

This bill provides a comprehensive mechanism for the civil commitment of individuals who are deemed to be sexually violent predators. Persons who are identified as possibly sexually violent predators by a multi-disciplinary team and a committee of prosecutors may be committed to confinement by the Secretary of DOH following a trial by jury. Persons who are determined to be sexually violent predators must be housed in a secure facility and segregated from other patients if housed in a state health facility. The bill provides for an annual review of persons confined under the act, and transitional and conditional release once the person is determined to no longer commit predatory acts.

Significant Issues

This bill requires that the offender undergo an evaluation to determine if they are a sexually violent predator. Results of previous studies show that sexual perpetrators often score within the normal range on psychological testing and that the mentally ill are no more likely to commit sexual violence than the rest of the population.

Research indicates that sexual violence is often not sexually motivated. It is often an act of power and control designed to humiliate and control someone else. It becomes the ultimate form of control and dominance over another.

SB 42 is designed to address the civil commitment of a population that presents potential danger to society due to their predilection to commit repeat violent sexual crimes. There are seventeen states with laws that have similarities to the proposed Sexual Predators Commitment Act. On January 22, 2002, the U.S. Supreme Court upheld the constitutionality of the Kansas Sexually Violent Predator Act, which is worded similarly to SB 42. The Supreme Court held that the confinement criterion embodied in the statute with respect to mental abnormality or personality disorder satisfied substantive due process. The Supreme Court upheld the State of Kansas' argument that states have the authority to define involuntary commitment criteria and may not specifically include mental illness.

The bill has broad system-wide operational and fiscal implications not only for DOH and other departments, including Corrections, Administrative Office of the Courts, Public Defender's Office, the Attorney General, the prosecutorial state functions. The bill contains new definitions, provisions, and processes. There is a clause in this bill to addressing problems of conflict of laws and constitutionality.

Sexually Violent Predator (SVP) statutes in other states contain provisions for 'step down and transition'. Information available to DOH indicate that these have yet to be used.

The PDD states that this legislation deprives incompetent persons the right not to be subjected to a trial at which they cannot assist. While similar legislation has been upheld in many states and by the United States Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346 (1997), this issue was not presented in that case and would be challenged in the New Mexico courts. Other potential challenges would arise as cases move through the system.

FISCAL IMPLICATIONS

The appropriation of \$11,450 contained in this bill is a recurring expense to the general fund to be divided as follows:\$11 million to DOH, \$150 thousand to the AGO, \$150 thousand to the

PDD and \$150 thousand the AOC to carry out the purposes of the Sexual Predator Civil Commitment Act.

DOH will use their appropriation to create and fund programs that do not presently exist, and will have to be created. The commitment of resources should be expected to be significant, with appropriate treatment protocols uncertain. DOH believes that a new and separate facility maybe required to house sexual predators. DOH may also need security personnel, as well as treatment staff, to operate such a facility, DOH would need to study all cost factors involved before we could determine if \$11 million is sufficient to provide an appropriate facility and operating budget.

Currently there is no separate and secure facility to provide housing and treatment to those persons committed to the DOH. Female patients would need a separate facility from the males. The Washington State experience has been that the cost for its sole female client is \$1 million per year.

Money is needed for legal costs to commit an alleged sexual predator. Costs include investigation, litigation, appeal, experts, and in most cases, provision of counsel for the alleged predator. States have cited average costs of several hundred thousand dollars to complete commitment proceedings for most individuals. Treatment costs (and elaborate treatment is legally required) are considered at the high range for inpatient mental health treatment, plus the recognized high costs of security in an essentially forensic hospital setting.

The PDD claims it is difficult to estimate the fiscal impact of this legislation on them without first having a measure of the number of persons who will be subjected to commitment under the legislation. The legislation permits the classification of any person who has been convicted of a sexually violent crime as a sexually violent predator. It provides for commitment proceedings for nine specific crimes and a catch-all category of any crime that is determined to have been sexually motivated. The initial hearings alone on commitment require two probable cause hearings and a trial by jury with expert testimony for the State and for the person sought to be committed. At all stages of the proceedings, whether for commitment, release, or review of conditions of confinement, the person committed is entitled to representation by counsel, and generally, a trial by jury. The legal work involved in presenting such cases is highly specialized and requires a working knowledge of psychiatric diagnoses and treatment modes, in addition to the psychological and sociological history of the person committed. The necessary procedures under the legislation will require more trial work for a specialized unit of the Public Defender Department, and more appeals for the Appellate Division.

Kansas has a similar statute. Based on the experiences of that state, the additional expenses for screening by the Attorney General's Office, initial Department of Health evaluations, independent evaluations of those referred for commitment, representation by counsel at trial and appeal, and costs of jury trial would range between \$335,000 to \$571,000 to complete the initial commitment stage for 27 to 35 persons. These costs do not include administrative costs or the costs of annual reviews. Of the states that have compiled cost information on commitment trials, the costs range per trial from a low of \$3,000 (plus testing at \$240 per hour) in South Carolina to a high of \$200,000 in Washington in the year 2000. The cost of a commitment trial in Arizona is \$90,000.

In patient service costs also cover a wide range, from a low of \$52,000 per year per person in Missouri to a high of \$164,250 per year per person in the District of Columbia. Because of the extremely high cost of committing, housing, and treating such persons, it is unclear how many persons will be identified as sexually violent persons under the legislation. Since procedures will be repeated annually, such as reviews, even five such clients per year would likely require the addition of two PDD attorneys and an additional social worker.

The legislation is not entirely clear on who is responsible for the cost of expert witnesses. It does provide that the district court assist in obtaining experts and approves payment of experts hired to do evaluations. If the person sought to be committed is responsible for these costs, the impact on the Department's budget is potentially great as expert psychological evaluations and testimony run into thousands of dollars per case.

The CD notes there is no appropriations included for them. In both the short term and the long term, the bill will result in a minor increase in costs to the CD, as a result of the requirement that the Secretary of Corrections establish a multi-disciplinary team. There will probably also be a small to moderate increase in costs to the Corrections Department as a result of the ability of the district court judges to order that potential sexual predators be placed in the custody of the CD after a probable cause determination has been made.

There could be a minimal decrease in costs to the Corrections Department's Probation and Parole Division if the civil commitment of these sexual predators resulted in slightly smaller probation and parole caseloads. There could also be a minimal decrease in revenue if the civil commitments result in fewer offenders being placed on probation or parole; which in time will result in slightly less probation and parole supervision fees being collected.

ADMINISTRATIVE IMPLICATIONS

There are direct implications for the DOH, in addition to coordination requirements among departments. New programs and services would have to be developed, and professional, licensed and direct care staff hired and trained. The DOH does not currently have the clinical staff or expertise to operate the type of programs required in the bill and SB 42 may require new capital projects, because no such secure state facility currently exists.

The DOH Secretary is charged with the responsibility of keeping the court and victims informed of any change in status of the treatment or release of a committed sexual predator and for all costs relating to the evaluation and treatment of persons committed to the Secretary's custody under the Act.

The mandates of representation for indigent persons by the legislation at every stage of the commitment proceedings and changes to the conditions of confinement will require the PDD commit already scarce resources to the representation of persons committed under the legislation. The legislation goes beyond the requirements of the Public Defender Act, NMSA 1978, sections 1-12, which charges the PDD to represent persons without counsel who are financially unable to obtain counsel and who are charged with crimes that carries a possible sentence of imprisonment, and requirements of the Defense of Indigents Act, NMSA 1978, sections 1-10, which guarantees legal counsel to a needy person who is charged with a serious crime.

The CD notes in both the short term and the long term, the bill will result in additional administrative burdens upon the CD. First, the Secretary of Corrections will be required to establish and maintain a multi-disciplinary team, which will have significant evaluation and reporting requirements. Furthermore, the CD will be required to establish and maintain a notification to alert the AGO of the upcoming release of certain sexual offenders.

Conversely, the bill could result in a minor decrease in the administrative burden upon CD's Probation and Parole officers if the civil commitment of these sexual predators resulted in smaller parole caseloads.

TECHNICAL ISSUES

The bill references "developmental disability", which may need to be defined. Reference is also made to the term "personality disorder", but this term is not defined in the definitions section. The Supreme Court upheld the Kansas Act referenced above based in large part to precise criteria for such terms as "mental abnormality", and "personality disorder".

The AODA provided the Following:

Technical issues include the following:

- Section 3.A. includes the children, youth and families department as an "agency that releases upon lawful order or authority a person serving a sentence or a term of confinement". No where else in the Act is it specified that juveniles are to be included.
- Section 3.I 10. This could be interpreted to include sexually motivated misdemeanors.
- Section 4.B.: Does not specify which agency has jurisdiction over an accused incompetent person or one who has been found legally insane.
- Section 8.A. reads "[a]t all times, a committed person committed for control, care and treatment by the department shall be kept in a secure facility and shall be segregated at all times from other patients under the supervision of the secretary." It is not clear whether or the sex offender needs to be segregated from other sex offenders.

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