

# SENATE BILL REPORT

## SSB 6493

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As Amended by House, March 6, 2012

**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:** Human Services & Corrections: 1/31/12, 2/02/12 [DPS-WM].

Passed Senate: 2/09/12, 48-0.

Passed House: 3/06/12, 93-0.

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### SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

**Majority Report:** That Substitute Senate Bill No. 6493 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Hargrove, Chair; Regala, Vice Chair; Stevens, Ranking Minority Member; Carrell, Harper, McAuliffe and Padden.

**Staff:** Shani Bauer (786-7468)

**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. An SVP is a person who has been convicted of, or charged with, a sexually violent offense and who suffers from 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 an SVP, the prosecuting attorney of the county where the person was convicted or charged or the Attorney General's Office, if so requested by the prosecuting attorney, may file a petition alleging that the person is an SVP. In preparation for a trial as to whether the person is an SVP, the court must direct that the person be evaluated by a professional as to whether the person is an SVP.

If a person is found at trial to be an SVP, the state is authorized by statute to involuntarily commit a person to a secure treatment facility. Civil commitment as an SVP is for an indefinite period. Once a person is committed, the Department of Social and Human Services (DSHS) must conduct annual reviews to determine whether the person's condition

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has so changed such that the person no longer meets the definition of an 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 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 an SVP and that placement in an 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 less restrictive alternative is appropriate. If the court finds that the state has not met its prima facie case or that probable cause exists, 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 sexually violent predator 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 DSHS for payment. Often, these invoices are already approved by the court and DSHS has little recourse but to pay them, even if expenses appear to be excessive or duplicative.

In 2011 the Legislature asked the Office of Public Defense (OPD) to develop a proposal to transfer statewide responsibility for indigent defense of sexually violent predator civil commitment cases from DSHS to OPD. In December 2011 OPD submitted its report to the Legislature, including several options for accomplishing this transfer. Those options included:

- continue the existing reimbursement process with hourly contracts, but transfer state agency responsibility from DSHS to OPD;
- allow OPD to contract with multiple attorneys or group practices statewide; or
- require OPD to hire state employees to provide defense services.

OPD estimates that the second and third options above could save the state between \$700,000 and \$1 million.

**Summary of Substitute Bill:** The director of OPD administers all state-funded services for representation of indigent respondents qualified for appointed counsel in SVP civil commitment cases. In providing those services, the director must:

- contract with attorneys or groups of attorneys for the provision of legal services;
- establish annual contract fees for payment of indigent defense services;
- establish procedures for the reimbursement of expert witnesses and other professional and investigative costs;
- make recommendations to the WA State Bar Association for appropriate caseload standards for SVP cases; and
- periodically submit a report to the Chief Justice, the Governor, and the legislature on the operation of SVP indigent defense services.

The transfer of duties from DSHS to OPD occurs on July 1, 2012, but provisions are made for a transitional period during which time the director may continue existing counsel so as to avoid unnecessary trial continuances.

DSHS is no longer responsible for the cost of one expert or professional person to conduct an evaluation on the prosecuting agency's behalf.

Indigent persons responding to an SVP petition for commitment and commitment review proceedings are entitled to appointed counsel contracted through OPD. The following activities are beyond the scope of representation of an attorney under contract with OPD:

- investigation or legal representation challenging the conditions of confinement at the SCC;
- investigation or legal representation for making requests under the Public Records Act;
- legal representation or advice in filing a grievance against DSHS;
- legal representation during a period not covered as part of the civil commitment process; and
- other activities as may be excluded by policy or contract with OPD.

OPD is responsible for the cost of one expert or professional person conducting an evaluation on the indigent person's behalf. Expert evaluations are capped at \$10,000; partial evaluations are capped at \$5,500; and expert services apart from an evaluation, exclusive of testimony at trial or depositions, are capped at \$6,000. OPD will pay the costs related to an additional examiner or in excess of the fee caps only upon a finding by the superior court that such appointment or extraordinary fees are for good cause.

DSHS and the courts are authorized to release records to OPD as needed to implement OPD's duties. OPD must maintain the confidentiality of confidential records. The inspection or copying of any nonexempt public record by persons residing in a civil commitment facility for SVPs may be enjoined utilizing the same procedures allowed for enjoining requests from persons serving a criminal sentence. In order to issue an injunction, the court must find that:

- the request was made to harass or intimidate the agency or its employees;
- fulfilling the request would likely threaten the security of correctional facilities;
- fulfilling the request would likely threaten the safety or security of staff, inmates, family members of staff, family members of other inmates, or any other person; or
- fulfilling the request may assist criminal activity.

If specific funding for the purposes of this act is not provided in the omnibus appropriations act, this act is null and void.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** The bill contains an emergency clause and takes effect on July 1, 2012.

**Staff Summary of Public Testimony on Original Bill:** PRO: We are in support of this bill but the success depends on whether current caseload limits are followed. While the bill incorporates Washington State Bar Association (WSBA) standards, it should also incorporate Washington Defender Association (WDA) standards. The bill should minimize disruption in making abrupt changes to counsel. Language should also be added to clarify that this legislation is not intended to abrogate the inherent authority of trial courts to apply constitutional standards. It is important to have parity between state defense and prosecution. Be hesitant to adopt case standards that have been developed by the defenders association. Effective and efficient representation is all that is required.

OTHER: We support this bill with concerns. Parity does not appreciate the fact that putting together a defense is more work than the prosecution and the prosecution's case comes pre-packaged. Parity to us means that defense compensation should be on par with prosecutor compensation. Annual fee limits do not recognize that some cases require much more time than others. Staffing and funding for defense cases should be tied to WSBA, WDA and professional standards to ensure against ineffective counsel. These cases are extremely complex and require a good deal of expertise. Funding for expert services should remain stable.

**Persons Testifying:** PRO: Ken Chang, Ken Henrikson, The Defender Association; Joanne Moore, Sophia Byrd McSherry, OPD; Malcolm Ross, Attorney General's Office; David Hackett, King County Prosecuting Attorney's Office.

OTHER: Doug Varnick, Mike Morris, Society of Counsel Representing Accused Persons; Bob Cooper, WDA, WA Assn. of Criminal Defense Lawyers.

**House Amendment(s):** Prosecuting agencies are authorized to obtain current evaluations of the respondent or SVP, including any tests requested by the evaluator, with the state bearing the expense. DSHS oversight of post-filing evaluations is eliminated, consistent with the rest of the bill. OPD is required to report on an annual, rather than periodic basis as to the operation of indigent defense services. Defense representation is limited to one counsel, except if good cause is shown. The scope of indigent defense representation is redefined.