FRANKEL: I don't disagree with the
7 fact that they might have authority. But I think
8 the perception of those who have never been in
9 the prison wouldn't be that. And then you might
10 have a jury who hasn't had that experience get
11 confused. I certainly as a defense attorney
12 would try and confuse them over the issue.

13 CHAIRPERSON BIRMELIN: Defense attorneys
14 are good at that, too, I might add. And it
15 would be clearly the District Attorney or
16 Attorney General's office or whoever is
17 presenting the case to make that jury understand
18 that there is a direct supervisory and
19 disciplinary function of that food service
20 worker, and there are.

21 And that may involve taking the
22 jury into a prison to show them what they do. I
23 don't find that a hard case to make myself. I
24 understand the point you're making. I don't
25 think it's a hurdle you can't overcome. And

1 I --

2 MR. FRANKEL: I merely made it as a
3 point of caution to think about as you proceed.

4 CHAIRPERSON BIRMELIN: Okay. Thank you
5 very much. And, Mr. Frankel, if you'll agree to
6 augment the answers that your intern gives as she
7 is being questioned and then hopefully this will
8 be a good experience for you and this will not
9 turn you against the wheels of government in your
10 internship before you leave it.

11 I will turn to the Democratic Chairman
12 of the Committee for any questions he may have.
13 Representative Caltagirone?

14 REPRESENTATIVE CALTAGIRONE: (No audible
15 response.)

16 CHAIRPERSON BIRMELIN: Representative
17 Masland.

18 REPRESENTATIVE MASLAND: Just a comment.
19 We were talking, former Prosecutor Feese and
20 myself as a former Assistant DA, that it is not
21 always as easy as you would make it seem. I had
22 a case in a prison where the guard was charged
23 with taking marijuana in to a prisoner.

24 And it was a very difficult case. We
25 talked to the jurors later. It was not an easy

1 sell to say that this guy shouldn't have been
2 doing that because who was your witness? Well,
3 my witness was not a very lovely, sterling
4 character, yes. So it does make it difficult.

5 I guess my only question is, your
6 position right now is you don't have a position;
7 is that correct?

8 MS. KLEIN: Our position is only to say
9 that we don't think that the law adequately or
10 would cover the kind of sexual relationship
11 between an inmate and a guard in every case, that
12 on a case-by-case basis it might be possible for
13 a prosecutor to argue that a prison employee has
14 that kind of coercive, custodial control over an
15 inmate to establish forcible compulsion but that
16 it would be very difficult to do and certainly
17 would not cover every case.

18 I think our testimony speaks to the
19 question of whether there is a loophole in the
20 law that would allow this kind of sexual
21 encounter to go on in a prison. And I think that
22 the law would. I think that it would not be
23 considered forcible compulsion.

24 REPRESENTATIVE MASLAND: Especially if
25 it's not a prisoner/guard situation.

1 Is that --

2 MS. KLEIN: Especially if it's not a
3 prisoner/guard situation. But even if it were a
4 prisoner/guard situation and there were consent
5 by an inmate, I think there would really be no
6 way to show that it was forcible compulsion.

7 Because as the Berkowitz case shows,
8 where there was a college student and there was
9 even "no" being asserted, the court called that
10 reluctant submission and refused to find it to be
11 forcible compulsion.

12 So I think the trouble would really come
13 in if there was consent by an inmate. I think
14 that that would automatically mean that it could
15 not be considered forcible compulsion.

16 MR. FRANKEL: To augment --

17 REPRESENTATIVE MASLAND: The Berkowitz
18 case, I think that probably the Rhodes case might
19 be a little bit more --

20 MS. KLEIN: Right.

21 MR. FRANKEL: But just to augment that,
22 we do not oppose the Bill because we found
23 existing law covers it. I mean, I think that
24 what we're here to say is that at this point, if
25 the policy decision based on the evidence

1 gathered today and from what I've heard today,
2 that there is a significant problem and there are
3 inadequate other means for addressing the problem
4 even though this becomes a strict liability
5 crime, we would think that, indeed, legislation
6 may be appropriate.

7 I don't know that until we hear all of
8 what evidence or witnesses may have to present.
9 But, really, when we took a look at this Bill, it
10 was to make a determination whether, you know, we
11 could come up and say, You don't need to do it,
12 it's already covered, and therefore we oppose it.
13 But we don't think it's already covered.

14 REPRESENTATIVE MASLAND: I appreciate
15 that. And I think that's one of the reasons why
16 we're having the hearing. Because as you
17 recall, the discussion during the Committee
18 meeting was such that I think we were leaning
19 very, very firmly against passing this. Thank
20 you.

21 CHAIRPERSON BIRMELIN: Representative
22 Josephs.

23 REPRESENTATIVE JOSEPHS: Thank you,
24 Mr. Chairman. I think that Mr. Frankel, you
25 indicated that the way -- assuming that we have

1 to extend the law, just making that assumption
2 for this question and that in some way this does
3 extend the law but in a way that might not need
4 to lead to convictions, if we're talking about a
5 jury that's not familiar with some of these
6 contact -- contract terms, do you think there
7 might be a better way to cover the situations
8 that we're talking about by perhaps changing, for
9 instance, the definition of forcible compulsion
10 to add some phrase which might indicate relative
11 powerlessness or unequal power between parties or
12 some other definition rather than adding to the
13 Bill in the way that the Bill is now presented to
14 us?

15 MR. FRANKEL: I would certainly be
16 reluctant to start tinkering with the definition
17 of forcible compulsion. If my memory serves me
18 correctly about the at least two if not three
19 sessions of deliberation over that aspect of the
20 law, it really was a long process.

21 Not necessarily bad process, but it was
22 long; and one does not need to revisit it. I
23 would think the tinkering could be done in such a
24 way as to just make it clear that an employee of
25 the Department of Corrections shall not engage in

1 sexual relations with anybody in the custody of
2 the Department of Corrections.

3 Remove the notions of supervisor and
4 discipline or whatever and just make it clear so
5 that it's what the Commissioner and I understand
6 the prison society -- and the fact that they're
7 both on the same side of the Bill is probably
8 remarkable and ought to say something.

9 But that's what they're looking for is
10 to stop that kind of behavior. And, you know,
11 I'll let the former prosecutors and the Chair,
12 you know, have their discussion as to whether
13 making it more specific in the language that I
14 have just stated or something similar to that,
15 you know, just sends the -- at least it
16 eliminates a vagueness problem.

17 It says, If you're an employee of this
18 department; and how you extend it down to the
19 jails of the counties, that's not language I'm
20 prepared to give off the top of my head.

21 But it makes it clear and it makes it so
22 that somebody can't come in and say, I didn't
23 know; the law's too vague. Or, I'm not a
24 supervisor; I don't have supervisory or
25 disciplinary authority. That would be the way

1 that I would suggest to deal with it and not
2 tinker with forcible compulsion.

3 REPRESENTATIVE JOSEPHS: Thank you.
4 Thank you, Mr. Chairman.

5 CHAIRPERSON BIRMELIN: I want to
6 introduce my counterpart on this Committee. He's
7 the Democratic Chairman of the Subcommittee on
8 Crimes and Corrections; that is, Representative
9 James, Member to my right. And I will turn at
10 this time to Representative Feese for any
11 questions that he may have.

12 REPRESENTATIVE FEESE: Thank you,
13 Mr. Chairman. Mr. Frankel, just following up
14 with that train of thought on the issue of
15 supervisor and disciplinary authority. And
16 that's where I was heading the same direction
17 thinking, Well, maybe we should say the
18 Department of Corrections employee.

19 But that even makes it more of a strict
20 liability crime, doesn't it? At least when we
21 have the language "supervisory or disciplinary
22 authority", when we think of someone who has
23 control, we think of someone who has by the
24 nature of their position, has some type of
25 coercive influence.

1 But if we say, employee, then we're even
2 broader. We're going beyond that.

3 MR. FRANKEL: And I follow you entirely.
4 And I certainly have reservations at all with
5 strict liability crimes to begin with and about
6 having a broad category. But I also am being
7 cognizant of what I even learned just today. I
8 read the statute, I mean, the proposed statute.

9 I only thought about prison guards. And
10 I think our testimony reflects that. I wasn't
11 thinking about any of the other kinds of workers
12 and is the level of manipulation and the benefits
13 of manipulation any better or any worse?

14 I think -- I think those are the kinds
15 of policy decisions that the Legislature will
16 have to make. But in terms of trying to make
17 clear what behavior that's being prohibited while
18 making it a larger class of employees whose
19 behavior is prohibited, at least makes it clear.

20 And I as somebody, you know, other than
21 the guard in the prison don't have to think,
22 Well, since I'm not a supervisory authority, I
23 can go do this. Well, the prison guard can't.
24 Or have the prisoner say, the savvy prisoner
25 who's gone into the law library and reads the

1 statute, Well, you don't have any supervisory
2 authority over me; so we can have a sexual
3 relationship.

4 REPRESENTATIVE FEESE: But the other
5 side of that coin would be, and just using an
6 example, you would have a female employee who's a
7 secretary who has contact with a -- an insistent
8 or fairly aggressive male inmate and they have
9 sexual relations.

10 At least in the language now -- even
11 though she can write up that inmate -- at least
12 with the language now we have a jury of 12
13 individuals who could apply some degree of common
14 sense I think, and say, Well, that is not the
15 type of disciplinary authority we think rises to
16 the level necessary.

17 Chairman Birmelin might disagree with
18 that, but I think sometimes you have to give
19 juries a little leeway to apply some good common
20 sense to situations.

21 MR. FRANKEL: I would --

22 REPRESENTATIVE FEESE: Just a strict
23 liability issue.

24 MR. FRANKEL: I understand your point.
25 And also when you were giving that example I was

1 thinking about could there possibly be a female
2 security guard who does have supervisory
3 authority but the male employee is particularly
4 manipulative, makes some kind of threats or
5 blackmail attempts against that?

6 It's a, you know, guard. Is there any
7 defense allowable at all in allowing the
8 juries to exercise some, dare I say the word,
9 nullification power may be necessary?

10 Because I don't know that we can imagine
11 here today every possible situation and scenario
12 that may occur in a prison setting. And I
13 shouldn't even make it a female guard. It could
14 be a male guard manipulated by a very large male
15 inmate.

16 CHAIRPERSON BIRMELIN: I don't
17 necessarily disagree with your statement either.
18 I want to thank you folks for your testimony.
19 Thank you very much for coming today.

20 MR. FRANKEL: Thank you.

21 CHAIRPERSON BIRMELIN: Our next
22 testifier today is Angus Love, is the Policy
23 Chairman of the Pennsylvania Prison Society.
24 Mr. Love, if you would come forward.

25 MR. LOVE: Good afternoon.

1 CHAIRPERSON BIRMELIN: If I'm not
2 mistaken, you were present with this Subcommittee
3 when we were in Cambridge Springs Prison this
4 past August, is that --

5 MR. LOVE: No, I was not. I was present
6 when you were in Philadelphia and City Council
7 Chambers. That was directly preceding that.

8 CHAIRPERSON BIRMELIN: I'm trying to
9 remember where I met you.

10 MR. LOVE: Well, I was going to say --

11 CHAIRPERSON BIRMELIN: Was it the
12 Pittsburgh Prison hearings?

13 MR. LOVE: No, I don't believe -- unless
14 they were here?

15 CHAIRPERSON BIRMELIN: No. No, they
16 were in Pittsburgh. In any event, we welcome you
17 here today. And we ask you if you would to share
18 your testimony with us at this time?

19 MR. LOVE: I thank you, Chairman
20 Birmelin. And I have testified before this
21 Committee on many times over the years. And I'm
22 happy to say that the fact that I'm supporting a
23 piece of legislation is not an April Fools' joke.

24 Although, it is one of the first times
25 that I can recall that I am in support of

1 legislation and certainly one of the few times
2 I'm in agreement with Commissioner Horn and
3 certainly hope that there will be more times in
4 the future.

5 I'm testifying today on behalf of the
6 Pennsylvania Prison Society which was founded in
7 1787 (sic) by Dr. Benjamin Rush and several other
8 signators of the Declaration of Independence from
9 English Rule.

10 We are the nation's oldest prison reform
11 organization. We are empowered by the
12 Commonwealth with a broad scope of Official
13 Visitor Status in Pennsylvania's prisons and
14 jails.

15 I'm also the Executive Director of
16 Pennsylvania Institutional Law Project, which is
17 a special project of Pennsylvania Legal Services
18 providing outreach to civil matters to the over
19 60,000 institutionalized people in our
20 Commonwealth.

21 In the interest of full disclosure, I am
22 also representing three women from the State
23 Correctional Institute at Cambridge Springs:
24 Lisa Lambert, Sara Vasquez, and Robin Phillips.

25 Each of these women allege they were

1 subject to unwanted sexual harassment, abuse,
2 and/or assault by correctional officials. They
3 also allege deficiencies in training,
4 supervision, and investigation of inmates'
5 complaints of sexual misconduct.

6 Case law involving around the Eighth
7 Amendment of the United States Constitution often
8 refers to the evolving standards of decency as a
9 benchmark to measure what is cruel and unusual
10 punishment.

11 That comes from the landmark case
12 Dulles v. Trop, Supreme Court decision made in
13 1957. As society evolves, our laws must also
14 evolve. Given the convergence of several
15 historical trends, there is a need for passage
16 of legislation offered by SB 833.

17 Twenty years ago, there were 8,000
18 people in the custody of the Pennsylvania
19 Department of Corrections. Of those, 279 were
20 women. Those individuals were housed in seven
21 male institutions and one female institution, the
22 State Correctional Institute at Muncy.

23 Male institutions were serviced
24 primarily by male correctional officers and a
25 mixed gender staff patrolled the Muncy

1 facility. Since then, there has been an almost
2 five-fold increase in DOC population, which now
3 stands at roughly 36,000 individuals housed in 25
4 institutions.

5 One of the fastest growing segments of
6 that growth spurt has been the female offender.
7 Now there are two female institutions plus the
8 Bedford County Jail which contracts with the
9 Department of Corrections to handle the
10 overflow. I think it comes to roughly 1400 women.

11 In addition to these population trends,
12 we have seen correctional officer positions
13 opened to all individuals regardless of gender.
14 Thus, there is now a significant number of both
15 sexes at male and female institutions.

16 While we applaud the new employment
17 opportunities for females, there has been the
18 unfortunate by-product of many cross-gender
19 issues being raised in the prison context.

20 When can a female officer work in a male
21 housing block? Should strip searches be
22 conducted by same sex staff? Should the DOC
23 handle -- how should the DOC handle personal
24 liaison between staff and inmates?

25 We contend that Senate Bill 833 sends a

1 strong message on this emerging issue. In
2 response to the rapidly expanding female
3 population, the Department of Corrections
4 purchased Alliance College and converted it into
5 a female institution opening in 1992 called
6 Cambridge Springs.

7 Even with the largest capital
8 construction program in DOC history, there has
9 still been a need for additional prison space.
10 Facilities such as old state hospitals,
11 rehabilitation centers, academic institutions
12 have been converted into prisons.

13 These facilities are not your typical
14 cellblock, high-walled secure facilities.
15 Dorm-style housing and open areas dominate these
16 facilities.

17 Convergence of trends -- of a rapidly
18 expanding prison population, an evermore rapidly
19 expanding female population, the need for
20 additional prison space in nontraditional
21 settings, and the increase of cross gender
22 supervision have created a serious problem at the
23 Cambridge Springs facility.

24 In the past few years, there have been
25 five criminal convictions of male staff for

1 involvement with female inmates. There have been
2 over a dozen terminations of staff for similar
3 allegations. Our office has received complaints
4 from several dozen women claiming harassment by
5 staff.

6 A volunteer of the Prison Society who
7 was investigating one of the claims had her
8 locker broken into and notes removed and also had
9 a gunshot put through the front door of her home
10 while she was investigating these allegations
11 which later turned out to result in a criminal
12 conviction of a guard.

13 To date, little or nothing has been done
14 to address the pervasive atmosphere of sexual
15 misconduct. And I stand corrected as I see
16 Commissioner Horn does seem to have taken some
17 steps regarding the training provisions.

18 This Bill would establish that sexual
19 liaison between staff and inmates are criminal
20 acts. There cannot be consent to sexual
21 relations between staff and inmates in a prison
22 context.

23 Other states and other courts have
24 recognized and codified this simple proposition.
25 Now it is time for our Commonwealth to add its

1 voice to this emergent issue. We respectfully
2 urge passage of SB 833. Thank you.

3 CHAIRPERSON BIRMELIN: Representative
4 Feese.

5 REPRESENTATIVE FEESE: Thank you,
6 Mr. Chairman. Thank you for your testimony. I
7 have a question. I'm sitting here thinking if
8 the idea behind the Senate Bill is to
9 deter -- one of the ideas is to deter sexual
10 relations between employees of the Department
11 of Corrections and inmates and make it basically
12 a strict liability crime and if whereas we
13 evidently know from the testimony inmates are
14 sometimes the aggressors in this sexual relation
15 and you support this Bill because it would
16 establish that sexual liaison between staff and
17 inmates are criminal acts, why should we not make
18 it a criminal act for the inmate to have sex with
19 the employee?

20 MR. LOVE: Why shouldn't the inmate be
21 charged criminally?

22 REPRESENTATIVE FEESE: Let's charge the
23 inmate too.

24 MR. LOVE: I never thought of that to be
25 honest with you. I'd have to give that some

1 thought. I don't think I would rule that out.
2 I think, though, that, you know, the problem is
3 that there's an unequal -- an unequal position in
4 one being the custodian and one being the
5 custodee.

6 And I think generally we look to the
7 individual who has the power as being the person
8 to take the brunt of the responsibility. I'm not
9 saying the other person is not blame free.

10 And the way things are now when these
11 allegations are made by inmates, it's generally
12 the inmates that suffer initially prolonged
13 periods of confinement in the solitary
14 confinement units while there's an investigation
15 ongoing.

16 So the inmate is often punished
17 significantly even for bringing this matter to
18 light, regardless of the consequences.

19 REPRESENTATIVE FEESE: I agree that's
20 what we're trying to get at; that is; the power
21 of the Department employee over the inmate. But
22 when we're talking strict liability, we're almost
23 removing that. We're saying it doesn't matter
24 just by the fact that you're a Department
25 employee.

1 And I think we could probably all come
2 up with some scenarios where the inmate has as
3 much authority -- not authority, but as much
4 power as a Department employee. And I was just
5 thinking that maybe we should just make it a
6 crime for both.

7 I don't know that that would deter
8 inmates; but it would certainly punish, which is
9 one of the goals of criminal law, not just
10 deterrent, but punishment.

11 MR. LOVE: Well, there was an incident
12 or there were several incidents at Muncy many
13 years ago where females became impregnated. I
14 don't know if it was by staff or inmates.

15 But the females were always then put in
16 the solitary confinement unit and often gave
17 birth to the child in the solitary confinement
18 units. I think the prior Commissioner Lehman
19 stopped that practice. And we were in favor of
20 that discontinuing of that practice.

21 REPRESENTATIVE FEESE: Thank you. Thank
22 you, Mr. Chairman.

23 CHAIRPERSON BIRMELIN: Follow-up to
24 Representative Feese's hypothetical and maybe,
25 Commissioner Horn, if you're still here you might

1 be able to answer that would that not be a
2 criminal defense if the inmate attacked and raped
3 an employee?

4 I mean, obviously, you would file
5 charges of rape and that inmate would then be
6 suspect to that charge, would he not?

7 MR. HORN: I'm always pleased to share.

8 MR. LOVE: So am I.

9 MR. HORN: I think if I understand your
10 question correctly -- and, again, I'm not an
11 attorney. But where an employee engages in
12 sexual conduct with an inmate where clearly the
13 employee resisted or said no and was forced
14 through physical force or the threat of force
15 that clearly that would be a defense against this
16 crime.

17 CHAIRPERSON BIRMELIN: Well, the
18 question is, then they obviously would be charged
19 with the crime?

20 MR. HORN: Right.

21 CHAIRPERSON BIRMELIN: Even though they
22 are inmates just as if they would violate drug
23 laws or stab another inmate or something like
24 that?

25 MR. HORN: The inmate would be charged

1 with the crime, yes, of course. And we have had
2 cases where inmates are charged with the crime of
3 assault and with sexual assault that they commit
4 that crime of rape or sexual assault or any form
5 of assault against a staff member.

6 CHAIRPERSON BIRMELIN: Taking
7 Representative Feese's scenario to where I think
8 he wanted to go was there is consensual sex.
9 There's not forcible and compulsion. Is
10 there anything in the internal policy --

11 MR. HORN: Well, I think there is a
12 distinction. See, I think that the point is that
13 the employee is capable of granting and
14 withholding consent because they are the ones who
15 are in the power relationship.

16 They have the legal power over the
17 inmate, that the inmate we are saying -- we are
18 saying that an inmate is incapable of giving
19 consent.

20 And I think the reason why you wouldn't
21 charge the inmate in this case is that the staff
22 member who engages in this conduct was capable of
23 walking away and going home at the end of the day
24 unless they were forced. In which case, the
25 force is the defense where the crime is charged

1 against the inmate.

2 REPRESENTATIVE FEESE: Thank you,
3 Mr. Chairman. But what we're doing is
4 eliminating the issue of consent mens rea intent
5 by just saying it's strict liability.

6 MR. HORN: As to the inmate.

7 REPRESENTATIVE FEESE: And strict
8 liability as to the --

9 MR. HORN: As to the employee. We're
10 limiting the issue of consent as to the inmate.

11 REPRESENTATIVE FEESE: So if it's just
12 strict liability because you're an employee and
13 you have sexual relations with an inmate, why
14 should we not make it the reverse?

15 Now, I understand we're talking about
16 where the employee has authority and power, but
17 we're reading that out of it now because we're
18 going to say it's strict liability.

19 MR. HORN: Right. Again, I'm not an
20 attorney. I don't understand the concept of
21 strict liability. So I'm not sure how to answer
22 it.

23 REPRESENTATIVE FEESE: Hypothetical.

24 MR. LOVE: Certainly, inmates are
25 disciplined for any such activity and have been in

1 the past.

2 CHAIRPERSON BIRMELIN:

3 Representative James.

4 REPRESENTATIVE JAMES: Thank you,
5 Mr. Chairman. And I'll -- I'm thankful for the
6 testimony that you -- both of you at the table.
7 Of course, you both may have to respond.

8 What bothers me oftentimes is when there
9 are problems in bureaucracies and you have
10 someone doing an investigation or checking it
11 out, there's this intimidation or there's this
12 act of retaliation.

13 And so it -- you know, I was kind of
14 concerned when you said that one of your members
15 was investigating the sexual assault or activity
16 up at Cambridge Springs and then something
17 happened in which somebody was shot in a house.

18 And I just wondered, have there been any
19 arrests in that area or as a result of that, what
20 happened to her?

21 MR. LOVE: There were no arrests. The
22 police merely identified the bullet, I believe,
23 as a 38 caliber bullet or something to that
24 effect. And that was the end of it.

25 As I said, the incident was involving

1 Lisa Lambert; and the correctional officer was
2 convicted, I believe, of official oppression and
3 indecent sexual assault and is now in prison
4 himself.

5 REPRESENTATIVE JAMES: And there haven't
6 been any other acts of intimidation or harassment
7 against the person?

8 MR. LOVE: No. I think this predated
9 Commissioner Horn. But once the central office
10 got involved, the investigation changed and
11 became much more serious and eventually resulted
12 in some findings.

13 REPRESENTATIVE JAMES: Thank you.

14 CHAIRPERSON BIRMELIN: Representative
15 Masland.

16 REPRESENTATIVE MASLAND: (No audible
17 response.)

18 CHAIRPERSON BIRMELIN: Representative
19 Caltagirone.

20 REPRESENTATIVE CALTAGIRONE: (No audible
21 response.)

22 CHAIRPERSON BIRMELIN: Representative
23 Josephs.

24 REPRESENTATIVE JOSEPHS: Thank you,
25 Mr. Chairman. I guess this is for you, Mr. Love.

1 I have never practiced criminal law at all, so my
2 background just isn't good in answering for
3 myself questions about strict liability crimes.

4 But hypothetically, there is a sexual
5 contact, let's say, just to make it more
6 believable in general, say, between a male inmate
7 and a female employee and somehow it comes to
8 light. I mean, part of this is -- it's hard for
9 me to think about how these things come to light
10 in a prison setting, but somehow it comes to
11 light.

12 If we passed 833 as it is now, would the
13 female employee be able to assert a defense of
14 being forced? Or would she be just convicted
15 because there was a sexual, I mean, or run a real
16 serious chance of being convicted because there
17 was in some way acknowledged sexual contact
18 between an inmate and a supervisor or somebody
19 who had disciplinary power over the inmate?

20 MR. LOVE: I'm not a criminal lawyer
21 either, but strict liability I'm familiar with in
22 several different contexts. And I think it
23 heightens the standard and eliminates a lot of
24 the potential defenses of consent, et cetera.

25 If it happened, then you're going to be

1 held liable more likely than not under a strict
2 liability standard. There will be very little to
3 say about it. That's my basic understanding of
4 the concept.

5 REPRESENTATIVE JOSEPHS: So there might
6 be some fact situation. And I know enough from
7 being in law school and having clients that you
8 can never think of every -- any facts, I mean,
9 think of all the permeations for months and
10 months and then suddenly a client walks into your
11 office and there's a whole bunch of other facts
12 that you never thought of.

13 But there might possibly be some fact
14 situation in which what the prison employee is
15 trying to assert is some sort of force, perhaps,
16 different than -- one is large, one is small,
17 whatever. But if we pass this, it would make it
18 more difficult for the prison employee to assert
19 that defense.

20 MR. LOVE: Well, I agree, no, you can't
21 cover every situation. There's a few situations
22 that these hearings have brought forth today that
23 I hadn't thought of in the past.

24 However, in your scenario, one would
25 assume that if an employee was alleging that

1 force was involved that the employee would
2 immediately go to the authorities.

3 If there was any element of coercion
4 involving an employee and an inmate, I would
5 assume, logically, the employee would immediately
6 go to a supervisory personnel and law enforcement
7 personnel and bring this to their attention.

8 And if they didn't, then one would have
9 to question whether or not that later assertion
10 when they were caught was credible.

11 REPRESENTATIVE JOSEPHS: Well, and
12 practically speaking, if the employee does that,
13 people tend not to believe the inmate, period,
14 and they do believe the employee. So I think
15 maybe this is very hypothetical; but I couldn't,
16 you know, sort of resist it. That's how lawyers
17 are.

18 MR. LOVE: Well, we always read
19 legislative history if it gets sticky. And I
20 think that some of the discussions today would
21 certainly be helpful in that context.

22 REPRESENTATIVE JOSEPHS: One other
23 thing. I -- as I said before, I really do agree
24 that there is no consent where there's these
25 unequal power relationships. I'm not sure that

1 the language that we're looking at solves the
2 problem. I wonder if you have any ideas how we
3 could solve the problem?

4 MR. LOVE: Well, I don't -- in Delaware,
5 there's a similar situation -- well, not similar.
6 But there's a situation in Delaware where a
7 female employee was impregnated by a guard. And
8 in that case, the judge ruled in no uncertain
9 terms that there is no such thing as consent to
10 liaison of that nature.

11 So it could be a judicial pronouncement,
12 or it could be a legislative pronouncement.
13 Either way, I think it's a strong principle that
14 we should strive to achieve in the Commonwealth.

15 REPRESENTATIVE JOSEPHS: I'm not looking
16 for an answer now because I think we're running
17 out of time. But if you have some language
18 suggestions that might be better than this, I,
19 for one, would appreciate getting them. And I
20 expect that the SubChairman would be happy to
21 receive them also.

22 MR. LOVE: I'll give that some thought.
23 And there's also the private provider concept.
24 But I think the language is fairly strong. But I
25 think Larry had suggested perhaps a DOC employee,

1 but I think that might be less inclusive because
2 there are a significant number of private
3 providers in the prison context that that would
4 not cover.

5 CHAIRPERSON BIRMELIN:

6 Representative Feese, you have a follow-up
7 question?

8 REPRESENTATIVE FEESE: Just a follow-up
9 comment. Thank you, Mr. Chairman. Mr. Love
10 referred to Delaware. Delaware has a crime
11 entitled, Sexual Relations in Detention Facility.

12 A person is guilty of sexual relations
13 in a detention facility when being a person in
14 custody at a detention facility or being an
15 employee working at a detention facility a person
16 engages in sexual intercourse or deviate sexual
17 intercourse on the premises of the detention
18 facility. So --

19 MR. LOVE: So that covers both.

20 REPRESENTATIVE FEESE: Yes. Thank you
21 for referring me to Delaware. I like that
22 statute.

23 CHAIRPERSON BIRMELIN: We can look
24 forward to you introducing something similar to
25 that in the near future then; is that correct?

1 REPRESENTATIVE FEESE: I'll be happy to
2 amend the section.

3 CHAIRPERSON BIRMELIN: We want to thank
4 you for testifying, Mr. Love, and
5 Commissioner Horn for your second appearance.

6 MR. HORN: Thank you.

7 CHAIRPERSON BIRMELIN: Our final
8 testifier today is Annemarie Kaiser. She is
9 Executive Director of the Pennsylvania District
10 Attorneys Association. Welcome.

11 MS. KAISER: Thank you. Good afternoon.
12 My name is a Annemarie Kaiser. I am currently
13 the Executive Director for the Pennsylvania
14 District Attorneys Association.

15 Prior to my current position, I served
16 as a Deputy District Attorney in Dauphin County.
17 While in Dauphin County, I prosecuted both child
18 abuse cases and adult sexual offenses.

19 Please keep in mind when you're hearing
20 my testimony today that the opinions set forth in
21 my testimony do not necessarily reflect the
22 opinions of the Pennsylvania District Attorneys
23 Association. My own observations and opinions as
24 a former prosecutor are the basis for my
25 testimony on the proposed legislation.

1 The Executive Committee of the
2 Pennsylvania District Attorneys Association as
3 well as the general membership of the Association
4 have not taken an official position on the
5 legislation. However, I intend to bring it to
6 their attention at the annual meeting.

7 As the legislation indicates, there are
8 several professions which by their very nature
9 allow an individual to obtain power or influence
10 over another individual.

11 These include doctors, psychotherapists,
12 dentists, physicians, and counselors as well as
13 other professionals. Senate Bill 833 and the
14 amendments thereto attempt to penalize
15 individuals who have obtained such authority and
16 misused it to engage in sexual activities with
17 another individual.

18 Although clearly well-intentioned, the
19 legislation as it is currently proposed may
20 hinder prosecutorial efforts. Under the current
21 status of law, a defendant convicted of rape by
22 forcible compulsion has committed a felony of the
23 first degree.

24 When one considers the term, forcible
25 compulsion, he or she may believe this term to

1 mean that the victim was taken until they were
2 beaten, until they were unconscious and therefore
3 forced to engage in sexual activity.

4 Reviewing the law in this area, this
5 definition is clearly erroneous. As we all know,
6 there are situations where a victim is so
7 emotionally threatened by the perpetrator that
8 the victim is not consenting to the act despite
9 the fact that the victim is not severely beaten.

10 The courts have recognized that such
11 instances often occur. Furthermore, the
12 Legislature and courts have determined that this
13 perpetrator's acts are no less egregious.

14 Thus, the definition of forcible
15 compulsion includes situations where the
16 defendant used moral, psychological, or
17 intellectual force to compel the victim to comply
18 with their wishes.

19 And as previously noted, the case of
20 Commonwealth versus Rhodes is cited in my
21 testimony at 510 Atlantic 2d 1217, 1986. A
22 defendant also commits a felony of the first
23 degree if he engages in sexual intercourse with a
24 victim who is incapable of consent because of
25 mental disability.

1 As proposed, Senate Bill 833 would carve
2 out an exception for situations where the victim
3 is staying in an institution, hospital, or
4 correctional facility. The exception would be
5 characterized as a felony of the second degree.

6 If the legislation is enacted as it is
7 presently proposed, defendants who prey on
8 persons staying in these facilities would be
9 subject only to a second-degree felony.

10 Another point to consider is that if an
11 inmate in a correctional facility is raped by
12 another inmate, the current law would
13 characterize it as a felony of the first degree
14 under the theory of forcible compulsion.

15 However, under the proposed law, if an
16 inmate is raped by a prison official, it is a
17 second-degree felony. Essentially, the
18 legislation would create unnecessary confusion.
19 Further complications arise with the amendments
20 which provide for a second-degree felony when a
21 psychotherapist engages in sexual activity with a
22 patient.

23 First, as I previously noted, if the
24 perpetrator used emotional and psychological
25 coercion tactics to rape the patient, a felony of

1 the first degree has been committed. Secondly,
2 the proposed amendments create problems in
3 situations which may not have been contemplated.

4 Here are a few examples: No. 1, an
5 individual who has recently sought advice
6 regarding a career change has decided to obtain
7 counseling. The individual goes to the counselor
8 for one visit and discusses available career
9 options.

10 At the conclusion of the session, the
11 individual determines that is not necessary to
12 see the therapist any further. Three months
13 later, the individuals, both single, unexpectedly
14 meet at a social event.

15 The two begin dating and eventually
16 engage in sexual intercourse. Under the proposed
17 legislation and the way I've reviewed the
18 legislation, I believe the therapist could be
19 convicted of a felony of the second degree.

20 Second example: An individual goes to
21 see a therapist for one visit and determines that
22 he's attracted to the female therapist. Both
23 parties are single. The client expresses his
24 interest in the therapist, and they both
25 determine that the client should be referred to

1 another counselor.

2 The parties begin dating after one month
3 passes and get married approximately four months
4 later. They consummate the marriage. The female
5 therapist under my reading of the legislation
6 could be convicted of a felony of the second
7 degree.

8 These examples serve to illustrate
9 situations that would result in severe criminal
10 penalties. In summation, being sexually
11 assaulted by a counselor, doctor, or any
12 individual who has power or influence over a
13 victim is clearly a devastating situation for the
14 victim.

15 However, as a former prosecutor, I find
16 this legislation may weaken the existing law by
17 reducing the grading of the offense and it will
18 serve to create more problems than it cures.

19 I also would mention again that these
20 views are not the views of the Pennsylvania
21 District Attorneys Association as they have not
22 reviewed the legislation.

23 Thank you very much for the opportunity
24 to address you on this matter, and I welcome any
25 questions that you may have at this time.

1 CHAIRPERSON BIRMELIN: I think there may
2 be some. I'll begin with Representative
3 Caltagirone.

4 REPRESENTATIVE CALTAGIRONE: No.

5 CHAIRPERSON BIRMELIN: Representative
6 Masland.

7 REPRESENTATIVE MASLAND: (No audible
8 response.)

9 CHAIRPERSON BIRMELIN: Representative
10 Feese.

11 REPRESENTATIVE FEESE: No questions.

12 CHAIRPERSON BIRMELIN: I may have been
13 mistaken.

14 MS. KAISER: Okay.

15 CHAIRPERSON BIRMELIN: Representative
16 James.

17 REPRESENTATIVE JAMES: No questions.

18 CHAIRPERSON BIRMELIN: Representative
19 Josephs.

20 REPRESENTATIVE JOSEPHS: I think that
21 your criticism of my amendments is not far from
22 the mark; but I wanted to explain to you and at
23 least so when you go to the District Attorneys
24 Association you don't -- you don't characterize
25 me and my abilities based only on these

1 amendments.

2 MS. KAISER: I apologize. I did not
3 mean it to come across as a harsh criticism. I
4 believe that the legislation is clearly
5 well-intentioned, and I think it is a devastating
6 situation for any victim that has to go through
7 that.

8 REPRESENTATIVE JOSEPHS: I agree with
9 you that the amendments make the situation worse.
10 And that is really one of the reasons or the main
11 reason why I thought them up and introduced them.

12 Because it seemed to me that Senate Bill
13 833 was weakening the power of the District
14 Attorney, for the prosecutor to find in cases
15 that the present law was correct and covered as
16 much as we need it to cover.

17 Now, I didn't think of some of the
18 objections that you brought out. But I thought
19 of objections in which, for instance, you might
20 find the defendant able to persuade a jury, as
21 was brought up before, that the alleged
22 perpetrator somehow didn't fit into the
23 definition that's being proposed in Senate Bill
24 833 and that in that case, the person might be
25 able to escape prosecution. And if we didn't

1 have Senate Bill 833, the person would be
2 more -- perhaps more likely to be convicted.

3 I proposed the amendments to make that
4 point, to say, you can go on and on naming people
5 and it doesn't make the Bill any better, that we
6 ought to stick with the language that we have,
7 and we ought not to fiddle with it; that the
8 Department of Corrections' problem in getting
9 these cases prosecuted lies not in the statute,
10 but somewhere in the system.

11 And that was my point. I don't intend
12 to insist on those amendments. But I do think
13 that Senate Bill 833 as it stands does not do
14 what we want it to do, and I would look towards
15 you as I've asked the other witnesses if you have
16 any suggestion for language to do what we want it
17 to do, which is to absolutely prohibit sexual
18 contact between people in these unequal power
19 situations, I would be happy for that suggestion
20 and not necessarily at this moment.

21 MS. KAISER: I would be happy to look
22 into the matter further. As I sat here and
23 listened today, I myself contemplated situations
24 that -- how to remedy the situation and make it
25 real specific so that if there is a loophole, if

1 cases go through, that they could be covered.

2 But I can't find any sitting here today.
3 I mean, perhaps it's something that requires
4 further study. The way the legislation stands in
5 my opinion only is that it's too expansive.

6 I think there's always going to be these
7 situations that could occur that are going to
8 create further problems. For example, the
9 situation that was just brought up where you have
10 this inmate who might be large, physically
11 overpowering against somebody who works in the
12 facility, attacks them, and, technically, they
13 could be prosecuted from my reading under the
14 statute. And I don't think that that's what the
15 Legislature is intending to do.

16 REPRESENTATIVE JOSEPHS: I think we have
17 a problem, but I don't want to replace it with a
18 worse problem. And that was the -- that's the
19 intent of my amendments and that's the intent of
20 my remarks and my thoughts on this Bill. Thank
21 you. Thank you, Mr. Chairman.

22 CHAIRPERSON BIRMELIN: Before I forget,
23 I'd like to direct the Secretary of the Committee
24 to be sure that copies of all of the testimony
25 today is given to those Members who were not in

1 attendance. I'll turn now to Representative
2 Masland who does have a question.

3 REPRESENTATIVE MASLAND: Thank you,
4 Mr. Chairman. I'm not going to give you another
5 hypothetical because I think we've about reached
6 our quota on those.

7 I would suggest, though, that the last
8 one you did with the inmate who was overpowering,
9 I think then there's not so much a defense in
10 that instance; but if the inmate overpowers the
11 employee, then the employee is the victim,
12 clearly.

13 So it depends on how far the facts go
14 with that. But there was one point that you made
15 that I think should be clarified. On the second
16 page of your testimony, you talked about if an
17 inmate is raped by another inmate that's a felony
18 in the first degree.

19 However, under the proposed law, if an
20 inmate is raped by a prison official, it is a
21 second-degree felony. It may be a second-degree
22 felony under Senate Bill 833, but that would not
23 preclude the prosecutor from pursuing the
24 first-degree felony also.

25 MS. KAISER: From the way I reviewed the

1 language when I was looking at the Bill as it
2 was, I realize that was the intent. However,
3 examining the Bill on its face, I didn't see
4 anything that indicated that it's clearly a
5 consensual situation; and, therefore, that does
6 not preclude you from prosecuting under the
7 forcible compulsion.

8 So I think if this Bill were to go
9 forth it's something that may need to be
10 clarified because I think an astute defense
11 attorney would quickly raise to a judge that,
12 Wait, they're prosecuting under the wrong
13 section.

14 REPRESENTATIVE MASLAND: We may need to
15 clarify the language. I think there is some good
16 intent behind it. But I think there's some
17 questions that were raised at the original
18 Committee meetings and maybe we'll have to go to
19 Nevada, Arizona, and Delaware statutes, which we
20 normally do here, and see whether they have some
21 advice that we can follow. Thank you.

22 MS. KAISER: Thank you.

23 CHAIRPERSON BIRMELIN: I want to thank
24 Attorney Kaiser for your testimony and the issues
25 that you raised, and we appreciate your coming

1 here today.

2 MS. KAISER: Thank you. I appreciate
3 everyone hearing my testimony.

4 CHAIRPERSON BIRMELIN: This meeting is
5 adjourned.

6 (At or about 2:50 p.m., the deposition
7 was concluded.)

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C E R T I F I C A T E

I, Deirdre J. Meyer, Reporter, Notary Public, duly commissioned and qualified in and for the County of Lancaster, Commonwealth of Pennsylvania, hereby certify that the foregoing is a true and accurate transcript of my stenotype notes taken by me and subsequently reduced to computer printout under my supervision, and that this copy is a correct record of the same.

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