

HOUSE BILL REPORT

SSB 6493

As Reported by House Committee On:
Public Safety & Emergency Preparedness
Ways & Means

Title: An act relating to sexually violent predator civil commitment cases.

Brief Description: Addressing sexually violent predator civil commitment cases.

Sponsors: Senate Committee on Human Services & Corrections (originally sponsored by Senators Regala, Hargrove, Stevens, Harper, Kline, Carrell and Shin).

Brief History:

Committee Activity:

Public Safety & Emergency Preparedness: 2/17/12, 2/21/12 [DPA];

Ways & Means: 2/24/12, 3/3/12 [DPA(WAYS w/o PSEP)].

**Brief Summary of Substitute Bill
(As Amended by Committee)**

- Transfers administration of defense representation in sexually violent predator commitment cases from the Department of Social and Health Services to the Office of Public Defense.

HOUSE COMMITTEE ON PUBLIC SAFETY & EMERGENCY PREPAREDNESS

Majority Report: Do pass as amended. Signed by 11 members: Representatives Hurst, Chair; Ladenburg, Vice Chair; Pearson, Ranking Minority Member; Klippert, Assistant Ranking Minority Member; Appleton, Armstrong, Goodman, Hope, Kirby, Moscoso and Ross.

Staff: Sarah Koster (786-7303).

Background:

Under the Community Protection Act of 1990, a sexually violent predator (SVP) may be civilly committed upon the expiration of that person's criminal sentence. A SVP is a person who has been convicted of, or charged with, a sexually violent offense and who suffers from

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a mental abnormality or personality disorder that makes the person likely to engage in predatory acts of sexual violence if not confined to a secure facility.

When it appears that a person may meet the criteria of a SVP, the prosecuting attorney of the county where the person was convicted or charged or the Office of the Attorney General, if so requested by the prosecuting attorney, may file a petition alleging that the person is a SVP. If the court finds probable cause exists to believe that the person is a SVP, the person will be evaluated by a professional, as to whether he or she is a SVP, in preparation for trial.

If a person is found at trial to be a SVP, the state is authorized by statute to involuntarily commit a person to a secure treatment facility. Civil commitment as a SVP is for an indefinite period. Once a person is committed, the Department of Social and Health Services (DSHS) must conduct annual reviews to determine whether the person's condition has so changed such that the person no longer meets the definition of a SVP or if conditional release to a less restrictive alternative (LRA) is in the best interest of the person and conditions can be imposed to protect the community. Even if the DSHS's annual review does not result in a recommendation of any type of release, the person may nonetheless petition the court for a conditional release or unconditional discharge.

If a committed person petitions for a conditional release or unconditional discharge, the court must set a show-cause hearing. The prosecuting agency must first show that the committed person continues to meet the definition of a SVP and that placement in a LRA is not appropriate. The committed person may then present evidence that the person has so changed, that the person no longer meets commitment criteria, or that conditional release to a LRA is appropriate. If the court finds that the state has not made a prima facie case or that probable cause exists that the person is no longer a SVP, the court must set a review hearing. In order to prevail, the state must once again prove beyond a reasonable doubt that the person meets the definition of a SVP or that conditional release is not appropriate. If the state does not meet its burden, the person must be released.

An indigent person is entitled to appointed counsel and an independent expert evaluation paid for by the state both at the original probable cause and commitment proceeding and in any review proceeding. Requests for the reimbursement of defense counsel and expert evaluators are submitted to the DSHS for payment. The DSHS additionally provides reimbursement to the prosecuting agency for legal costs and the cost of expert evaluators.

The DSHS has adopted rules and regulations restricting reimbursement for civil commitment costs including defined hourly rates for counsel and other legal staff and a cap on expert costs.

Upon request of the Legislature, the Office of Public Defense (OPD) submitted in 2011 a report with a proposal to transfer statewide responsibility for indigent defense of a SVP civil commitment cases from the DSHS to the OPD.

Summary of Amended Bill:

The Office of Public Defense Responsibilities.

The OPD will administer the representation of indigent respondents qualified for appointed counsel in SVP commitment cases.

In providing these services, the Director of the OPD will:

- contract with law firms and individual attorneys to provide legal services to indigent people;
- establish annual contract fees for defense legal services based on court rules and court orders;
- establish procedures for the reimbursement of expert witnesses and other costs;
- review and analyze existing caseload standards; and
- submit annual reports to the Washington Supreme Court, the Governor, and the Legislature, with data on the operation of indigent defense representation under this chapter, including: (1) recommended levels of appropriation to maintain adequate defense services to the extent constitutionally required; (2) the time to trial, with special emphasis on the number of and reason for continuances granted; and (3) recommendations for policy changes to improve the SVP commitment process.

The following activities are outside the scope of the OPD's representation of respondents in SVP commitment cases, unless provided as part of investigation and preparation for any hearing or trial under this chapter:

- investigation or legal representation challenging the conditions of confinement at the Special Commitment Center or any secure community transition facility;
- legal representation or advice regarding filing a grievance with the DSHS as part of its grievance policy or procedure;
- legal representation during a period not covered as part of the civil commitment process; and
- any other activities excluded by policy or contract with the OPD.

Transfer Process.

All of the DSHS' materials related to indigent defense will be transferred to the OPD, as will appropriations made to the DSHS for carrying out this function. The date of transfer is July 1, 2012. However, the OPD has the authority to continue contracting with existing counsel if there is a scheduled trial date within 180 days of this transfer date, so as to provide continuity of service and prevent trial continuances.

If the OPD contracts with existing counsel, as described above, the payment will be prorated based on the new standard contract fees established by the OPD, with a possibility for extra compensation if justified by attorney documentation.

Evaluation Costs.

The DSHS no longer bears the costs of prosecutorial or defense evaluation of the respondent, either for the initial trial or annual review. The OPD will bear the costs of a defense evaluation, if the respondent is indigent. The state will bear the costs of prosecutorial evaluations, which may include any procedures or tests requested by the evaluator, including

a clinical interview, psychological testing, plethysmograph testing, and other polygraph testing.

Expert evaluation costs are capped at \$10,000, including travel and any other expenses. Partial evaluations are capped at \$5,500 and expert services which do not include evaluations or testimony are capped at \$6,000. The OPD may pay fees beyond these caps if the superior court determines that they are for good cause.

Amended Bill Compared to Substitute Bill:

The striking amendment authorizes prosecuting agencies to obtain current evaluations of the respondent or the SVP, including any tests requested by the evaluator, with the state bearing the expense; eliminates the DSHS' oversight of post-filing evaluations, consistent with the rest of the bill; requires annual, rather than periodic, reporting on the operation of indigent defense services under this section; limits defense representation to one counsel, except if good cause is shown; and redefines the scope of indigent defense representation under this section.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect on July 1, 2012. However, the bill is null and void unless funded in the budget.

Staff Summary of Public Testimony:

(In support) In 1990 Washington created a program for civil commitment of SVPs after completion of their sentence, which other states have adopted as a model. We know it is important to continually look at what we are doing and how to improve, especially with regard to spending taxpayer money and meeting due process concerns. The OPD model for the transfer of defense services improves accountability and transparency. This is not a final solution to improving this program but it is an important first step.

The numbers of defense counsel in the proposal, 23.5 full-time employees per 305 SVPs, are based on the only standard for defense representation in this area and a thorough look at defense representation. Prosecution is more paper driven than defense representation and so requires more assistants and less attorneys.

(In support with amendment) This bill is a step in the right direction towards creating a system which will increase parity between defense and prosecution with regard to staffing and also in reducing litigation costs around this law, which are out of control. With this bill, however, prosecution staffing will be outweighed by the OPD. The transfer of funds out of the DSHS is a sound public policy move, but there must be a crucial amendment to this bill, which transfers the authority to conduct the evaluations to the prosecution, along with the funding.

Language should be added to section 8 of the bill to ensure that defense counsel can access certain records necessary for defense without opening the door for blanket Public Records Act requests.

(Opposed) None.

Persons Testifying: (In support) Senator Regala, prime sponsor; and Joanne Moore and Sophia Byrd McSherry, Office of Public Defense.

(In support with amendment) David Hackett, King County Prosecutor's Office; Brooke Burbank, Office of the Attorney General; and Bob Cooper, Washington Defender Association and Washington Association of Criminal Defense Lawyers.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass as amended by Committee on Ways & Means and without amendment by Committee on Public Safety & Emergency Preparedness. Signed by 26 members: Representatives Hunter, Chair; Darneille, Vice Chair; Hasegawa, Vice Chair; Alexander, Ranking Minority Member; Bailey, Assistant Ranking Minority Member; Dammeier, Assistant Ranking Minority Member; Orcutt, Assistant Ranking Minority Member; Carlyle, Chandler, Cody, Dickerson, Haigh, Haler, Hudgins, Hunt, Kagi, Kenney, Ormsby, Parker, Pettigrew, Ross, Schmick, Seaquist, Springer, Sullivan and Wilcox.

Staff: Melissa Palmer (786-7388).

Summary of Recommendation of Committee On Ways & Means Compared to Recommendation of Committee On Public Safety & Emergency Preparedness:

The Ways and Means Committee recommended that a judge may, rather than shall, require a respondent or sexually violent predator to complete any or all of the following, if requested by an evaluator: a clinical interview, psychological testing, plethysmograph testing, and polygraph testing.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect on July 1, 2012. However, the bill is null and void unless funded in the budget.

Staff Summary of Public Testimony:

(In support) The Office of Public Defense (OPD) supports this bill. Last year, the Legislature directed the OPD to engage in a study to take over defense activities for indigent respondents of sexually violent predator civil commitment proceedings. The OPD completed the study

and provided it to the Legislature on December 1, 2011. This bill tracks well with the OPD's proposal. The OPD can implement this bill and provide effective counsel, while generating savings. There is an adequate level of funding provided in the House of Representative's operating budget proposal of \$6,650,126. The entire amount provided in the budget proposal is the minimum amount necessary for this program. The OPD is pleased to see adequate funding provided in the budget.

(With concerns) This bill should address the transfer of authority specific to legal costs for civil commitment proceedings, and should not insert additional policy into the statute. There are inconsistencies in the bill where there is reference to "expert" in one section and reference to "experts" in other sections. This internal inconsistency should be corrected. Additionally, there will be large increased costs for the polygraph and plethysmograph testing associated with language that was adopted by the Public Safety and Emergency Preparedness Committee. Plethysmographs are expensive, not admissible in proceedings, and would allow the viewing of child pornography. The Public Safety and Emergency Preparedness Committee amendments should be removed from this bill.

(Opposed) None.

Persons Testifying: (In support) Sophia Byrd McSherry, Washington State Office of Public Defense.

(With concerns) Bob Cooper, Washington Defender Association and Washington Association of Criminal Defense Lawyers.

Persons Signed In To Testify But Not Testifying: None.