

SUBJECT: Civil commitment of sexual violent predators

COMMITTEE: Corrections — favorable, with amendment

VOTE: 5 ayes — Haggerty, Staples, Allen, Gray, Longoria

0 nays

4 absent — Culberson, Ellis, Farrar, Lengefeld

SENATE VOTE: On final passage, May 6 — voice vote

WITNESSES: For — None

Against — None

On — Kelly Page, Texas Department of Health Professional Licensing; Maria T. Molett, Council on Sex Offender Treatment; Beth Mitchell, Advocacy, Inc.; Barbara A. Miller, Texas Department of Mental Health and Mental Retardation; Kim McPherson, The Mental Health Association in Texas; Lynn Lasky, National Alliance for the Mentally Ill in Texas; Melinda Hoyle Bozarth and Wayne Scott, Texas Department of Criminal Justice.

BACKGROUND: For more information on the civil commitment issue, see House Research Organization Focus Report Number 76-8, *Civil Commitment of Sex Offenders*, March 16, 1999.

DIGEST: SB 29 would allow for the commitment through the civil courts to outpatient treatment and supervision for certain repeat sex offenders who have been released from a prison or state mental health facility. SB 29 would authorize the civil commitment of sexually violent predators, who would be defined as repeat sexually violent offenders who suffer from a behavioral abnormality that makes them likely to engage in a predatory act of sexual violence.

SB 29 would take effect September 1, 1999, and apply to persons who on or after January 1, 2000, were serving a sentence in Texas Department of Criminal Justice (TDCJ) or had been committed to the Texas Department of Mental Health and Mental Retardation (TDMHMR) for an offense committed

before, on, or after the effective date. SB 29 would take effect only if a specific appropriation for its implementation was provided in HB 1, the general appropriations act.

**Sexually violent predators.** Sexually violent predators would be defined as *repeat sexually violent offenders* who suffer from a behavioral abnormality that makes them likely to engage in a predatory act of sexual violence.

*Repeat sexually violent offenders* would be persons who were convicted of more than one sexually violent offense and who had a sentence imposed for at least one of the offenses or if the person:

- ! was convicted of a sexually violent offense, regardless of whether the sentence was imposed or whether it was probated and the person later discharged from probation;
- ! entered a plea of guilty or no contest in return for a grant of deferred adjudication;
- ! was judged not guilty by reasons of insanity; or
- ! was adjudicated by a juvenile court for a sexually violent offense and committed to the Texas Youth Commission for fixed-term sentence or for habitual felony conduct.

After a conviction that fit the above criteria, the person would have to commit a sexually violent offense and be convicted and a sentence imposed or be judged not guilty due to insanity to be considered for civil commitment.

Sexually violent offenses would be defined as indecency with a child involving contact; sexual assault; aggravated sexual assault; aggravated kidnaping with intent to abuse the victim sexually; first-degree burglary of a habitation with intent to commit indecency with a child involving contact, sexual assault, aggravated sexual assault, or aggravated kidnaping with intent to abuse the victim sexually; an attempt, conspiracy, or solicitation to commit one of these offenses; offenses under prior state laws that are substantially similar to these offenses; and substantially similar offenses under laws of other states, federal law, or military law.

**Multidisciplinary team.** TDCJ and TDMHMR would have to establish jointly a multidisciplinary team to review the records of persons referred by the two departments to the team for consideration for civil commitment. The

team would have to include two persons from TDMHMR, three persons from TDCJ, one of whom would have to be from TDCJ's victim services office, one person from the Department of Public Safety (DPS), and one person from the Interagency Council on Sex Offender Treatment who has experience as a sex offender treatment provider.

The Texas Department of Criminal Justice would have to give the multidisciplinary team written notice of the anticipated release of persons serving sentences for sexually violent offenses and who may be repeat sexually violent offenders. The Texas Department of Mental Health and Mental Retardation would have to give the multidisciplinary team written notice of the anticipated discharge of persons committed to MHMR after being judged not guilty of a sexually violent offense due to insanity and who may be a repeat sexually violent predator.

The notice of release of persons who may be repeat sexually violent offenders would have to be given at least 16 months before the anticipated release date.

Within 30 days of receiving notice, the multidisciplinary team would have to determine whether the person was a repeat sexually violent offender and whether the person was likely to commit a sexually violent offense if released, to give notice to TDCJ or TDMHMR, and to recommend the assessment of the person for a behavioral abnormality.

**Assessment for behavioral abnormality.** Within 30 days of a recommendation that a person be assessed for a behavioral abnormality, the multidisciplinary team would have to determine whether the person suffered from an abnormality that made the person likely to engage in a predatory act of sexual violence. The team would have to use an expert to examine the person, and the expert would have to make a clinical assessment based on testing for psychopathy, a clinical interview, and other appropriate assessments.

If the team determined that a person suffered from a behavioral abnormality, the team would have to give notice to the attorney representing the state, who would be employed by the state's prison prosecution unit.

**Petition alleging predator status.** The attorney representing the state would be able to file a petition alleging the person was a sexually violent predator in

a Montgomery County district court. A petition would have to be filed within 60 days after the date the person is referred to the prosecutor.

A special division of the prison prosecution unit, distinct from the part of the unit that prosecutes criminal cases, would be responsible for initiating and handling civil commitment proceedings. Persons being considered for civil commitment would be represented by the Office of State Council for Offenders.

**Trial.** Within 60 days after a petition was filed alleging someone was a predator, the judge would have to conduct a trial on the question. The rights of the accused would include the right to appear at the trial, to cross-examine a witness testifying against the person, and to view and copy all petitions and reports in the court file.

The accused or the state would be entitled to a jury trial on demand. The judge or jury would have to determine beyond a reasonable doubt whether the person was a sexually violent predator. A decision by a jury that someone was a predator would have to be by unanimous verdict. Either the accused or the state could appeal the decision.

**Civil commitment.** If a judge or jury determined a person was a sexually violent predator, judges would be required to commit the person for outpatient treatment and supervision to be coordinated by a case manager employed by the Interagency Council on Sex Offender Treatment. The treatment and supervision would have to begin on the person's release from the correctional facility or state hospital and would have to continue until the abnormality had changed to the extent the person was no longer likely to engage in a predatory act of sexual violence.

Judges would have to impose on the person requirements necessary to ensure compliance with treatment and supervision and to protect the community. The requirements would have to include:

- ! participation in treatment;
- ! submission to tracking, such as electronic monitoring or global positioning satellite services;
- ! residence in a particular location;
- ! a prohibition against the person changing residences or leaving the state

without prior authorization;

- ! a prohibition against contact with a victim or potential victim;
- ! a prohibition against the use of alcohol or a controlled substances; and
- ! notification of their case manager within 48 hours of any change in their status that would affect proper treatment and supervision, including a change in health or job status.

Judges also could impose any other requirements they deemed necessary including establishing child safety zones to prevent the person from being in certain areas. It would be a third-degree felony, punishable by two to 10 years in prison and an optional fine of up to \$10,000, to violate a requirement imposed by the judge.

At all stages of the civil commitment proceedings, a person would be entitled to the assistance of counsel. If the person were indigent, courts would have to appoint a counsel through the Office of State Counsel for Offenders, a part of TDCJ. Civil commitment proceedings would be subject to the rules of procedure and appeal for civil cases.

Persons would be authorized to retain an expert to perform examinations and to participate in civil commitment proceedings on their behalf. If a person were indigent, judges would determine whether expert services for the person were necessary. If the services were necessary, the judge would have to appoint an expert on the person's behalf, and the court would have to approve reasonable compensation for the expert's services.

The state would be required to pay up to \$1,600 for the cost of a civil commitment trial. The state would pay the costs of state or appointed counsel or experts and the costs of the person's outpatient treatment and supervision.

**Treatment, supervision.** The Interagency Council on Sex Offender Treatment would be responsible for providing treatment through case managers to persons who were civilly committed. Case managers would have to coordinate the outpatient treatment and supervision, including periodically assessing the success of the treatment and supervision, and make recommendations to a judge about whether to allow persons to change residences, leave the state, or other matters.

The council would have to approve and contract for a treatment plan to be

developed by a treatment provider. Treatments could include monitoring with a polygraph or plethysmograph. Treatment providers could receive annual compensation of up to \$6,000 for providing treatment.

Case managers would provide supervision of persons who were civilly committed. Supervision would have to include tracking services and, if required by court order, supervised housing. The council would have to contract for supervised housing and contract with the Department of Public Safety (DPS) for tracking services. Committed persons could not be housed in a mental health facility, state school, or community center.

Treatment and supervision providers would have to provide at least monthly reports to case managers on whether the person was complying with treatment and supervision requirements.

**Commitment review.** Committed persons would have to be examined biennially by an expert under contract by the Interagency Council on Sex Offender Treatment.

Judges would have to conduct a biennial review of the status of the committed person. The person would not be entitled to be present at the review but would be entitled to be represented by council. Judges would have to have a hearing if they determined that probable cause existed to believe the person's behavioral abnormality had changed so that the person would no longer be likely to engage in a predatory act of sexual violence or that a requirement imposed on the person should be modified.

The committed person would be entitled to be present at the hearing and to all the constitutional protections provided at the initial commitment hearing. The hearing would have to be before a jury, if requested by either the committed person or the state. At the hearing, the burden of proof would be on the state to prove beyond a reasonable doubt that the person had not changed.

**Petitions for release.** Petitions for release from the person who was civilly committed could be filed at any time or a petition could be filed upon recommendation by the Interagency Council on Sex Offender Treatment.

If the council determined that a person no longer was likely to engage in a predatory act of sexual violence, it would have to authorize the person to

petition the court for release. Judges would have to set a hearing on the petition. The hearing would have to be held before a jury if requested by either the committed person or the attorney representing the state. The burden of proof at the hearing would be on the state to prove beyond a reasonable doubt that the petitioner's abnormality had not changed.

If a petition were filed without the council's authorization, judges would have to attempt to review the petition as soon as practicable. Judges would be required to deny these petitions without a hearing if the petition were frivolous or if the petitioner previously filed a release petition without the council's authorization. The judge also would have to determine that the previous petition was frivolous or that the petitioner's abnormality had not changed to the extent that the petitioner was no longer likely to engage in a predatory act of sexual violence.

The judge could not deny a petition filed without the council's authorization if probable cause existed to believe the petitioner's abnormality had changed to the extent the petitioner was no longer likely to engage in a predatory act of sexual violence. If a petition filed without the council's authorization was not denied, judges would have to conduct a hearing as soon as practicable.

**Information exchange.** SB 29 would allow agencies and entities involved in the civil commitment process to exchange information, including information about supervision, treatment, criminal history, and physical and mental health, about persons being considered for civil commitment.

Psychological reports, drug and alcohol reports, treatment records, diagnostic reports, medical records, and victim impact statements that were submitted to a court would be part of the court's records and would have to be sealed and could be opened only by a judge's order, as provided the statute, or in connection with a criminal proceeding as allowed by law.

SUPPORTERS  
SAY:

**Sexually violent predators.** SB 29 would be an effective way to closely monitor, supervise, and treat sexually violent predators while they are in the community. This would give Texas a full range of options for dealing with sexual predators and improve public safety while being more cost effective than committing sexually violent predator to inpatient treatment.

Even with long prison terms, expanded treatment, and low parole rates, some sexual predators who have not completed treatment successfully will be released from prison or mental health facilities and should be under constant supervision until they complete treatment. Releasing these predators after their prison sentences would likely result in new sex crimes and additional victims. SB 29 would allow these predators to be monitored constantly with electronic tracking and to be placed in supervised housing, all while requiring they be treated.

There is no better way to spend tax dollars than on protecting the public from dangerous sexual predators. Texas should not hesitate to spend a portion of its budget surplus to protect the public from the most dangerous, repeat sex offenders. According to the fiscal note, about 15 persons would be committed per fiscal year, and SB 29 would cost the state about \$4 million for fiscal 2000-01 for prosecution costs, rule development, treatment, and supervision.

The cost of civil commitment would not escalate continually because, thanks to tougher laws enacted in recent years, many repeat sex offenders are being sentenced to life in prison and will serve at least 35 years before even being considered for parole. These offenders may die in prison or be poor candidates for subsequent civil commitment because they will be elderly or infirm when they finish their sentences.

SB 29 would require that the commitment, treatment, and supervision of sexual predators occur through a law and a set of procedures separate from the law concerning mental health commitments. Persons with mental illness would not be stigmatized by association with criminal sexual predators because SB 29 would not use the mental health system or its resources.

**Multidisciplinary team.** SB 29 would institute a multidisciplinary team to screen offenders to ensure that only repeat offenders most likely to reoffend would be funneled through the review process.

**Assessment for behavioral abnormality.** In addition to the initial screening, offenders would be assessed for behavioral abnormalities. The existing involuntary commitment procedures for the mentally ill are inadequate to handle these sex offenders because the law is designed to give short-term treatment to persons with mental illness and then release them into the community. Sexual predators, in contrast, have behavioral abnormalities that



make them highly likely to commit another sexually violent act, and they need treatment for a much longer period than is traditional for mentally ill persons who are committed involuntarily.

Creating a civil commitment system for sexual predators with “mental abnormalities” would not provide an additional issue for defendants to raise in trying to opt out of the criminal justice system. Sex offenders — even those who will later be considered for civil commitment — would continue to be handled first by the criminal justice system, like all offenders who are competent to stand trial. Offenders who are not competent to stand trial would be judged so by the court system and handled like all incompetent defendants.

**Petition alleging predator status.** Petitions alleging a person was a sexual predator would be filed in the Montgomery County district court to ensure that they were filed in a central place close to the prison prosecution unit that would handle the cases. Persons being considered for civil commitment would be represented by TDCJ’s Office of State Council for Offenders to ensure that appointed attorneys would be centralized and experienced.

**Trial.** Indigent offenders being considered for civil commitment could be provided an attorney at the state’s expense to ensure that they were adequately represented and their rights were protected. SB 29 would ensure that a person being considered for civil commitment would have all necessary rights, such as a jury trial on demand, appearance at the trial, the ability to cross-examine witnesses, and an appeal.

**Civil commitment.** Committing a sexually violent predator to outpatient treatment and supervision would not violate offenders’ state or federal constitutional rights. It would even less restrictive on offenders than the Kansas law that allowed inpatient civil commitment and was upheld by the U.S. Supreme Court in 1997 in *Kansas v. Hendricks*, 117 S.Ct. 2072.

SB 29 would track parts of the Supreme Court’s decision by establishing narrow and specific commitment criteria, requiring many layers of review, and ensuring sex offenders’ rights to a defense and other due-process safeguards.

**Treatment, supervision.** Although no “cure” may exist for the problems of sexual predators, treatment is society’s best opportunity to change these offenders so that they pose no danger to others, and civil commitment would be the best way to ensure treatment. To keep costs from escalating and to ensure that civil commitment was used only when there was a real threat to public safety, the criteria for commitment would be narrow.

The Interagency Council on Sex Offender Treatment would be the proper entity to contract for treatment and supervision services. It has the knowledge and experience to hire case managers and to oversee the treatment providers. SB 29 would not present the council with a conflict of interest because its current relationships with treatment providers mostly involves keeping a registry, not otherwise regulating them. The council simply would have to gather information about whether a judge should consider a hearing to release a person from civil commitment. Judges would make the ultimate decision.

**Petitions for release.** SB 29 would adequately protect persons who have been committed to treatment by allowing them to file a release petition at any time and by requiring the council to file a petition if the person’s situation had changed. Although judges would have to deny petitions under certain circumstances, they would be prohibited from denying an unauthorized petition if a person’s situation had changed to the extent they were no longer likely to engage in a predator act of sexual violence.

OPPONENTS  
SAY:

**Sexually violent predators.** Harsh penalties for sex offenses and existing authority to commit mentally ill people involuntarily for treatment are better ways of protecting the public than enacting a new outpatient civil commitment law. Singling out various classes of people who can be confined against their will would be unwise and could lead to an ever-expanding list of those who would qualify for civil commitment.

To handle repeat sex offenders, it would be better to impose tough criminal sentences, increase supervision of offenders released on parole, and beef up

laws requiring the registration of sex offenders and community notification of their whereabouts. For example, the state could institute a sentence of life without parole for repeat sex offenders or require that they be given life sentences, under which some sex offenders currently have to serve 35 years,

without good-conduct time, before being considered for parole. In the future, civil commitment could prove unnecessary as the pool of serious offenders released from prison shrinks because of longer sentences and because many of those who are released are elderly or infirm.

The cost of long-term supervision and treatment of sex offenders who have been civilly committed, coupled with litigation, would be prohibitive. The state's resources would be better spent and public safety better enhanced by providing effective treatment for the thousands of sex offenders in prison, rather than by spending millions of dollars on a few offenders after they complete their sentences.

The cost of civil commitment would continue to escalate as more offenders are subjected to constant supervision and treatment and few, if any, are released from the requirements. Claims that the selection of those civilly committed would be limited and that the number of those committed would be low are unrealistic.

These calculations underestimate the difficulty decision-makers would face in excluding offenders from the commitment process, given the unknown consequences of such a decision and potential bad publicity if an offender who was not civilly committed later committed another crime. In addition, the Legislature could find it hard to resist efforts to expand the pool of those considered for commitment.

**Multidisciplinary team.** Accurate screening and commitment of sex offenders could be impossible because the pool of serious sex offenders is so large — by one count, about 3,000 sexually violent offenders will be released from prison during fiscal 2000-01. Also, the techniques for forecasting future dangerousness are so unreliable that it would be difficult to make proper decisions about the risk posed by the offenders. The availability of civil commitment could give the public a false sense of security because many potentially dangerous offenders still would be released into society without being committed to outpatient treatment. Any method for selecting candidates for civil commitment would be flawed, unfairly imposing harsh supervision on some who would not commit another offense.

**Assessment for behavioral abnormality.** If the state contends that the civil commitment of sex offenders is not punishment but is merely a way to treat

persons with “mental abnormalities,” defense lawyers could try to delay or halt criminal proceedings for accused sex offenders by claiming that the offenders rightfully belong in the mental health system, not the criminal system.

**Civil commitment.** Civil commitment would amount to little more than an “end run” around civil rights laws by using a civil forum to increase a criminal’s punishment unfairly. It is not certain that a Texas civil commitment law would pass state and federal constitutional muster simply because the U.S. Supreme Court upheld the Kansas law. The court’s decision, reached by a slim 5-4 margin, dealt only with the Kansas law as it applied to federal constitutional protections. The Texas Constitution contains a layer of constitutional protections that are distinct from — and in some ways greater than — federal protections. The decision did not address the legality of a system like the one set up in SB 29.

**Treatment, supervision.** In a concurring opinion to the U.S. Supreme Court’s decision on the Kansas law, Justice Anthony Kennedy cautioned that if the state does not provide adequate treatment, civil commitment of sex offenders who have served their criminal terms could be unconstitutional. Since reliable, effective treatment for sexual predators does not exist, it could be impossible to provide treatment that would meet this standard. Often, civil commitment laws rely on vague criteria such as “mental abnormality” or “personality disorder” that have no medical definition. This makes it difficult to design treatment and difficult for offenders to argue that they have been “cured” and should no longer be subject to treatment and supervision.

The Interagency Council on Sex Offender Treatment would be an inappropriate body to provide treatment and supervision services. The council’s main duty is to keep a registry of treatment providers and be a resource for persons wanting information about sex offender treatment. The council could have a conflict of interest in contracting with those that it registers. Some provisions of SB 29 could unwisely force the council to act as a kind of parole board and make

decisions about whether persons should be authorized to file petitions for release.

**Petitions for release.** Although SB 29 would allow persons to file a petition for release at any time, it would be inappropriate to require judges to deny the petitions under certain circumstances. Judges should be allowed to make decisions on petitions without statutory restrictions.

OTHER  
OPPONENTS  
SAY:

SB 29 would not go far enough. Public safety and treatment should involve inpatient commitment to a secure facility, like the Kansas system upheld by the U.S. Supreme Court.

NOTES:

The committee amendment would require that the multidisciplinary team representative from the Interagency Council have experience as a sex offender treatment provider; designate that the multidisciplinary team as responsible for behavioral abnormality assessment; specify how the DPS would procure equipment for tracking services; and make the Interagency Council responsible for authorizing persons to file release petitions.