

OPINION
78-133

September 26, 1978 (OPINION)

Mr. Edward J. Klecker
Director of Institutions
State Capitol
Bismarck, ND 58505

Dear Mr. Klecker:

This is in response to your letter of August 9, 1978, regarding communications between male and female prisoners. You enclose a copy of a letter addressed to you from the Warden of the North Dakota State Penitentiary, J. H. Havener, along with a memorandum addressed to you from Special Assistant Attorney General Edwin F. Zuern which concludes that North Dakota Century Code Section 12-47-22 "is valid and should be enforced." You then ask us to "review this material and advise me by letter your opinion as to what extent, under present requirements of having to keep female prisoners in our all male prison, we can permit communication between our male and female inmates under the restrictions seemingly spelled out in the above cited code section."

In response to your question, we note that North Dakota Century Code Section 12-47-22 provides as follows:

12-47-22. DISCIPLINE OF INMATES - CONFINEMENT IN CELLS - COMMUNICATION. Inmates of the penitentiary shall be confined in separate cells at night whenever there are sufficient cells. All communications between male and female inmates shall be prevented, and no communication shall be allowed between inmates of the penitentiary and person without the penitentiary except under the supervision prescribed by the rules and regulations of the penitentiary. No person, without the consent of the warden, shall bring into or carry out of the penitentiary any any writing or information to or from an inmate.

As Mr. Zuern points out, this law was first enacted in 1883, even before the advent of statehood. At the time of the enactment, this section was, in all probability, an accurate reflection of the then current moral code and current theories of correctional psychology and correctional security standards. It is also doubtlessly true that at this early time those standards and codes were significantly different from those of the present day. Currently, as Warden Havener notes, there may be rehabilitative benefits to be gained by "small-group programming" in which women prisoners are allowed to communicate and interact with male prisoners.

The fact remains, however, that Section 12-47-22 has not been repealed by the Legislative Assembly. Therefore, it remains effective law, and clearly applies to "all communication between male and female inmates" (Emphasis applied). While the requirements of this section may seem antiquated and unduly restrictive, the section

is nevertheless the law of this state. Whether or not the judgments implicit in Section 12-47-22 are reflective of current thinking in the field of corrections or are otherwise a necessary and integral part of the policies of this state, is a decision which must be left to the Legislative Assembly. Further, while this section may be subject to a successful challenge on constitutional grounds, no challenge has in fact been brought and until the statute is declared void by a court of competent jurisdiction, we are constrained to assume its validity.

In direct answer to your question, communications between male and female inmates must be regulated in accordance with the mandate of Section 12-47-22.

We trust that the foregoing adequately answers your inquiry.

Sincerely,

ALLEN I. OLSON

Attorney General