

ONE HUNDRED FIRST LEGISLATURE - FIRST SESSION - 2009
COMMITTEE STATEMENT
LB36

Hearing Date: Thursday January 29, 2009
Committee On: Judiciary
Introducer: Flood
One Liner: Change method and procedure for inflicting the death penalty

Roll Call Vote - Final Committee Action:
Advanced to General File with amendment(s)

Vote Results:

Aye:	6	Senators Ashford, Christensen, Lathrop, Lautenbaugh, McGill, Rogert
Nay:	1	Senator Council
Absent:		
Present Not Voting:	1	Senator Coash

Proponents:
Sen. Mike Flood
Don Kleine
Joe Kelly
Joseph Smith
J. Kirk Brown
Bill Sun

Representing:
Introducer
Douglas County Attorney
Lancaster County Attorney
Madison County
Nebraska Department of Justice
Sun family

Opponents:
Ernie Chambers
Randy Steidl
Sen. Cap Dierks
Michael Radelet
Mark Heath
Richard O'Brien
Sadie Bankston
Eric Berger
Amy Miller
Craig Groat
Rev. Dr. Chuck Bentjen

Representing:
self
Witness to Innocence
self
self
self
self
self
self
self
ACLU Nebraska
self
ELCA; Christian Church in NE; Presbyterian Church
USA; UMC of NE

Neutral:

Representing:

Summary of purpose and/or changes:

LB 36 is a bill that would change the method and procedure for implementing a death sentence under Nebraska Statute from electrocution to lethal injection. This bill would also require the Director of Correctional Services to implement a protocol for the administration of substances used to carry out the lethal injection.

LB 36 would also transfer the following provisions currently found in Section 29 (Criminal Procedure) of the Nebraska Statutes to Section 83 (Department of Corrections) of the Statutes. The sections transferred are as follows: Mode of

inflicting the death penalty (29-2532), Punishment inflicted (29-2533), Executions; persons permitted (29-2534), "Warden" Director of Department of Correctional Services and military force necessary to carry out punishment (29-2535), "Warden" to "Director" of the Department of Correctional Services; inflict punishment; return of proceedings; clerk of court (29-2536).

A section by section description of LB 36 is as follows:

Section 1. (Amends section 29-2537) Convict; appears mentally incompetent

- Provides that the Director of Correctional Services has the responsibility to give notice regarding the appearance of incompetence of anyone sentenced to death, to a judge of the district court from which the convicted person was tried and sentenced.
- A Judge upon receiving notice from the Director regarding the appearance of incompetence, shall investigate to their satisfaction whether they are required to order that a commission be convened to examine the convicted person sentenced to death.
- A court that determines there is not sufficient cause to appoint a commission shall state their findings on the record and refuse to suspend the execution.
- If the court determines that a commission ought to be appointed to examine the convicted person, the court shall make a finding to that effect, enter the finding on the record of the district court in the county from which the person was convicted and if necessary, suspend the execution and appoint three licensed mental health professionals employed by the state to examine such person as a commission. (The underlined language is a change from the current requirement that the three superintendents of the state centers at Lincoln, Hastings, and Norfolk be appointed to examine the convicted individual.)
- The commission appointed, shall determine whether the convicted person is competent or not and report its findings in writing within ten days after its appointment to the court. If two members of the commission find the individual incompetent, the court shall suspend the convicted person's execution until further order.
- The court shall appoint a commission annually to review the competency of the convicted person and upon a finding by two members of the commission; the court shall certify that finding to the Supreme Court which will then establish a new execution date.
- The standard to determine competency under this section is the same as that used to determine competency to stand trial.

Section 2. (Amends 29-2538)

- Provides that if the court has suspended an execution pending a competency investigation and the original execution date has passed before the investigation is completed, the court upon receiving indication that the individual is competent shall certify competency to the Supreme Court which court shall then issue a new execution date.

Section 3. (Amends 29-2539)

- Provides that the members of the commission appointed to determine competency are entitled to mileage for driving to and from the location where the convicted person is confined. (Costs to be paid by the county were convicted person was tried and sentenced.)
- All of the findings and orders previously mentioned in the bill shall be entered in the district court records of the county where the convicted person was tried and sentenced.

Section 4. (Amends 29-2540)

- Provides that a pregnant female shall be treated as incompetent by the court for purposes of carrying a sentence of death.

Section 5. (Amends 29-2541)

- If the commission appointed pursuant to 29-2537 finds that a convicted female, sentenced to death is pregnant, the sentencing court shall suspend the execution of her sentence until she is no longer pregnant.
- Upon receiving a report that the pregnancy has been completed the judge shall appoint a new execution date.
- The judge after setting a new execution date shall issue a warrant to the Director of Correctional Services for enforcement of the sentence.

Section 6. (Amends 29-2542)

- Provides that if a convicted person sentenced to death, escapes confinement and misses their execution date because of their escape, that upon being captured and returned to the care of the Director of Corrections the director shall notify the Supreme Court and the Supreme Court shall issue a warrant containing the date for the enforcement of the sentence.
- The date of execution shall be no later than 60 days from the date of the warrant.

Section 7. (Amends 29-2543)

- Provides that a person, whose sentence of death has been affirmed by the Supreme Court after mandatory review, shall have their execution date set by the court through issuing a warrant to the Director of Corrections who will carry out the execution. The execution must be carried out within 60 days after the warrant is issued.
- If the initial execution date has been stayed and the original execution date has passed, the Supreme Court must establish a new execution date upon receiving notice from the Attorney General that the stay is no longer valid.

Section 8 (Amends 29-2546) Makes grammatical changes to this section.

- "Warden" is changed to "Director of Correctional Services" and
- "Convict" is changed to "convicted person"

Section 9. (Amends 29-2532)

- Provides that death sentence be carried out by an intravenous injection of a substance or substances in an amount that will cause death.
- Provides that the lethal substance(s) used to cause death shall be used per the directions of an "execution protocol" that will be created and maintained by the Department of Corrections.

Section 10. (New Section)

- Provides that upon receipt of the execution warrant, the Director of Correctional Services shall enforce the warrant at the time specified in the warrant.
- Requires the Director of Correctional Services to create, modify and maintain a written execution protocol detailing the methods and substances to be used to carry out an execution sentence and who the members of the execution team will be.
- Requires that the execution protocol that is developed provide that the first or only substance injected be able to render the injected individual unconscious and that a method to verify that the individual that was injected is indeed unconscious be utilized before any additional substances are used.
- Provides that the execution protocol created and maintained by the Director of Corrections is exempt from the Administrative and Procedures Act, which would subject proposed changes to a public notification and comment period.
- Provides that the execution protocol shall not be made available without the Director of Corrections' consent or an order of the District Court of Lancaster County upon good cause being shown.

Section 11 (New Section)

- Provides that carrying out an execution sentence by lethal injection shall not be deemed the "practice of medicine" or "healthcare" which is subject to law, regulation, licensure or certification.
- Provides that the substances used to carry out the lethal injection can be obtained by the Director of Corrections without a prescription.
- Provides that a member of the execution team who is licensed by a board or department shall not be punished or face disciplinary action by the board or department for the individual's participation in a court ordered execution.

Section 12 (New Section)

- Provides that the Director of Corrections, per the execution protocol may designate any person as qualified to administer the lethal substances to the convicted person.
- Provides that the identities of the members of the execution team and any information reasonably calculated to lead to the identities of the team are confidential and exempt from the federal Freedom of Information Act.
- Information pertaining to the identities of the execution team can only be obtained through a court order for good

cause shown and that limits the dissemination of such information.

- Disclosure of execution team member's information, without a court order is a class I Misdemeanor and the members whose information was disclosed shall also have the right to file a civil action.

Section 13 (New Section)

- Provides that if the method utilized to carryout a sentence of death is deemed unconstitutional, the death sentence shall remain in force until a sentence can be lawfully carried out.

Section 14 (Amends 29-2533)

- Provides that a sentence of death shall be carried out at a Department of Corrections facility under the supervision of the Director of Correctional Services and out of the view of all persons except those permitted by sections 15 and 16 of this act.

Section 15 (Amends 29-2534)

- Provided that the individuals allowed to be present at an execution, (excluding the Director Of Corrections and those required under the terms of the execution protocol) are as follows:

1. A clergymen member of the Clergy,
2. No more than three persons selected by the convicted person;
3. No more than three persons representing the victim or victims of the crime, and
4. Up to six persons designated by the Director of Correctional Services.

Section 16 (Amends 29-2535)

- Provides that the Director of Correctional Services may request the presence of the State's military if the director believes such a force is necessary to carry out the requirements of the sentence of execution. Upon receiving the request for military personnel, the governor is authorized to dispatch as many troops as he/she deem necessary to ensure that the sentence of execution is carried out.

Section 17 (Amends 29-2536)

- Provides that the term "warden" as used in this section be replaced with the term "Director of Correctional Services" and the term "convict" is replaced with the term "convicted person".

- This section requires that the Director of Correctional Services report back to the court that the conviction stemmed from that the sentence of death has been carried out. The clerk upon receiving notice of completion of sentence from the Director of Correctional Services shall enter such fact into the record of conviction.

Section 18 (New Section)

- Provides that sections 9 and 14 to 17 of this act shall be assigned to Chapter 83, article 9 of the Nebraska Statutes.

Section 19 (New Section)

- Provides a severability clause to this act.

Section 20 Harmonizes remaining provisions.

Section 21 Repeals section 29-2544 and 29-2545 of the current statutes.

Explanation of amendments:

AM 828 would make the following changes to LB 36:

- On page 10, strike lines 14-24. This section contains the provision which would have exempted the execution protocol created, modified, and maintained by the Director of Corrections from the Administrative Procedures Act.

- On page 12, strike beginning with "identities" in line 1 through the first "to" in line 7 and insert "identity of such members shall be confidential and exempt from"; in line 8 strike the comma; and strike lines 12 through 19. The

changes on page 12 clarify that the identities of the execution team shall be confidential to the limits allowed under the Nebraska Public Records Statutes 84-712 to 84-712.09 and are not exempt from the Freedom of Information Act. This section also removes the Class I misdemeanor penalty for releasing information pertaining to the execution team without a court order from this bill.

- Finally, on page 14, line 2, after the period insert "At least two persons designated by the director shall be professional members of the Nebraska news media." This provision is to ensure that of the six people that the Director of Corrections may designate for attendance at an execution, that at least two be members of the Nebraska media.

Brad Ashford, Chairperson