

Department of Planning and Budget 2003 Fiscal Impact Statement

1. Bill Number: HB2445

House of Origin Introduced Substitute Engrossed
Second House In Committee Substitute Enrolled

2. Patron: Griffith

3. Committee: Passed Both Houses

4. Title: Sexually Violent Predators

5. Summary/Purpose: This bill moves the effective date of the sexually violent predator statute from 2004 to "the date of enactment of House Bill 1400, House Bill 2445 or Senate Bill 1149 of the 2003 General Assembly Session." It changes the definition of a sexually violent predator to a person who, among other things, has difficulty controlling his predatory behavior and who receives a score of 28 or above on the Virginia Criminal Sentencing Commission Sex Offender Risk Assessment Instrument. It also prohibits his collateral challenge of prior convictions and restricts his right to use evidence in his defense if he refuses to cooperate with his mental examination. The legislation extends time limits for actions required on behalf of the Commonwealth. The bill also changes the eligibility requirements for those subject to review from a release date "no earlier than ten but no later than eight months" to "within 10 months" from the date of review.

6. Fiscal Impact Estimates are: Final.

6a. Expenditure Impact:

<i>Fiscal Year</i>	<i>Dollars</i>	<i>Positions</i>	<i>Fund</i>
2003-04	\$3,715,914	71.00	GF
2004-05	\$6,242,631	104.00	GF

7. Budget amendment necessary: Program 440, subprogram 11.

8. Fiscal implications: Virginia first passed a statute on involuntary civil commitment of sexually violent predators (SVP) in 1999, following a 1997 Supreme Court ruling (Kansas v. Hendricks) that held that the Kansas program was constitutional and did not violate constitutional prohibitions on double jeopardy. Virginia's statute is modeled after those of Kansas and Washington. The effective date was initially set at January 1, 2001. The program was adjusted during the 2000 Session of the General Assembly and the effective date changed to July 1, 2001. The effective date was again changed during the 2001 Session to January 1, 2003. Items 49 and 331 C of the 2002 Appropriation Act changed the effective date to January 1, 2004. Item 49 directed the Attorney General to review the law and make recommendations for improvement. Item 331 also directed the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) to prepare a revised estimate of the costs to implement the sexually violent predator program. The results of this

study indicated that there is currently no facility available to house the full SVP program without considerable capital investment.

The most recent analysis by the Department of Corrections (DOC), performed 1/14/03, assumed that the offenders who would be eligible for consideration for this program would be released on their mandatory release dates, or, if that were not available, on their good behavior credited release dates. The assumption that has been used by the Crime Commission and the Department of Planning and Budget, based on the historical experiences of other states with SVP programs, is that an average of ten percent of eligible offenders would be civilly committed as sexually violent predators. The number of offenders, with their most serious offense being one of those included in the criteria for consideration as a violent sexual predator, and the projected number of civil commitments appear in the table below.

Fiscal Year	DOC Releases	Estimated SVPs
2003	291	29
2004	251	25
2005	199	20
2006	164	16
2007	158	16
2008	151	15
2009	114	11
2010	100	10
2011	103	10
2012	68	7

In an attempt to narrow the eligibility pool, the requirement that an offender score 28 or above on the Sex Offender Risk Assessment Instrument was added to the bill. Though it may affect the size of the initial pool of eligible offenders reviewed, there is no certainty that it would limit the final number of individuals deemed to be sexually violent predators. It is also unlikely that the original number of SVPs estimated using the 10 percent assumption would score less than 28 on the assessment instrument. Given these uncertainties, there is no reason to reduce the current estimate on the number of individuals who are likely to be committed.

The bill would be effective upon passage and specifies that the DOC Director identify offenders who are scheduled for release within the ten months following the date of review. Should this review occur in late February or early March, it is assumed that the first person likely to be determined to be a SVP would not enter a SVP program until July 2003. With actual release dates not provided by DOC, it is assumed that the releases are evenly dispersed throughout both fiscal years and that 10 individuals with the potential for parole between March and June FY 2003 could be expected and the full 25 individuals in FY 2004. The SVP program would be expected to grow from 35 by the end of FY 2004, to 55 by the end of FY 2005, and to 71 by the end of FY 2006.

The constitutionality of the civil commitment of sexually violent predators is based on insuring that such commitment is truly civil in nature and not punitive (Kansas v. Hendricks,

1997). Historically, this has meant maintaining an arm's length relationship between SVP programs and correctional programs. Core elements that differentiate "civil" commitment from punitive confinement are:

- restored civil rights;
- being under the care of a mental health department rather than a correctional department;
- increased safety and privacy; and
- access to legitimate treatment.

With multi-million dollar new construction or renovations (as suggested in the SVP site study referenced earlier) being out of reach due to Virginia's current budgetary issues, there are limited options for locating a program for sexually violent predators. Other than situating a new SVP unit on the grounds of a DMHMRSAS campus, the site study did not assess any existing DMHMRSAS building in detail for potential use as an SVP facility.

Vacated correctional facilities were considered in prior years and eliminated early on as being too cost prohibitive, even by the recent SVP site study. Nevertheless, DOC reexamined the costs of converting Nottoway Work Center and Southampton Women's Diversion Center to house the SVP program for this bill. The Nottoway Work Center consists of two large open dormitories, each housing 50 double bunks, with adjacent bathrooms and showers, a dining area, and a small multi-purpose room. Nottoway can be converted to a 40-room design, including an added program building for \$7.5 million. Nottoway could also be converted to a 20-room design with cell space in one dormitory and program space in the second dormitory for \$3.3 million. Southampton Women's Diversion Center, a 50-bed open bay facility, can be converted to a 15-room design, requiring a building addition and a new program building for \$5.6 million. Considering the census needs and timing required, neither of these facilities with modifications, could house the SVP program once fully implemented.

In light of the Supreme Court's decision in *Seling v. Young* (2001) where the lack of privacy is mentioned, the Office of the Attorney General (OAG) has advised the use of separate rooms and bathrooms for this population, to avoid the potential for a court challenge over clients' privacy and safety concerns.

To improve safety, privacy, and access to treatment, nearly every other state houses their SVP population in single rooms and mandates the single use of bathrooms. Kansas used an existing penitentiary setting that was a correctional forensic hospital with single rooms. Washington housed their facility in a former federal penitentiary that has single rooms. Wisconsin began their program in a DOC forensic unit with single rooms but since has built a new facility. Minnesota built its facility consisting of 30-man pods with single rooms. California's program is housed in an existing forensic mental health hospital containing single rooms. Florida converted the open bay dorms of a prison to three and four-person cubicles, in addition to utilizing single-person cells in two other buildings.

Wherever the facility is ultimately located, the projected staffing and operating costs for FY 2004 will be \$3,340,114, including security. Of this amount, \$2,965,195 is associated with personal services, including treatment staff (therapy, psychiatry, etc.), facility administration and support services, and security. Operating costs related to non-personal services total \$374,919. These figures represent twelve months of facility operation. All costs were calculated using a ramp-up over the fiscal year as civil commitments occur, with 70 MEL

required by the end of FY 2004. Another \$300,000 will be required for two licensed psychiatrists or psychologists skilled in SVP diagnoses to perform the mental health examinations that are part of the Commitment Review Committee assessments of the eligible offenders identified by the DOC Director.

The Office of the Attorney General will require \$75,800 and one additional attorney position (Assistant AG II) to review cases, file petitions to civilly commit defendants, and prosecute cases. The OAG will monitor workload during FY 2004 to determine if additional resources will be required in FY 2005.

9. Specific agency or political subdivisions affected: Department of Mental Health, Mental Retardation and Substance Abuse Services, Department of Corrections, Office of the Attorney General.

10. Technical amendment necessary: No.

11. Other comments: The General Assembly provided what are likely to be insufficient resources for this program with \$500,823 in FY 2003 and \$1,028,292 in FY 2004. For treatment of sexually violent predators by DMHMRSAS, \$200,000 is funded in FY 2003 and \$300,000 in FY 2004. The funding within DOC of \$300,823 in FY 2003 and \$428,292 in FY 2004 includes perimeter security and direct resident costs (food and medical care). In FY 2003, \$200,000 of this amount is to be used for perimeter security enhancements to an existing DOC facility to house the residents. Funding for the resources required in the OAG is included in a partial restoration of the 15 percent budget reduction in FY 2004.

This bill is a companion to SB 1149.

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cc: Secretary of Health and Human Resources
Secretary of Public Safety