House Judiciary Committee
February 8, 2021

House Bill 2153

Testimony of the Kansas Association of Criminal Defense Lawyers (KACDL)
Presented by Bryan Cox
Neutral

Dear Chairman Patton and Members of the Committee:

HB 2153 attempts to pursue an important goal of protecting residents of adult care facilities, some of the most vulnerable and dependent people in our state. I strongly support that objective. However, this bill is not likely to take meaningful steps in that direction, and risks serious negative side-effects. For this reason, I testify neutrally on this bill. In Part I, I offer testimony to help the committee understand why this bill would ineffectively address its goal, and would risk deeply serious and unintended side effects. In Part II, I offer proposed amendments to this bill that would successfully meet the objectives of the bill without the current drawbacks.

I. As introduced, HB2153 would be ineffective, and have unintended consequences.

HB2153, as introduced, would impose steep penalties. It would, most notably, shift a violation of section (a)(1) of the statute from a level 5 to a level 2 felony if the victim is a resident in an adult care facility. For someone convicted of this offense with no prior record, this would nearly quadruple the penalty from a range of 31-34 months (and border box) to a range of 109-123 months.

These penalties would most likely be imposed upon frontline medical care workers such as CNAs and CMAs. These workers are often low-paid, young, and overworked.[1] They are often called upon to provide care to residents without the necessary resources to do so. The decisions on providing these resources are far above their pay grade, made by the managers and executives in charge of the adult care facilities. Those frontline workers have also borne the brunt of continuing to provide care throughout the difficult conditions of the COVID-19 pandemic.

Most adult care facility workers are certified and included on a registry maintained by the Kansas Department for Aging Disability Services (KDADS). KDADS already investigates allegations of abuse, neglect, and exploitations. The agency maintains records of all findings of

[1] Nursing staff is only required to have 2 hours per day per resident in nursing care facilities, and can work at a ratio of one nurse to thirty residents. K.A.R. 28-39-154.

abuse, neglect, or exploitation by CNA/CMAs. Compliance by these individuals already has significant consequences for their certification and that of the facilities that employ them.

To be clear, egregious abusive conduct deserves to be punished. But this bill would punish an extremely broad range of conduct at the same level as crimes such as reckless murder and criminal sexual exploitation of a child. As explained below, workers that perform their jobs in good faith risk severe criminal liability under this bill, and those that commit the truly egregious offenses against vulnerable individuals will likely be able to be prosecuted for other offenses such as aggravated battery, aggravated assault, or kidnapping.

The penalties in this bill would extend to a massive range of poorly-defined conduct.

Mens rea. Section (a)(1) requires only a "knowing" mens rea element. A knowledge mens rea requires only that an accused know what they are doing—that they are not, for example, sleepwalking or otherwise acting unconsciously. It does not require any proof that a person engaged in conduct with the conscious objective to cause a harmful result. If a worker confines a person for a reason that they believe to be valid, but that is later decided to be "unreasonable"—a fairly subjective standard—they could be criminally culpable under this statute.

Reasonableness and necessary standards. Section (a)(1) criminalizes "unreasonable confinement" and "unreasonable punishment." There is no additional definition to these terms, and as a tutor for law students I can confidently tell you that the "reasonableness" standard is one of the most difficult standards to apply with certainty. This is fine when we are dealing with negligence in tort, and the potential liability is monetary in nature. I do not believe it is okay when the potential liability is a felony conviction and 10 or more years imprisonment. Section (a)(3)'s definition also contains a nebulous standard of omission or deprivation of "necessary" treatment, goods, or services.

What is "unreasonable punishment?" If a person visits their grandparent in an adult care facility to introduce their significant other, and the grandparent makes a socially inappropriate comment, can the grandchild decide not to give the grandfather the dessert they baked for them? Punishing this conduct with 10 years in prison seems egregious. Perhaps punishment only refers to corporal punishment, in which case I would ask why we consider *any* corporal punishment of a dependent adult to be reasonable. There is precious little case law on this topic.

What care is "necessary?" If a CNA/CMA deprives someone of their afternoon walk or other group time activity because of client behavior, is this a level 5 felony?

Is any timeframe unreasonable? If a worker blocks a door briefly while moving a cart, another patient, or a piece a furniture, but could have easily avoided doing so and had no reason for not having avoided the blockage of the door, is that unreasonable?

Remember that jurors are not told the potential penalty or severity of a charge.

No safe harbor. If a medical worker follows a policy implemented by their employer, or follows training that they received, but that policy or training is later considered to be unreasonable, there is nothing to prevent that worker from being guilty under this statute.

II. Proposed changes to effectuate the intent of the bill.

Change the mens rea. The most effective change would be to amend the underlying offense to require a mens rea of "intentionally." To effectuate this change, I would suggest amending line 10 to strike "knowingly" and insert "with the intent to cause physical, emotional, or financial harm" at the end of the line.

Alternatively, the committee could insert a new sub-section (b) that creates an aggravated form of the offense, and would apply the higher severity level only to this aggravated form of the offense.

Adjust the change in severity level. Regardless of any other change, setting the severity level of this conduct at level 2 imposes extremely harsh penalties that minimize the relative severity of other, more heinous acts such as murder and commercial exploitation of a child. Stepping from level 3 to level 2 is one of the significant jumps in the sentencing guidelines, with guideline ranges nearly doubling from 55-61 months (SL3) to 109-123 months (SL2). I believe the intent of the bill could still be effected by changing the severity level to SL4. This would still move the offense to a presumptive prison disposition, and would increase the range to 38-43 months.

If the committee sees fit to adjust the definition of the crimes as I have suggested above, I would also suggest that a distinction in severity level is warranted even when an individual is not in an adult care facility. To that end, I would suggest that conduct described in (a)(1) be a lower-level felony if committed merely knowingly, a level 5 felony if committed intentionally, and a level 4 felony if committed intentionally and the victim is a resident of an adult care facility.

More clearly define the standard of conduct. As I have observed in Part I, an "unreasonable" standard is potentially very broad, and applies a subjective standard without clear guidance on what would or would not comply with that standard. This could be amended to read "unlawfully," or to another standard that is more clear.

Alternatively, remove the "unreasonable" standards from the elevated punishment. This could be done by retaining the first mode of committing (a)(1) in that sub-section, and creating a new sub-section that contains the confinement and punishment modes, but is not subject to a higher severity level.

Provide a safe harbor. At minimum, front-line medical workers acting in good faith deserve the certainty and peace of mind that, if they follow their training and the policies of their employer, they will not be thrown in prison for a decade. The committee should amend this bill to ensure that an accused will not be guilty if they can show that they acted in accordance with specific training, industry practice, or a policy of their employer. This determination should be able to be made either early in the process as an immunity from prosecution, or be available as an affirmative defense to be decided by the jury.

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I thank the Chairman and all members of this Committee for the opportunity to testify today, and am happy to participate further in the consideration of this bill.

Sincerely,

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