

Department of Legislative Services
 Maryland General Assembly
 2006 Session

FISCAL AND POLICY NOTE

Senate Bill 49 (Senator DeGrange)
 Judicial Proceedings

Sexually Violent Predators - Registration and Commitment to a State Facility

This bill creates a procedure for the civil commitment of “sexually violent predators.”

Fiscal Summary

State Effect: General fund expenditures could increase by at least \$7.5 million in FY 2007 and by \$48.6 million by FY 2011, excluding possible capital costs, for the Department of Health and Mental Hygiene (DHMH) and the Office of the Public Defender. Out-year costs reflect inflation and 45 new patients annually. Revenues would not be affected.

(in dollars)	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	7,464,800	18,984,500	28,804,300	39,694,700	48,621,500
Net Effect	(\$7,464,800)	(\$18,984,500)	(\$28,804,300)	(\$39,694,700)	(\$48,621,500)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: Minimal. While this bill would generate an indeterminate number of additional trials in the circuit courts, the total number is assumed to be minimal for any individual circuit and is not anticipated to have a measurable effect on the expenditures of the Judiciary.

Small Business Effect: Potential meaningful increase in business opportunities for psychiatrists and psychologists who are likely to be called by the State or the defense in trials and review hearings relating to the civil commitment of sexual offenders.

Analysis

Bill Summary: This bill establishes civil commitment procedures by which a “sexually violent predator” may be placed in the custody of DHMH until the person is not likely to engage in a predatory sexual act if released. The bill requires the Attorney General to make determinations as to whether such persons meet a statutory definition of sexually violent predators prior to their release from the custody of the Division of Correction (DOC).

Specifically, the bill provides that the Attorney General must be notified by DOC of the anticipated release of a person who has been convicted of a sexually violent offense or a person charged with such an offense who has been determined to be incompetent to stand trial or not criminally responsible. The Attorney General must then make the determination as to whether the person meets the criteria of a sexually violent predator. The Attorney General is required to receive recommendations upon which to base such a determination from: (1) a review committee of prosecutors appointed by the Attorney General; and (2) a multidisciplinary team consisting of representatives of DHMH and the Department of Public Safety and Correctional Services (DPSCS). If the defendant is indigent, the bill requires the court to appoint counsel.

The bill defines a sexually violent predator as a person who: (1) has been convicted of a sexually violent offense; and (2) suffers from a mental abnormality or personality disorder that makes the person likely to engage in a predatory act involving a sexually violent offense.

The bill substantially protects all persons involved in the determination process from civil liability for acts performed in good faith under the provisions of the bill.

The bill authorizes the Attorney General to petition a circuit court that there is probable cause to believe that the person named in the petition meets the statutory definition of sexually violent predator. If probable cause is found, the court must direct the person to be taken into custody and conduct a trial within 60 days.

The bill provides for the manner in which such a trial may proceed. The defendant, the Attorney General, or the judge may ask for a jury trial. The State has the burden of proof of beyond a reasonable doubt. A person found to be a sexually violent predator must be placed in the custody of DHMH for “control, care, and treatment at a State facility until the defendant’s mental abnormality or personality disorder of the person has so changed that the person is not likely to engage in a predatory act involving a sexually violent offense if released.” The bill provides for specified annual mental examinations, court reviews, notifications, and reports.

A committed person must be annually notified of the right to petition for release. The committed person is entitled to an attorney, but is not entitled to be present at annual review hearings. The bill also provides for release hearings and the criteria upon which a person must be released.

The bill eliminates current law provisions relating to court determinations of sexually violent predators at the request of State's Attorneys after a second or subsequent sexually violent offense. These provisions were added under Chapter 754 of 1997. Under provisions governing the registration of sexual offenders, the bill alters the definition of "sexually violent predator" to mean: (1) a person who is or was required to register every 90 days for life in another state or a federal, military, or Native American jurisdiction; or (2) a person released from custody of DHMH who met the criteria set forth under this bill.

Current Law: Under Maryland's Crimes Against Children and Sexual Offender Registration Law, a "sexually violent predator" is defined as a person who: (1) is convicted of a sexually violent offense; (2) has been determined to be at risk of committing another sexually violent offense; and (3) a person who is or was required to register every 90 days for life in another state or a federal, military, or Native American jurisdiction. If a person has been convicted of a sexually violent offense, a State's Attorney may request the sentencing court to make a determination as to whether the convicted person is a sexually violent predator.

A "sexually violent offense" is defined as first or second degree rape; first, second, or third degree sexual offense; attempted rape or sexual offense; or assault with intent to commit first or second degree rape or first or second degree sexual offense as prohibited under Maryland's criminal code on or before September 30, 1996. Also included under this definition are certain crimes that were committed in another state or in a federal, military, or Native American tribal jurisdiction.

After release from incarceration for the underlying offense, sexually violent predators are required to register with their supervising authority every 90 days for life.

Background: This bill is modeled after an existing statute in Kansas. Kansas' Sexually Violent Predator Act established procedures for the civil commitment of persons who, due to a "mental abnormality" or a "personality disorder," are likely to engage in "predatory acts of sexual violence."

To date, the constitutionality of the civil commitment provisions in Kansas (and other states) has been upheld. The U.S. Supreme Court sustained the constitutionality of the

Kansas statute, in general, finding the statute civil in nature and, as such, nonpunitive. The civil commitment statute for sexual predators in Washington State, which predates the Kansas law, has also withstood constitutionality tests. In 2001, the U.S. Supreme Court found, in essence, that a state's failure to provide treatment required by law does not turn a sex predator's lawful confinement into unlawful punishment.

However, also in 2001, in *Kansas v. Crane*, the court held that a state must prove convicted sex offenders cannot control themselves if they are to be kept confined after their prison terms expire. Although the ruling did not ban such civil commitments, sexual offenders must be treated the same as other people singled out for involuntary commitment.

The Kansas Legislative Post Audit Committee reviewed the growth of the state program in a performance audit released in April 2005. According to the report, as of March 2005, the Kansas Department of Corrections had 2,423 sex offenders in custody. Since 1998, the number of residents in the civil commitment program increased from 16 to 136. Few offenders are leaving the program. Most have been diagnosed as pedophiles.

The percentage of eligible offenders committed to the Kansas program increased from 3% in fiscal 2000 to a peak of 11% in 2003. In fiscal 2000, an average of 1.3 offenders entered the program each month. During the first seven months of fiscal 2005, that average was 2.7.

Since fiscal 2001, annual program costs have increased about 478% (\$1.2 million to \$6.9 million). During that same period, staffing levels increased by 342%, and the number of residents in the program increased by 144%. The program's 2006 budget request was \$7.8 million. With the increased number of residents, the estimated annual cost for treatment and confinement per sexual predator offender in Kansas has decreased from about \$75,000 to \$50,700. In a survey of six other state programs, Kansas found its costs to be the lowest.

The audit report drew the following conclusion: "If current trends continue, Program census and costs will be much greater in the years to come. It appears Kansas will either have to change its policies so that it commits fewer sex offenders to the Program or allows those in the Program to be released sooner, or it will have to reconcile itself to supporting a new class of institutionalized individuals."

The audit report also included two recommendations. One calls for the program to be studied further during the 2005 interim. The other calls for the Department of Social and Rehabilitation Services to develop forecasts for resident capacity, housing costs, and staffing costs.

According to another study by the Washington State Institute for Public Policy (March 2005), 17 states have laws that authorize civil confinement of sex offenders identified as “sexually violent predators.” As of December 2004, 3,493 persons have been held for evaluation as a sexually violent predator or committed for treatment, and 427 such persons were discharged or released. The institute found it difficult to directly compare reported costs for state programs because the service delivery models vary so much among the states with programs. Frequently, budget figures are spread across multiple parts of state government and not pro-rated to capture the sexually violent predator program portions. In any case, the cost of operating secure facilities for such commitments in the U.S. is at least \$224 million annually. States with small numbers of program residents will naturally have higher costs per resident.

The 17 states with statutes that authorize the confinement and treatment of sexual predators following completion of their criminal sentences are Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, New Jersey, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin. Washington opened a new facility for such commitments in 2004, California opened a new 1,500 bed facility in 2005, and Florida is planning construction of a new 600-bed facility. The California experience has been based on a commitment percentage of about 15% of eligible persons over an eight-year period.

It is possible that the U. S. Congress will pass the Children’s Safety Act of 2005 (HR 3132) during 2006. This federal legislation would, in part:

- require the U.S. Attorney General to (1) maintain a national sex offender registry at the Federal Bureau of Investigation; (2) establish a sex offender management assistance program; and (3) authorize sex offender apprehension grants;
- amend (1) the DNA Identification Act of 1994 to expand the scope of DNA samples to be included in the Combined DNA Index System; and (2) the DNA Analysis Backlog Elimination Act of 2000 to authorize the Attorney General to collect DNA samples from individuals who are arrested or detained under U. S. authority;
- increase penalties for violent crimes against persons under age 18, including death or life imprisonment, if the crime results in the death of a person under that age, and increase penalties for sexual offenses against children;
- require background checks and checks of national crime information databases and state child abuse registries before approval of foster or adoptive placements; and

- establish (1) procedures for the civil commitment of sexually dangerous persons; and (2) mandatory minimum penalties for child sex trafficking.

Maryland's Clifton T. Perkins Hospital Center was established in 1960. The hospital serves as the State's sole maximum security psychiatric hospital. Perkins currently has 215 operated beds and operates at 100% capacity. In the 2006 capital budget, funding was provided to complete design and construct a new 48-bed maximum security wing, which will create additional capacity and allow the consolidation of the more difficult forensic mental health clients at Perkins. The services at Perkins include comprehensive treatment for violent offenders of correctional institutions and detention centers who meet the criteria for involuntary commitments and psychiatric treatment for those patients whose mental illness manifests itself in such aggressive and violent behavior as to render it impossible for them to be treated within the regional State psychiatric hospitals. The anticipated completion date of the new wing is June 2007.

State Fiscal Effect: While it is difficult to reliably predict what Maryland's costs would be under a civil commitment statute for sexual predators, it is known that program costs and growth rates in Kansas have far exceeded earlier estimates. In addition, it is unclear as to when, on average, a sexually violent offender committed as a sexual predator to the "control, care, or treatment" of DHMH might successfully petition for release. There is insufficient data to predict when, if ever, a sexual predator might be considered not to be a threat to re-offend as a sexual predator. In existing programs in other states, very few have been thus far released.

In any event, what follows is a somewhat broad discussion of the potential costs that could arise from this bill.

Cost projections under the provisions of this bill are based on three assumptions: (1) approximately 300 persons per year due to be released by DOC (based on recent intake and release data) would trigger the Office of the Attorney General to seek sexual predator determinations; (2) 45 persons per year (15% of the 300 due for release, based on California's experience) would be subject to actual commitment; and (3) a staff to patient ratio of 1:5 must be maintained for hospital accreditation purposes as established by the Joint Commission on Accreditation of Healthcare Organizations. In addition, it is assumed that the same professional expertise for multidisciplinary teams would be needed for annual status reviews of committed persons.

Summary of Quantifiable Fiscal 2007 State Costs	
DHMH	\$6.7 million in hospitalization and other related costs (increasing to \$47 million by FY 2011 not including significant eventual capital costs)
Public Defender	\$722,880 (including expert witnesses, and increasing to \$1.5 million by FY 2011)
FY 2007 Total	\$7.46 million

Department of Health and Mental Hygiene

It is assumed that persons committed under this bill would be maintained in a maximum security hospital setting such as the Clifton T. Perkins Hospital Center. The per patient budgeted cost for fiscal 2007, including overhead, based on a census of 215 patients, is \$182,101. It is also assumed that such maximum security costs for the “control, care, or treatment” of sexual predators would grow at a rate of 3% per year.

Accordingly, general fund expenditures for DHMH could increase by an estimated \$6,741,876 in fiscal 2007, which reflects the bill’s October 1, 2007 effective date, as well as a pro-rated patient population adjustment to reflect the gradual nature of annual commitments. This estimate reflects the cost of nine new positions (one physician/psychiatrist, one psychologist, one social worker, one registered nurse, one licensed practical nurse (LPN), two LPN-security attendants, one assistant Attorney General, and one office secretary) to participate in evaluations required of the multidisciplinary teams convened by the Attorney General and other duties related to hearings and trials statewide. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses, especially the maximum security costs of hospitalization. The information and assumptions used in calculating the estimate are stated below:

- 300 persons annually for whom sexual predator determinations will be sought by the Attorney General;
- 45 cases annually for which commitment proceedings will be successful; and
- sexual predators will tend not to be successful in achieving release from civil commitment.

Salaries and Fringe Benefits	\$ 423,951
Hospitalization Costs	6,146,224
Expert Witness Costs	50,000
Other Operating Expenses	<u>121,701</u>
DHMH FY 2007 Total	\$6,741,876

Future year expenditures reflect: (1) full salaries with 4.6% annual increases and 3% employee turnover; and (2) 1% annual increases in ongoing operating expenses. By fiscal 2011, total personnel and operating costs for DHMH are estimated to be \$47,091,243 which includes the care, control, and treatment of 215 patients under the bill.

In addition, only a limited number of new maximum security patients could be immediately absorbed at a currently operating DHMH facility. While some additional space might be created by moving some current patients to other sites, this bill would eventually, perhaps shortly, give rise to a need for additional maximum security beds at Perkins or elsewhere. Accordingly, the bill could result in the need for a significant amount of additional capital expenditures. Design, planning, and construction of the new Perkins' 48-bed high security wing incurred costs of \$11,645,000 from fiscal 2005 to 2007.

Office of the Attorney General

All costs for the Attorney General, including approximately \$50,000 per year for expert witness fees are included under the costs associated with DHMH's costs cited above, for the hiring of a new Assistant Attorney General assigned to DHMH.

Office of the Public Defender

The Office of the Public Defender advises that, based on recent experience in other states, initial trials could be from two to six weeks in duration. In addition, each person is entitled to representation at all annual status review hearings. Assuming that there would be nearly 45 new trials per year, it is estimated that an additional four attorneys, one paralegal, one office law clerk, and one secretary would be needed to handle this new caseload. The Public Defender also reports that since extensive use would be made of expert witness testimony at the various proceedings, significant additional costs for such witnesses (including travel expenses) would accrue.

Accordingly, general fund expenditures could increase for the Public Defender by an estimated \$722,884 in fiscal 2007, which accounts for the bill's October 1, 2007 effective

date. This estimate reflects the cost of seven new positions (four assistant public defenders, one paralegal, one office law clerk, and one office secretary) to handle the new caseload of sexual predator trials and hearings, including background investigations and trial preparation. It includes salaries, fringe benefits, one-time start-up costs, travel, and ongoing operating expenses.

Salaries and Fringe Benefits	\$342,709
Expert Witness Fees	375,000
Other Operating Expenses	<u>5,175</u>
OPD FY 2007 Total	\$722,884

Future year expenditures reflect: (1) full salaries with 4.6% annual increases and 3% employee turnover; (2) 1% annual increases in ongoing operating expenses; and (3) a growth rate of cases of 45 new cases per year.

Department of Public Safety and Correctional Services

The requirements of this bill would not have any significant effect on the Division of Correction's operations or funding. The division's current operations include procedures for assessing sex offenders' risk to public safety, suitability for release, and registration. This should include procedures for coordinating preparation for trials and hearings. The bill would have no fiscal impact on the Division of Parole and Probation.

Legislative Services notes that DPSCS believes that under the bill there is the need to hire one psychology associate at a cost of \$44,621 (reflecting salary, fringe benefits, and operating expenses) in fiscal 2007, and growing to \$66,291 by fiscal 2011. However, these costs have never before arisen relating to the provisions of this bill and no supporting documentation of such costs was provided. Accordingly, such costs are not included here.

Additional Comments: Although the Developmental Disabilities Administration (DHMH) believes that this bill could result in the hiring of 40 new persons, with costs of over \$5 million in fiscal 2007 and continuing in amounts of over \$2 million in the out-years, these costs are associated with the care and custody of some of the persons already covered by, and in the custody of, the Mental Health Administration, as cited above.

Additional Information

Prior Introductions: SB 280 of 2002 and SB 134 of 2001 each received an unfavorable report from the Senate Judicial Proceedings Committee. HB 450 of 2001 received an unfavorable report from the House Judiciary Committee. SB 117 of 1998 passed the Senate and received an unfavorable report from the House Judiciary Committee.

Cross File: None.

Information Source: Judiciary (Administrative Office of the Courts, District Court), Office of the Public Defender, Department of Health and Mental Hygiene, Office of the Attorney General, Department of Public Safety and Correctional Services, Center for Sex Offender Management, Kansas Legislative Division of Post Audit, Larned State Hospital (Larned, Kansas), Florida Office of Program Policy and Government Analysis) Department of Legislative Services

Fiscal Note History: First Reader - January 18, 2006
ncs/jr

Analysis by: Guy G. Cherry

Direct Inquiries to:
(410) 946-5510
(301) 970-5510