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December 4, 2013

Ms. Lucinda E. Jesson  
Commissioner  
Minnesota Department of Human Services  
P.O. Box 64998  
St. Paul, MN 55164-0998

Dear Commissioner Jesson:

By federal court order, the Sex Offender Civil Commitment Advisory Task Force has been charged with examining certain specific aspects of Minnesota's process for the civil commitment of sex offenders. The Task Force was directed to provide recommended legislative proposals to the Commissioner of Human Services on the following three topics:

- A. The civil commitment and referral process for sex offenders;
- B. Sex offender civil commitment options that are less restrictive than placement in a secure treatment facility; and
- C. The standards and processes for the reduction in custody for civilly committed sex offenders.

The Task Force was directed to issue its recommendations for item "B" by December 3, 2012, and it met that deadline in its first report. The Task Force now reaffirms its 2012 recommendations, and provides its recommendations for items "A" and "C." These recommendations are the result of twenty public meetings of the Task Force over a 14-month period.

The Task Force was unanimous in its conclusion that the serious problems that exist in the current program can and should be addressed by legislative actions that:

- (1) rationalize the process,
- (2) make it more objective, and
- (3) eliminate to the greatest extent possible the influence of politics on commitment, placement and release decisions,

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*Via E-Mail and U. S. Mail*

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with the ultimate goal that the rights of those persons subject to civil commitment proceedings and the interests of the public will be better protected.

We hope that these recommendations will be of assistance to your office and the Legislature in the coming months.

Very truly yours,

s/Eric J. Magnuson  
Eric J. Magnuson

EJM/kd  
Enclosure

84383921.2

**December 2, 2013**

**MEMO**

**TO: Lucinda Jesson, Commissioner of Human Services**

**FROM: The Hon. Eric J. Magnuson, Chair,  
The Hon. James Rosenbaum, Vice Chair,  
Sex Offender Civil Commitment Advisory Task Force**

**SUBJECT: Final Report**

## **INTRODUCTION**

As noted in the Task Force's report of December 2012<sup>1</sup>, Minnesota has the highest per capita number of civilly committed sex offenders of any state that employs civil commitment. It also has the lowest rate of release from commitment. Factors that contribute to these statistics, issues that arise from them, and potential steps to address those issues have been considered by the Governor's Commission on Sex Offender Policy (January 2005), by the Office of the Legislative Auditor (Civil Commitment of Sex Offenders, March 2011), and by the Department of Human Services (Options for Managing the Growth and Cost of the Minnesota Sex Offender Program: Facility Study, January 2011). These topics are also the subject of the federal litigation that resulted in the appointment of this Task Force.

There is broad consensus that the current system of civil commitment of sex offenders in Minnesota captures too many people and keeps many of them too long. The Task Force believes that these issues can be addressed to some degree by changes in several aspects of the current civil commitment process: Screening for Commitment Consideration, Petitioning for Commitment, Commitment Procedures, Commitment Criteria, and Procedures and Standards for Reduction in Custody.

Although the Task Force briefly discussed the possibility that the Legislature might consider eliminating sex offender civil commitment and the Minnesota Sex Offender Program ("MSOP")

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<sup>1</sup> <https://edocs.dhs.state.mn.us/lserver/Public/DHS-6641-ENG>. We have attached a copy of that report for reference.

altogether, the Task Force concluded that such a recommendation would be beyond the scope of its charge. While there may be effective alternatives for sex offender management other than the current system of civil commitment -- including enhanced treatment of sex offenders during the term of their criminal confinement, probation, and conditional release -- for purposes of this report, the existence of a civil commitment process for those sex offenders most likely to reoffend is taken as a given. The job of the Task Force is to suggest recommendations that improve the effectiveness and rationality of that commitment system.

Finally, civil commitment of sex offenders addresses only one element of the problem of sexual violence in our society, including child sex abuse. Preventing the victimization of others and providing for the effective treatment of those persons who perpetrate that violence are both necessary elements to improved public safety. In addition to the specific recommendations detailed in this report, we urge the Legislature to direct the appropriate state agencies to develop a comprehensive program for the prevention of sexual violence. The Task Force believes that this may best be accomplished through the creation of a long term executive level working group charged with establishing goals and evidence-based strategic objectives consistent with the vision, goals and strategies of the Minnesota Department of Health, June 2009 plan, *The Promise of Primary Prevention of Sexual Violence: A Five-Year Plan to Prevent Sexual Violence and Exploitation in Minnesota*. That legislative direction should be accompanied by an allocation of funds specifically designated for research on the causes of sexual violence, the development and implementation of best practices for prevention of sexual violence, and the diagnosis and effective treatment of sex offenders. In addition, the program should include public education on the civil commitment of sex offenders, so that the public better understands not only the reasons for commitment, but also the reasons for discharge from commitment in appropriate cases.

## CONSIDERATIONS

In general terms, our recommendations reflect these considerations:

- The statutory criteria for commitment as a Sexually Dangerous Person or Sexual Psychopathic Personality (“SDP” and “SPP”) must ensure that the civil commitment process accurately identifies and commits those individuals who present a significant and demonstrable risk to the public in the absence of commitment, but does not sweep into the civil commitment process individuals who present a lower risk. The apparent elasticity of the existing criteria is illustrated by the dramatic increase in civil commitments after December 2003 despite no change in the SDP/SPP criteria.
- The process for identification and treatment of individuals who may be candidates for civil commitment should begin at an earlier stage, during the time of criminal

confinement. Treatment is effective, and is demonstrably effective in the corrections environment. Increasing the resources available to the Department of Corrections for enhancement of its treatment programs would reduce the need for and cost of treatment and confinement after incarceration.

- Current procedures for initial screening and commencement of commitment proceedings result in significantly disproportionate rates of commitment petition filings in different areas of the state. A centralized screening body that would review all recommendations for further proceedings would help address the apparent disparity in the rates at which civil commitments are sought. Although a centralized petitioning authority might also add to the consistency of decisions across the state to seek civil commitments, local prosecutorial responsibility is an important aspect of law enforcement. A centralized screening authority will adequately accomplish rationalization of the rates of initiation of commitment proceedings without the need to alter the petitioning authority now granted to county attorneys across the state.
- Commitment decisions are too often all or nothing adjudications. Under current law all offenders committed to MSOP are presumptively placed in the highest level of security. The result is that some offenders, while meeting the criteria for commitment, may be needlessly confined in the most secure facilities, when both public safety and the need for effective treatment might be better served in a less restrictive environment. The commitment decisional process should be divided into two parts – a commitment decision, and then a separate placement decision. This bifurcation will allow the committing authority to focus more closely on the need for commitment, and, if established, then make an informed decision on the degree of confinement and treatment best suited to the needs of the committed individual and the interests of public safety.
- An independent judicial body, one that is not subject to local or other political pressures, should make commitment, transfer, and release decisions.
- The burden of proof at all stages of the commitment and confinement process should be on the State to show the need for initial commitment, for continued commitment, and the level of confinement needed to ensure public safety.
- The need for continued commitment and the propriety of placement must be reviewed on a regular basis, without demand or request by the committed individual.
- Civil commitment of persons whose offending behavior occurred while a juvenile and individuals with developmental disabilities present special issues that are not adequately

addressed by current law and practices. Special criteria and/or procedures should be developed to ensure such persons are appropriately treated in the commitment system.

- No person should be civilly committed based solely on behavior that occurred while that person was a juvenile. There is a recognized need in some cases for extending jurisdiction over juveniles who have engaged in sexually offending conduct. The Legislature should examine how best to address that need outside of the current system of civil commitment of sex offenders.

## **RECOMMENDATIONS**

The Task Force believes that the specific Legislative actions discussed in more detail below will address the most serious issues that face Minnesota’s system of sex offender civil commitment. In order to understand better the rationale for the recommendations that the Task Force makes in the identified areas of concern, this report discusses each issue separately – first describing current Minnesota law, next summarizing issues in the current operation of the law that have been identified in prior studies and the analysis of the Task Force, and finally stating the specific recommendation for legislative change in each area.

The issues and suggestions regarding many of the areas of concern overlap. In each area discussed in this Report, we have striven to provide specific recommendations to promote greater precision and objectivity in identifying those individuals who should be subject to the commitment process, and to ensure that the decisions made concerning those individuals are based on accurate evidence and consistent application of the law. The recommendations are, in many respects, cumulative, and the recommendations in each area must be considered in light of the recommendations made with regard to other areas of the commitment process.

### **Abbreviations Used In This Report**

|      |                                   |
|------|-----------------------------------|
| AGO  | Attorney General’s Office         |
| DHS  | Department of Human Services      |
| DOC  | Department of Corrections         |
| MI&D | Mentally Ill & Dangerous          |
| MSOP | Minnesota Sex Offender Program    |
| OLA  | Office of the Legislative Auditor |
| SCAP | Supreme Court Appeal Panel        |
| SDP  | Sexually Dangerous Person         |
| SPP  | Sexual Psychopathic Personality   |
| SRB  | Special Review Board              |

## Sentencing

**Current Law:** Sexual offenses carry specific sentences, which include the possibility of extended correctional supervision following release from confinement. *See, e.g.*, Minn. Stat. § 609.3453 (2013) (providing for enhanced sentencing and conditional release for criminal sexual predatory conduct). While treatment options are available through the Department of Corrections (DOC), they are not specifically incorporated in the criminal sentencing process. Civil commitment generally is pursued in anticipation of an offender's supervised release date which comes after incarceration for two-thirds of his sentence.

**Issues:** The OLA wrote "The Legislature should consider providing indeterminate sentencing for some sex offenders. As a condition of their release, offenders could be required to successfully complete treatment in prison." (p. 46).

Gov. Pawlenty's 2005 task force recommended a "blended determinate-indeterminate sentencing system for sex offenders...doubling of the current statutory maximum sentences for criminal sexual conduct crimes, and vigorous, politically-independent reviews of the offender's response to treatment while in custody." It called for creation of a "Sex Offender Release Board" that would review offenders' records, including treatment progress, to determine when they should be released from prison; the Board would establish release and supervision conditions. The task force recommended "Increasing the statutory maximum indeterminate sentence to life for those offenders with a prior history of criminal sexual conduct."

In 2005, the Legislature enacted mandatory life sentences for certain repeat and egregious offenders. *See* Minn. Stat. § 609.3455. In 2006, the Sentencing Guidelines Commission issued a separate Sex Offender Grid, which greatly enhanced the penalties for sex offenses.

### **Recommendation:**

*The Task Force makes no specific recommendation concerning legislative changes in the criminal sentencing laws, or in the jurisdiction of DOC. The Task Force believes that such changes may be viable alternatives or complements to the current system of civil commitment, but that the detailed subjects of criminal sentencing and the jurisdiction of DOC involve issues beyond the scope of the charge given to the Task Force. Nonetheless, the Task Force notes that, as reflected in its earlier report, and as corroborated by information provided during its consideration of these issues, providing treatment to sex offenders while they are subject to the jurisdiction of the DOC appears to be effective and cost-effective, and expansion of those treatment programs should be examined carefully, regardless of any changes in sentencing laws for sexual offenses.*

## Screening

**Current Law:** The Department of Corrections makes a preliminary determination based on whether a commitment petition “may be appropriate” based on review by a screening committee and independent counsel (Minn. Stat. § 244.05, subd.7; *see also* DOC Policy No. 205.200). The DOC screening currently only serves to identify possible commitment candidates and bring them to the attention of county attorneys. A county attorney may seek commitment without receiving a screening referral from DOC, as in the case of juveniles who are not subject to screening and even individuals who are screened but whose names are not forwarded.

**Issues:** The OLA report noted statistically significant variations in the rate of petitions for civil commitment among the various judicial districts in the state. The OLA report specifically provided that “The Legislature should direct the Department of Human Services to convene a task force ... [and could] have the task force examine the referral process...” (p. 48). In addition, the report provided “The Legislature should direct the Department of Corrections to study the recidivism rates of sex offenders who have been referred or petitioned for civil commitment and not civilly committed ...” (p. 49)

Gov. Pawlenty’s 2005 task force recommended “transferring the process of screening of sex offenders for possible civil commitment to an independent panel” and suggested that “a Sex Offender Release Board would be well suited to perform this function.”

On numerous occasions, the Task Force discussed the need for the development and consistent application of clear and scientifically based standards for both screening and commitment, and for release from commitment. The Task Force recognizes that the psychological and predictive standards employed in the civil commitment process are continually evolving. At the same time, the Task Force believes that there is a significant issue concerning the precision and scientific basis of evidence used in determining whether the legal criteria for commitment have been satisfied.

Commitment standards based on the best possible science should be both clear and current for the benefit of all persons involved in the commitment process. Although included in the following recommendation regarding Screening, the Task Force has incorporated in its subsequent recommendations as well the notion that the standards by which persons are civilly committed should be clear, consistent, and as objective as possible.



## **Recommendation:**

- A. *The Task Force recommends that the Legislature establish a centralized, professionally independent (not part of DHS or DOC) screening unit with statewide jurisdiction to develop and implement a comprehensive assessment process to evaluate sex offenders who might meet the criteria for commitment under the SDP or SPP laws. No petition for civil commitment of individuals as Sexually Dangerous Persons or Sexually Psychopathic Personalities should be allowed without first having been submitted to the screening unit. The screening unit would determine whether, in its assessment, the person meets commitment criteria and the petition should be pursued – a higher standard than the current direction to DOC to forward persons for whom petitioning for commitment “may be appropriate.”*
- B. *This independent screening unit should be, to the greatest extent possible, insulated from political influence. The screening process should include multidisciplinary teams of professionals with training and credentials that assure that their assessments are evidence-based, and employ the most current and accurate science, including the use of current, validated risk assessment instruments. The screening unit must have sufficient staff, with sufficient training and professional independence to meet these goals.*
- C. *The law should charge the screening unit with the production of consistent, accurate and quality evaluations that identify the scientific basis for a recommendation that a particular person considered for commitment either does or does not meet the legal criteria for commitment. The work of the screening unit should be audited by well-qualified, independent auditors at least once every two years.*
- D. *A decision by the screening unit that the person does not meet commitment criteria would not be binding on the prosecuting authority, but would be admissible in proceedings before the body adjudicating any commitment petition. However, no member of the screening unit may testify in any commitment proceedings at which a report of the screening unit will be considered.*

## Petitioning

**Current law:** The authority to file a SDP/SPP petition rests with the county attorney. Current law requires “good cause” to initiate a petition (Minn. Stat. § 253D.08). Pre-petition screening investigation is optional for SDP/SPP (Minn. Stat. § 253D.08). A petition may be accompanied with a statement by an examiner supporting commitment (Minn. Stat. § 253B.07, subd. 2(c)).

**Issues:** The OLA wrote “The Legislature should direct the Department of Human Services to convene a task force to consider the need for changes in the sex offender commitment standard and process, including the advisability of establishing a centralized prosecution structure and a single commitment court for sex offenders ... The task force should be required to report its findings to the 2012 Legislature.” (p. 48).

Gov. Pawlenty’s 2005 task force recommended “Encouraging the Minnesota Supreme Court to use existing statutory authority to establish a specialized panel for civil commitments... a statewide judicial panel would result in the development of valuable expertise and efficient economies of scale.”

As noted in the discussion concerning screening, there are wide variations in the rates of commitment petitions filed across the state.

### **Recommendation:**

- A. *The Task Force recommends that the civil commitment petitioning function remain with the county attorneys’ offices across the state.*
- B. *Issues regarding perceived inconsistent decisions to seek commitment are more appropriately addressed by changes in the commitment screening process contained in the prior recommendation.*

## Commitment Procedures

**Current law:** Commitment petitions are heard in a bench trial in the county of financial responsibility or county where the subject of the petition is present or, if the subject of the petition is in the custody of the DOC, in the county where the conviction resulting in custody was entered (Minn. Stat. § 253D.07, subd. 1; Commitment Act R. 6). Current law also authorizes but does not require the Minnesota Supreme Court to establish a statewide panel of district court judges to hear and decide commitment petitions (Minn. Stat. § 253D.11, subd. 1).

The burden at the commitment hearing is on the county attorney to establish the elements justifying commitment by clear and convincing evidence (*see* Minn. Stat. § 253D.07, subd. 3). The statute regarding stays of commitment does not specifically contemplate its use in MI&D and SDP/SPP commitments, but court rules do recognize stayed orders for these commitments (Commitment Act R. 22). Commitments are presumptively made to a secure treatment facility; individuals who are the subject of commitment have the burden of establishing, by clear and convincing evidence, that a suitable less restrictive alternative exists (Minn. Stat. § 253D.07, subd. 3).

**Issues:** The OLA report recommended that “The Legislature should direct the Department of Human Services to convene a task force to consider the need for changes in the sex offender commitment standard and process, including the advisability of establishing a centralized prosecution structure and a single commitment court for sex offenders ...” (p. 48). The OLA also stated that “The plan should also address the funding and statutory changes needed to address a stay of commitment option. The cost impact of these options should be compared with the costs of expected growth at MSOP without any change in policy. The plan should be presented to the 2012 Legislature.” (p. 45)

Gov. Pawlenty’s 2005 task force recommended “Encouraging the Minnesota Supreme Court to use existing statutory authority to establish a specialized panel for civil commitments....a statewide judicial panel would result in the development of valuable expertise and efficient economies of scale.”

The Task Force discussed at length questions concerning the ability of district court judges not specialized in handling commitment matters to render consistent decisions based on similar facts, and to resist public and political pressures that often attach to commitment proceedings. The Task Force concluded that there was little reason to believe that district court judges are either unable or unwilling to decide commitment cases fairly. However, as is reflected in other portions of the of this report, the Task Force is deeply concerned about the influence of public opinion and political pressure on all levels of the commitment process, and in light of that

concern has concluded that an independent judicial body that could provide consistent adjudications and develop a coherent body of commitment jurisprudence is a necessary component of any plan to rationalize the civil commitment system.

Because under the current system a person subject to civil commitment faces what many feel is a de facto life sentence, the Task Force also discussed at length a possible recommendation to change the standard of proof for commitment from “clear and convincing” to “beyond a reasonable doubt.” However, the Task Force concluded that if the other changes it recommends are implemented, including the creation of a special court to hear petitions for civil commitment of sex offenders, then there was no compelling need to change the standard of proof embodied in current law.

### **Recommendation:**

- A. *The Legislature should provide for the creation of a special SDP/SPP civil commitment court with statewide jurisdiction in all civil commitment matters based on the alleged status of the person subject to commitment proceedings as a sexually dangerous person or sexual psychopathic personality.*
- B. *The court should be comprised of senior judges retired from active service appointed by the Chief Justice, and should have resources to appoint examiners and other professionals to provide reports and recommendations to the court independent of submissions by the petitioner or defense.*
- C. *The Legislature should create a statewide office to approve and administer a panel of qualified commitment defense counsel who would be available, at State expense, to represent persons subject to SDP/SPP civil commitment proceedings, in order to ensure that the defense of persons subject to commitment proceedings is adequate, both with regard to the quality of legal representation and investigative and professional resources.*
- D. *The Legislature should modify current law to provide for a bifurcated hearing process. The first hearing would determine if commitment is appropriate; the second hearing would determine the terms and conditions of commitment, including placement.*

## Commitment Criteria

**Current law:** For commitment as an SDP under current statutory and case law, the county attorney must prove by clear and convincing evidence three distinct elements:

(1) The respondent must have engaged in a “course of harmful sexual conduct,” requiring more than one act but not requiring that those acts have resulted in criminal convictions – just that the acts occurred. “Harmful sexual conduct” means “sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another.” Violence, or the likelihood of physical harm, is not required, and “non-violent” acts may be sufficient to show harmful sexual conduct. Proof of actual harm is not required because the issue is the harmful nature of the conduct. There is a statutory rebuttable presumption that criminal sexual conduct and other criminal offenses (if sexually motivated) are harmful sexual conduct.

(2) The respondent currently has a “[s]exual, personality, or other mental disorder or dysfunction” and that disorder “does not allow [him] to adequately control [his] sexual impulses” or his “sexual behavior.”

(3) As a result of the individual’s disorder, the respondent is highly likely to engage in harmful sexual conduct. “Highly likely” is a higher standard than “more likely than not,” i.e., a 51% likelihood standard is not a high enough standard. Thus, the “highly likely” standard corresponds to the “clear and convincing evidence” evidentiary standard. The determination of whether the respondent is highly likely to reoffend is based upon “*Linehan* factors”<sup>2</sup> developed in case law and currently under review by the Minnesota Supreme Court in *In re Ince*<sup>3</sup>:

(a) The person’s relevant demographic characteristics (e.g., age, education, etc.);

(b) The person’s history of violent behavior (paying particular attention to recency, severity, and frequency of violent acts);

(c) The base rate statistics for violent behavior among individuals of this person’s background (e.g., data showing the rate at which rapists recidivate, the correlation between age and criminal sexual activity, etc.);

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<sup>2</sup> *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*).

<sup>3</sup> *In re Ince*, 2013 WL 1092438, No. A12-1691 (Minn. Ct. App. Mar. 18, 2013) (unpublished), rev. granted (Minn. May 29, 2013).

- (d) The sources of stress in the environment (cognitive and affective factors which indicate that the person may be predisposed to cope with stress in a violent or nonviolent manner);
- (e) The similarity of the present or future context to those contexts in which the person has used violence in the past; and
- (f) The person's record with respect to sex therapy programs.

A committing court is not bound to use these factors rigidly, as it can determine that a particular *Linehan* factor is not helpful in the particular case. A court can also consider other factors not on the *Linehan* factor list. Indeed, *Linehan* “did not foreclose good faith attempts by the courts to isolate the most important factors in predicting harmful sexual conduct.”<sup>4</sup>

The current statutory and case law criteria for commitment as an SPP are similar. The petitioner must prove by clear and convincing evidence that the person subject to the commitment petition has, as a result of a mental or emotional condition, engaged in a “habitual course” of “misconduct in sexual matters,” defined as “sexual misconduct of such an egregious nature that there is a substantial likelihood of serious physical or mental harm being inflicted on the victims.” The acts of misconduct must be similar. The petitioner must show that the person subject to the commitment petition has an “utter lack of power to control the person’s sexual impulses” and as a result of this inability to control his/her behavior is “dangerous to other persons.” “Utter” lack of power can be situational; the subject of the petition need not act out all the time, in every situation. There is no statutory rebuttable presumption that criminal sexual conduct and other criminal offenses (if sexually motivated) are harmful sexual conduct.

**Issues:** The OLA report did not provide a specific recommendation regarding the commitment standard, but it did note that “Minnesota laws facilitate the civil commitment of sex offenders in a number of ways.” (p.20) The OLA commented that “Minnesota laws specifically allow for offenses that involve emotional harm, as well as those involving physical harm or violence.” The OLA further noted that Minnesota requires two offenses while most states require one, but “unlike most states, Minnesota does not require that the offenses resulted in convictions.”

Gov. Pawlenty’s 2005 task force, and the 2011 DHS report, did not specifically address this topic.

Because civil commitment of sex offenders is based on predictions of future behavior rather than exclusively proof of past facts, decisions concerning whether the legal criteria for commitment

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<sup>4</sup> *In re Linehan*, 557 N.W.2d 171, 189 (Minn. 1996) (*Linehan III*).

have been met are inherently based on professional and judicial judgment. The most effective way to address the lack of precision inherent in such subjective decisions is, in the view of the Task Force, to ensure to the greatest extent possible that the predictive elements of the commitment decision are clearly defined and scientifically based. The assessment methods employed and the decisions made should be subject to regular review by independent and professional experts in the field.

**Recommendation:**

*The Legislature should provide that the independent Screening Unit proposed in the earlier portion of this report shall maintain expertise on the most current and accurate assessment methods and analysis and regularly publish guidance on those subjects for the benefit of the courts, petitioners, and those subject to the petition process.*

## Reduction in Custody

**Current law:** Under current law, the process for a reduction in custody begins with filing a petition with the Special Review Board (SRB). The SRB holds a hearing and makes a recommendation to the Judicial Appeal Panel, which possesses the sole authority to grant a reduction in custody. The Appeal Panel may adopt the SRB's recommendation or elect to hold a *de novo* hearing. If any party (patient, county, commissioner) objects to the SRB recommendation, the Appeal Panel must hold a hearing.

Unlike other states that require an annual or other regular evaluation and review by the committing court, Minnesota law provides only that the committed individual or the head of the facility may initiate a petition for a reduction in custody. The individual must wait at least six months following final commitment or disposition of a previous reduction-in-custody petition before filing a new petition. The Minnesota Supreme Court commented that this opportunity for periodic review of the need for continued confinement and commitment is critical to upholding civil commitment in light of a due process challenge. *In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994).

The February 2013 OLA report on State Operated Services recommended annual review by the district court for all Mentally Ill and Dangerous commitments, the type of commitment upon which the SDP/SPP commitment procedures were originally modeled in 1994. In contrast to those persons civilly committed as sex offenders, those who are civilly committed as Mentally Ill are reviewed after six months and annually thereafter by the committing court, although they generally have far fewer impositions on their liberty.

In an Appeal Panel hearing on a petition for provisional discharge or full discharge, the committed individual need only make out a *prima facie* case in order to then require the county and state to prove by clear and convincing evidence that provisional or full discharge criteria are not met. *See Coker v. Jesson*, 831 N.W.2d 483 (Minn. 2013). For a transfer petition, the evidentiary standard is preponderance of the evidence.

For a transfer out of a secure treatment facility, the Appeal Panel must be satisfied that transfer is appropriate based upon five factors: (1) clinical progress and present treatment needs, (2) need for security to accomplish continuing treatment, (3) need for continued institutionalization, (4) which facility can best meet the person's needs, and (5) whether transfer can be accomplished with a reasonable degree of safety for the public (Minn. Stat. § 253D.29).

For a provisional discharge, the Appeal Panel must be satisfied "that the patient is capable of making an acceptable adjustment to open society" based on whether there is no longer a need for



treatment in the patient’s current setting, and whether the provisional discharge plan will provide a “reasonable degree of protection to the public” (Minn. Stat. § 253D.30).

For a discharge, the Appeal Panel must consider whether conditions exist to provide a reasonable degree of protection to the public and to assist the patient in adjusting to the community (Minn. Stat. § 253D.31). The Appeal Panel must be satisfied that the patient is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision. *Id.* (*Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995) holds that discharge must be granted if the individual is *either* no longer dangerous to the public *or* no longer suffers from a mental condition requiring treatment.)

**Issues:** The OLA recommended that “The Legislature should require MSOP to develop a plan for alternative facilities for use by certain sex offenders currently at MSOP, as well as for certain newly committed individuals. The plan should provide details about funding and needed statutory changes to ensure adequate supervision, monitoring, and treatment of these sex offenders... The Legislature could consider amending provisional discharge criteria to allow for the provisional discharge of offenders who no longer meet commitment criteria.” The OLA also recommended that “The Legislature could consider amending state law to require a periodic review of clients by an entity independent of MSOP.”

Gov. Pawlenty’s 2005 task force recommended establishment of a “continuum of structured treatment options” and wrote that “patients transitioning from civil commitment should be bounded at all times by a strong and mutually reinforcing set of security measures – including supervision agents; highly structured living facilities; and electronic monitoring, Global Positioning Services and polygraph services.” It recommended that when patients “successfully complete treatment, and are transitioning back to community settings, they need to be supervised by effective and well-trained corrections agents. The Legislature should formalize these methods in statute, and thereby improve the overall effectiveness, safety and viability of “pass-eligible” status and provisional discharges.”

The 2011 DHS report recommended a “stronger community network of treatment, resources and accountability for sexual offenders” and called for “alternatives to MSOP that maintain public safety” because the “current options for community-based treatment programs for the highest risk sexual offenders are limited.” The report recommended “community-based housing options for sex offenders on court-ordered provisional discharge in the community” and wrote that “MSOP reintegration design places MSOP clients on provisional discharge temporarily in a half-way house to assist in their reintegration...after many years of institutionalization... Housing resources for sex offenders in Minnesota are currently limited and without housing, offenders become homeless... Appropriate housing that maintains public safety would be necessary for

sexual offenders on provisional discharge or release from DOC... Incentives to develop housing statewide would distribute provisionally discharged MSOP clients more evenly across the state.”

The Task Force focused much of its efforts on examination of the process and standards for commitment. However, the Task Force was also acutely aware that one of the most striking features of the MSOP as it has operated over time is the negligible number of releases from the program. Significant modifications of the process by which the need for continued commitment is determined and the standards for evaluating that need will address the serious issues of duration of commitment and the absence of meaningful release from commitment.

### **Recommendation:**

- A. *The Task Force recommends that the Legislature modify current law to provide for biennial review of the continued commitment of committed individuals, including review of the placement of the committed individual, without requiring the individual to request that review.*
- B. *The same Screening Unit that reviews initial commitment proceedings should conduct a forensic evaluation and provide a recommendation concerning both ongoing commitment and placement. If the review indicates a change in the need for ongoing commitment or that a change in the current placement may be appropriate, the matter will be set for a hearing. Otherwise the recommendation will be forwarded to the commitment court for a paper review, and either the responsible county attorney or the committed individual can request a court hearing on continued commitment and placement.*
- C. *The Legislature should modify current law to provide that the special SDP/SPP civil commitment court with statewide jurisdiction proposed in the recommendations concerning “Commitment Procedures” conduct the periodic review of continued commitment and placement, thereby replacing the existing SRB and Appeal Panel process.*
- D. *The same panel of qualified commitment defense counsel that represents persons subject to commitment proceedings at the initial commitment stage should be available to represent committed individuals in the periodic review proceedings.*
- E. *The petitioning authority must justify terms and conditions of continued commitment under the law at each biennial review.*

## **Sex Offender Civil Commitment Advisory Task Force Members<sup>5</sup>**

Hon. Eric J. Magnuson, Chair, is the former Chief Justice of the Minnesota Supreme Court and currently partner at the law firm of Robins, Kaplan, Miller & Ciresi, L.L.P.

Hon. James M. Rosenbaum, Vice Chair, served as United States District Judge for the District of Minnesota, including service as Chief Judge of the District

Rep. Jim Abeler represents the cities of Anoka and Ramsey in the Minnesota House and is the ranking member on the House Health and Human Services Finance Committee

Donna Dunn is Executive Director of the Minnesota Coalition Against Sexual Assault

James D. Franklin is Executive Director of the Minnesota Sheriffs' Association

Fred Friedman is Chief Public Defender for the Sixth Judicial District of Minnesota, and Adjunct Associate Professor at the University of Minnesota Medical School, Duluth campus

Hon. Kathleen Gearin recently retired after serving as Judge in the Second Judicial District, including service as Chief Judge of the District

Senator John M. Harrington – Chief of Police, Retired, City of St. Paul and now Chief of the Metropolitan Transit Police

Eric Janus is Dean of the William Mitchell College of Law

Gerald T. Kaplan is Executive Director of Alpha Human Services and is a licensed psychologist

Rep. Tina Liebling represents Rochester and chairs the House Health and Human Services Policy Committee

Sen. Warren Limmer represents the Maple Grove/Osseo/Dayton/Rogers/Hassan area, is an Assistant Minority Leader, and is the ranking Minority Member on the Senate Judiciary Committee and Judiciary Finance Division

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<sup>5</sup> The members of the Task Force have served in a volunteer capacity at the request of the federal court and the Commissioner of Human Services. The views expressed in this report are those of the Task Force, and do not necessarily represent the position of any of the organizations to which the members belong.

Sen. Tony Lourey represents Pine, Carlton, Kanabec and St. Louis Counties and chairs the Senate Health and Human Services Finance Division

Ryan Magnus is a partner in the law firm of Jones and Magnus in the Mankato area

Kelly Mitchell is Executive Director of the Minnesota Sentencing Guidelines Commission

Hon. Paul A. Nelson served as Judge in the Eighth Judicial District, including service as Chief Judge of the District

Roberta Opheim is the State Ombudsman for Mental Health and Developmental Disabilities

Mark Ostrem is the Olmsted County Attorney and serves on the Board of Directors of the Minnesota County Attorneys Association

Comm. Tom Roy is the Minnesota Commissioner of Corrections

Comm. Nancy Schouweiler is a Dakota County Commissioner and is past President of the Association of Minnesota Counties

Hon. Joanne M. Smith is Judge of the Second Judicial District, and has served as Chief Judge of the District

Dr. Michael D. Thompson is Executive Director of the Minnesota Chapter of the Association for the Treatment of Sexual Abusers (MnATSA)



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December 3, 2012

**Eric J. Magnuson**  
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**VIA E-MAIL AND U.S. MAIL**

Ms. Lucinda E. Jesson  
Commissioner  
Minnesota Department of Human Services  
P.O. Box 64998  
St. Paul, MN 55164-0998

Dear Commissioner Jesson:

I enclose with this letter the first report of the recommendations of the Sex Offender Civil Commitment Advisory Task Force. As the report indicates, we have been charged with examining and providing recommended legislative proposals on three areas of the Minnesota civil commitment system for sex offenders. This report addresses the issue of Less Restrictive Alternatives to commitment of sex offenders to secure treatment facilities.

The order of the federal court required this report to be submitted by December 3, 2012, which we now do. Our goal was to answer the specific immediate question posed to us, before proceeding with a broader inquiry.

The short timeline within which we were required to present our initial recommendations made it necessary for us to be very focused in our analysis and recommendations. This report explains our process, identifies the resources we examined, explains the reasoning behind our conclusions, and contains a list of specific recommendations for legislative action on the topic of Less Restrictive Alternatives. However, we realize that our work is not done.

To address the other two issues identified by the court, the Task Force will need to review the entire system of civil commitment of sex offenders from referral to commitment to release. We plan to conduct that review and analysis over the next twelve months. It is our plan to meet regularly and often in the early months of the coming year so that we may communicate with legislators and coordinate our efforts with legislative developments on the subject. Following the end of the legislative session, we will take stock of where things stand and meet on a regular basis through the following months to prepare our final recommendations. We expect that we will present that final report on or before December 1, 2013.

B R I G G S   A N D   M O R G A N

Ms. Lucinda E. Jesson  
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The members of the Task Force recognize the seriousness of the assignment that they have undertaken and appreciate the trust and confidence that you and the court have shown in us.

Very truly yours,

Briggs and Morgan, PA

s/ Eric J. Magnuson  
Eric J. Magnuson

EJM/kd  
Enclosure

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**November 29, 2012**

**MEMO**

**TO: Commissioner of Human Services**

**FROM: The Hon. Eric J. Magnuson, Chair,  
The Hon. James Rosenbaum, Vice Chair,  
Sex Offender Civil Commitment Advisory Task Force**

**SUBJECT: Less Restrictive Alternatives to Secure Facility Commitments**

This Task Force has been charged with examining and providing recommended legislative proposals on the following three topics:

- A. The civil commitment and referral process for sex offenders;
- B. Sex offender civil commitment options that are less restrictive than placement in a secure treatment facility; and
- C. The standards and processes for the reduction in custody for civilly committed sex offenders.

Part of the Task Force's charge is to have recommendations on the second topic by December 3, 2012. To that end, the Task Force met on October 11, November 1, 15, and 29. Members have studied a large volume of resource materials throughout this time period. Meetings included presentations from practitioners and discussion among Task Force members. Members were invited to make submissions addressing the three topics, with emphasis on the Less Restrictive Alternatives topic.

A number of conclusions may be drawn from our preliminary examination of the issues presented:

- It is clear from the review by Task Force members of the resource materials and the discussions and submissions of the members that Less Restrictive Alternatives is not a simple problem. Serious constitutional issues are presented in the pending federal litigation which gave rise to the appointment of the Task Force. Not only is civil commitment complex legally and medically, but there is a great deal of overlap between addressing Less Restrictive Alternatives for those already civilly committed (the first task assigned to the Task Force by the federal court and Commissioner), and providing alternatives to those who are subject of pending but not completed or future petitions for commitment.

- It is also clear that considerable additional study and thought will be necessary to provide a comprehensive proposal that deals with these interrelated issues.
- Perhaps the most significant impediment to effective Less Restrictive Alternatives is the absence of facilities and funding for programs to which offenders can be committed short of a secure facility, or outright release.
  - Existing law allows a court to commit an individual to a less-restrictive alternative if the individual “establishes by clear and convincing evidence that a less restrictive treatment program is available that is consistent with the patient's treatment needs and the requirements of public safety.” Minn. Stat. § 253B.185, subd. 1(d) (2012). However, the lack of programs and facilities makes this provision of limited value.
  - The Legislative Auditor’s March 2011 report highlighted this issue in its findings and recommendations:
    - “Minnesota lacks reasonable alternatives to commitment at a high security facility.” (p. xi)
    - “One problem with Minnesota’s commitment process is that it results in an all-or- nothing outcome. The decision that prosecutors and judges face is that either a sex offender is civilly committed in an expensive, high security facility, or the offender is released to the community, sometimes with no supervision if he has served his complete prison sentence.” (p. 42)
    - “Minnesota may be committing some sex offenders who could be treated and supervised in other less costly settings.” (p. 43)
    - “Recommendation: The Legislature should require MSOP to develop a plan for alternative facilities for use by certain sex offenders currently at MSOP, as well as for certain newly committed individuals. The plan should provide details about funding and needed statutory changes to ensure adequate supervision, monitoring, and treatment of these sex offenders. The plan should also address the funding and statutory changes needed to address a stay of commitment option. The cost impact of these options should be compared with the costs of expected growth at MSOP without any change in policy. The plan should be presented to the 2012 Legislature.” (p. 45)



## Recommendations

1. The Legislature must provide adequate funding for less secure residential facilities, group homes, outpatient facilities, and treatment programs. The Legislature must ensure that such facilities and programs are operational within a reasonable period of time.
2. The Department of Corrections, the Department of Human Services, prosecutors, the courts, and persons subject to the commitment process must have full ability to access these Less Restrictive Alternatives. To the extent that any of the current statutory or regulatory laws are obstacles to Less Restrictive Alternatives, appropriate legislative changes should be made.
3. Less Restrictive Alternatives must ensure public safety. The Legislature should provide for increased resources for public education regarding the rehabilitative aspects of such programs and the provisions for public safety.
4. The Legislature should provide for geographic distribution of Less Restrictive Alternative facilities and programs to serve the entire state through regional, multi-provider and other collaborative programs. The Legislature must consider how local government ordinances, resolutions, or similar laws which have the effect of limiting, excluding, or impeding the siting of Less Restrictive Alternative facilities or programs for civilly committed sex offenders should be dealt with when they conflict with the establishment of a statewide plan for Less Restrictive Alternatives.
5. To effectuate these efforts, the Task Force urges the Legislature to adopt legislation providing that:
  - a. The Commissioner of Human Services shall request proposals from governmental and non-governmental entities and organizations for the development of new programs or enhancement of existing programs to provide safe options for the housing, supervision, and treatment of civilly committed sex offenders outside of a secure treatment facility.
  - b. Proposals shall at a minimum be required to describe the provision of residential services, treatment services, supervision services, use of monitoring technology such as GPS, and transitional services such as employment counseling and training in daily living skills.
  - c. Provision of these services need not be done solely within a residential facility so long as the proposal addresses the need for public safety in all aspects of programming.
  - d. Proposals must also include a plan for transitional progression into other lesser-restrictive settings and conditions.

- e. Proposals may include regional, multi-county or multi-provider programs and facilities.
- f. Proposed programs may be designed to serve individuals who previously have been civilly committed to secure facilities, and those who are subsequently civilly committed.
- g. The Commissioner of Human Services may award planning funds as necessary to further the development of proposals for less-restrictive alternatives.
- h. The Commissioner may request proposals on an ongoing basis.
- i. The Commissioner shall enter into contracts with governmental and non-governmental entities and organizations agreeing to provide housing, supervision, and treatment of civilly committed sex offenders outside of secure treatment facilities.
- j. If the Commissioner determines that there is insufficient capacity or geographic distribution from those awarded contracts under this section, the Commissioner shall establish state-operated facilities and programs in such amount as to provide sufficient capacity and geographic distribution.
- k. The Commissioner shall develop Less Restrictive Alternative programs and facilities throughout the state after due consideration of the population of offenders to be served, the number of facilities and different programs necessary to serve that population, the expressed desire of the Legislature that facilities not be unduly concentrated, and the financial impact of programs and facilities providing overlapping services.
- l. The Commissioner shall supervise, coordinate, and administer the development of less-restrictive alternative facilities and programs.
- m. Certification and licensing of programs and facilities granted by either the Department of Human Services or the Department of Corrections shall be honored by both departments.
- n. The Commissioner of Human Services shall perform case management and supervision activities for those civilly committed to a Less Restrictive Alternative and should have supervisory authority whenever the Commissioner is not directly providing those services.