

August 2001

## **MENTAL ILLNESS AND CHEMICAL DEPENDENCY COMMITMENT PROCEDURES AND MANDATORY MINIMUM DRUG SENTENCING LAWS - BACKGROUND MEMORANDUM**

Senate Concurrent Resolution No. 4018 (attached as an appendix) directs the Legislative Council to study the commitment procedures contained in North Dakota Century Code (NDCC) Chapter 25-03.1 and the commitment laws from other states to determine if North Dakota law sufficiently addresses the treatment needs of controlled substance abusers in this state, to study the mandatory minimum sentence requirements of NDCC Chapter 19-03.1 and the mandatory minimum sentencing laws from other states and the federal government relating to drug offenses, and to study the need for legislation to assist in the cooperative efforts of state, local, and federal agencies to combat unlawful drug use and abuse in this state.

### **BACKGROUND**

#### **Mental Illness and Chemical Dependency**

The majority of North Dakota's initial laws concerning the voluntary, involuntary, and emergency commitment of individuals with mental illness and chemical dependency were enacted in 1957 and were not substantially changed until 1977. In 1977 the Legislative Assembly enacted Senate Bill No. 2164, the bill that created NDCC Chapter 25-03.1. The bill established many of the commitment procedures for the individuals with mental illness and chemical dependency which are currently in effect. The bill was precipitated by a number of state and federal court decisions that had invalidated state commitment laws similar to North Dakota's law.

A number of the commitment procedures contained in NDCC Chapter 25-03.1 have been amended in the years since the chapter was enacted in 1977. For example, in 1989 Senate Bill No. 2389 replaced the terms "alcoholic individual" and "drug addict" with "chemically dependent person"; the bill set forth more specific procedures for the application for involuntary treatment; and the bill permitted the parties to waive the preliminary hearing. In 1993 Senate Bill No. 2370 authorized the state's attorney to seek reimbursement of funds expended by the county for a respondent who was determined to be indigent but is later found to have funds or property; clarified that a respondent has a right to a preliminary hearing; and set forth a procedure for a respondent to seek the discharge of a petition.

#### **North Dakota Drug Laws**

The Uniform Controlled Substances Act, codified as NDCC Chapter 19-03.1, is the primary law regulating controlled substances in North Dakota. The Act has been adopted in 48 states plus Washington, D.C., Puerto Rico, and the Virgin Islands.

North Dakota Century Code Chapter 19-03.1 was initially passed in 1971 and is administered by the State Board of Pharmacy. Controlled substances or drugs are divided into five schedule classifications under Chapter 19-03.1 ranging from Schedule I containing drugs with a high potential for abuse and no accepted medical use to Schedule V containing the least dangerous of the controlled substances.

#### **Mandatory Minimum Sentences for Drug Offenses**

Mandatory minimum sentencing laws have been among the more popular crime-fighting measures of recent years. Mandatory minimum sentencing laws require that a judge impose a sentence of at least a specified length if certain criteria are met.

Proponents of mandatory minimum sentences argue the sentences' certainty and severity help ensure that incarceration's goals will be achieved. Those goals include punishing the convicted and keeping them from committing more crimes for a period of time as well as deterring others not in prison from committing similar crimes. Critics of the laws, however, argue that mandatory minimums foreclose discretionary judgment when it may most be needed, and these laws result in instances of unjust punishment.

North Dakota Century Code Section 19-03.1-23 provides for mandatory terms of imprisonment for the manufacture, delivery, or possession with intent to manufacture or deliver certain controlled substances. The crime with which an offender may be charged and the length of mandatory imprisonment under this section is dependent upon the classification of the controlled substance and whether the offender has previous convictions for that offense.

North Dakota Century Code Section 19-03.1-23.1 provides for increased penalties for aggravating factors in drug offenses, including the manufacture or distribution of a controlled substance in or on or within 1,000 feet of a school or the delivery of a controlled substance to a minor.

North Dakota Century Code Sections 19-03.1-24 and 19-03.1-25 also provide penalties for other drug-related offenses.

## **COMMITMENT PROCEDURES FOR MENTALLY ILL AND CHEMICALLY DEPENDENT INDIVIDUALS - SUMMARY OF STATUTORY PROVISIONS**

North Dakota Century Code Chapter 25-03.1 provides for commitment procedures for mentally ill and chemically dependent individuals.

### **Voluntary Commitment Procedures**

Section 25-03.1-04 provides that the screening and admission of an individual to a public treatment facility for mental illness or chemical dependency must be performed by the regional human service center in the region in which the individual is physically located. Upon receipt of the request, the regional human service center is to arrange for an evaluation of the individual and, if appropriate, treat the applicant or refer the applicant to the appropriate treatment facility.

### **Involuntary Commitment Procedures**

Section 25-03.1-07 provides that a person may be involuntarily admitted to the State Hospital or another treatment facility only if it is determined the individual requires treatment.

### **Petition for Involuntary Treatment**

Section 25-03.1-08 provides that any adult (the applicant) may present a petition for involuntary treatment of an individual (the respondent) to the state's attorney of the county where the respondent is located or to an attorney retained by the applicant to represent the applicant through the proceedings. The petition must be verified by affidavit of the applicant and must contain assertions that the respondent requires treatment; detailed facts that are the basis of the assertion; and names, telephone numbers, and addresses of witnesses to those facts. To assist in completing the petition, the state's attorney may direct a qualified mental health professional designated by the regional human service center to investigate and evaluate the specific facts alleged by the applicant. The investigation must be completed as promptly as possible and include observations and conversations with the respondent, if possible. The state's attorney or the retained attorney shall file a petition with the clerk of court if the information provided by the applicant or by the investigation provides probable cause to believe that the respondent requires treatment. If the state's attorney determines there is insufficient grounds for filing a petition with the court, the state's attorney may refer the applicant to other community resources.

Section 25-03.1-09 provides that the clerk of court, upon the filing of a petition for involuntary treatment, is to notify the district judge or juvenile court judge. The judge is to review the petition and the accompanying documentation to determine whether it meets

requirements of law and whether it establishes probable cause to believe the respondent requires treatment. If probable cause has not been established, the petition must be dismissed unless an amendment can cure the defect.

If the judge determines probable cause has been established, the respondent or the respondent's nearest relative or guardian must be served with:

1. A copy of the petition and supporting documentation.
2. A notice informing the respondent of procedures required by the law.
3. A notice of the respondent's right to a preliminary and treatment hearing; the right to be present at the hearings; the right to have counsel; the right to an independent evaluation; and if the respondent is indigent, the right to counsel and an independent expert examiner, each at the expense of the county of the respondent's residence.
4. A notice that if an expert examiner is to be appointed, the respondent must be given an opportunity to select that examiner.

### **Court-Ordered Examination**

Section 25-03.1-10 provides that if the petition is not accompanied by a written supportive statement of a psychiatrist, physician, or psychologist who has examined the respondent within the last 45 days, the court is to order the respondent to be examined by an expert examiner of the respondent's choice or one appointed by the court. The county of the respondent's residence is responsible for paying the cost of the court-ordered examination.

Section 25-03.1-11 provides that the respondent must be examined within a reasonable time by an expert examiner as ordered by the court. If the respondent is taken into custody under emergency treatment provisions, the examination must be conducted within 24 hours of custody. The examination report must be filed with the court and must contain:

1. Evaluations of the respondent's physical condition and mental status.
2. A conclusion as to whether the respondent requires treatment.
3. If the report concludes that the respondent requires treatment, a list of available forms of care and treatment which may serve as alternatives to involuntary hospitalization.
4. The signature of the examiner.

If the examiner concludes that the respondent does not require treatment, the court may terminate the proceedings and dismiss the petition. If the examiner concludes that the respondent requires treatment, the court is to set a date for hearing. If the respondent is in custody and is alleged to be suffering from mental illness or a combination of mental illness and chemical

dependency, the preliminary hearing must be within seven days of the date the respondent was taken into custody. If a preliminary hearing is not required, the treatment hearing must be held within seven days of the date the court received the examiner's report, not to exceed 14 days from the time the petition was served.

Section 25-03.1-11.1 provides that, with the consent of the court, the parties may waive the preliminary hearing and conduct the treatment hearing within the time period set for the preliminary hearing.

### **Notice of Hearings**

Section 25-03.1-12 provides that the court is to give notice of a petition and of a time and place of any hearing to the respondent; parents of a respondent who is a minor; the respondent's attorney; the petitioner; the state's attorney; the superintendent or the director of any hospital or treatment facility in which the respondent is hospitalized or is being treated; the spouse of the respondent; any guardian; and other relatives or persons as the court may determine.

### **Right to Counsel**

Section 25-03.1-13 provides that every respondent is entitled to legal counsel. The section also provides procedures for appointing counsel, waiver of the right to counsel, and compensation of counsel for an indigent respondent.

### **Preliminary Hearing**

Section 25-03.1-17 provides that a respondent who is in custody and who is alleged to be mentally ill or to be suffering from a combination of chemical dependency and mental illness is entitled to a preliminary hearing. At the preliminary hearing, the judge is to review the medical report and allow the petitioner and the respondent an opportunity to testify and to present and cross-examine witnesses. The court may receive the testimony of any other interested person. The judge may receive evidence that would otherwise be inadmissible at a treatment hearing. If the court does not find probable cause to believe that the respondent requires treatment, the court is to dismiss the petition.

If the court finds probable cause to believe the respondent requires treatment, the court is to consider less restrictive alternatives to involuntary detention and treatment. The court may then order the respondent to undergo up to 14 days' treatment under a less restrictive alternative or if it finds that alternative treatment is not in the best interest of the respondent or others, the court is to order the respondent detained for up to 14 days for involuntary treatment in a treatment facility.

### **Treatment Hearing**

Section 25-03.1-19 provides that the involuntary treatment hearing, unless waived by the respondent, must be held within 14 days of the preliminary hearing.

If the preliminary hearing is not required, the involuntary treatment hearing must be held within seven days of the date the court received the examiner's report. The hearing must be held in the respondent's county or in the county where the State Hospital or treatment facility treating the respondent is located. At the hearing, evidence in support of the petition must be presented by the state's attorney, private counsel, or counsel designated by the court. The petitioner and the respondent must be afforded an opportunity to testify and to present and cross-examine witnesses. The court may receive the testimony of any other interested person. There is a presumption in favor of the respondent and the burden of proof in support of the petition is upon the petitioner. If, upon completion of the hearing, the court finds the petition has not been sustained by clear and convincing evidence, the court is to deny the petition, terminate the proceeding, and order the respondent to be discharged if the respondent was hospitalized before the hearing.

Section 25-03.1-20 provides that if the respondent is found at the involuntary treatment hearing to require treatment, the court may:

1. Order the individual to undergo a program of treatment other than hospitalization;
2. Order the individual hospitalized in a public institution; or
3. Order the individual hospitalized in any other private hospital if the attending physician agrees.

### **Alternatives to Hospitalization**

Section 25-03.1-21 provides for alternatives to hospitalization. Before making its decision in an involuntary treatment hearing, the court is to review a report assessing the availability and appropriateness of treatment programs other than hospitalization for the respondent which has been prepared and submitted by the State Hospital or treatment facility. If the court finds that a treatment program other than hospitalization is adequate to meet the respondent's treatment needs and is sufficient to prevent harm or injuries that the respondent may inflict upon oneself or others, the court is to order the respondent to receive whatever treatment other than hospitalization is appropriate for a period of 90 days.

Section 25-03.1-22 provides that an initial order for involuntary treatment may not exceed 90 days.

### **Emergency Commitment Procedures**

Section 25-03.1-25 provides that when a peace officer, physician, psychiatrist, psychologist, or mental health professional has reasonable cause to believe that an individual requires treatment and there exists a serious risk of harm to that person, other person, or property of an immediate nature that considerations of safety do not allow preliminary intervention by a judge,

the peace officer, physician, psychiatrist, psychologist, or mental health professional may cause the person to be taken into custody and detained at a treatment facility, which includes any hospital, including the State Hospital, and any public or private treatment facility.

If a petitioner seeking the involuntary treatment of a respondent requests that the respondent be taken into immediate custody and the judge, upon reviewing the petition and accompanying documentation finds probable cause to believe that the respondent requires treatment and there exists a serious risk of harm to the respondent, other person, or property if allowed to remain at liberty, a judge may enter a written order directing that the respondent be taken into immediate custody and detained until the preliminary or treatment hearing.

### **Transportation Expenses**

Section 25-03.1-39 provides that whenever an individual is about to be involuntarily hospitalized, an official or person designated by the court is to arrange for the individual's transportation to the treatment facility with suitable medical or nursing attendants and by such means as may be suitable for the person's medical condition. Whenever practicable, the individual is not to be transferred by police officers or in police vehicles. If the individual is unable to pay for expenses of transportation and friends or relatives do not oblige themselves to pay the expense, the court may direct that the expenses are to be paid by the individual's county of residence.

## **PREVIOUS STUDIES**

### **1973-74 Interim**

The Legislative Council's 1973-74 interim Judiciary "A" Committee, in its study of the state's Criminal Code, was concerned about the workability and constitutionality of the state's mental health commitment procedures. Because of its workload, the committee was unable to pursue the subject directly; however, the committee did recommend a study resolution, subsequently passed by the 1975 Legislative Assembly, directing a study of mental health commitment procedures. The 1975 Legislative Assembly considered a measure, House Bill No. 1605, proposing a major overhaul of the state's mental health commitment procedures. The legislative history indicates that because of the size and complexity of the bill and the short amount of time available to consider the bill, House Bill No. 1605 was defeated and a study resolution was passed.

### **1975-76 Interim**

During the 1975-76 interim, the Legislative Council's State and Federal Government Committee, pursuant to House Concurrent Resolution No. 3002, studied the

state's mental health commitment procedures. The committee received testimony from individuals working with and in the state's mental health system. The testimony highlighted different aspects and shortcomings of the present laws, which led the committee to the conclusion that the system needed a major overhaul rather than a few changes here and there. The committee recommended two mutually exclusive bills. The first bill, 1977 Senate Bill No. 2070, created a new commitment procedure and, in the process, abolished county mental health boards. The second bill, 1977 Senate Bill No. 2069, allowed for the formation of multi-county mental health boards. Both bills recommended by the interim committee failed to pass the Senate; however, Senate Bill No. 2164, which contained many of the same provisions as Senate Bill No. 2070, passed. Senate Bill No. 2164 established procedures for the voluntary, involuntary, and emergency commitment of individuals with serious mental disorders, alcoholism, and drug addiction.

### **1977-78 Interim**

During the 1977-78 interim, the Legislative Council's Committee on Criminal Justice System was directed to study the Uniform Controlled Substances Act and drug laws in general, the potential penalties that may be imposed for violation of the drug laws, and the actual sentencing procedures and practices followed in North Dakota to determine whether the state's drug laws and sentencing procedures required revision in order to combat the increasing drug problem. The committee recommended House Bill No. 1048, which provided for the establishment of a drug enforcement unit under the Attorney General to enforce all drug laws. The committee also recommended House Bill No. 1049, which allowed a state, county, or city law enforcement agency to seize a conveyance used for transporting drugs and allowed the conveyance to be forfeited and sold with proceeds remaining after forfeiture expense to go to the appropriate state, county, or city general fund. Both bills were passed by the 1979 Legislative Assembly.

### **1987-88 Interim**

During the 1987-88 interim, the Legislative Council's Budget Committee on Human Services Committee, as part of its study of the role and function of the State Hospital in the provision of services to the mentally ill and chemically dependent, reviewed the law that provided for a 72-hour emergency detention before a preliminary hearing for persons who are believed to be suffering from mental illness, alcoholism, or drug addiction. The law provided that detention was to be in a treatment facility and not in a jail unless no other secure facility was available. The committee expressed concerns regarding the holding of persons in jail facilities before their commitment hearings. The

committee received testimony that jail facility operators were being trained and provided information on the handling of mentally ill individuals. The committee made no recommendations regarding this issue. A bill passed during the 1989 legislative session which amended North Dakota Century Code Section 25-03.1-25 increased the maximum time period for detention before a preliminary hearing from 72 hours to 7 days.

### **1993-94 Interim**

During the 1993-94 interim, the Legislative Council's Legislative Audit and Fiscal Review Committee received a report from the State Auditor's office on the cost of 1993 House Bill No. 1062 regarding mandatory sentencing for drug offenders. The review indicated that based on the fiscal year 1994 cost per day to house an inmate of \$51.68 and the average projected inmate increase of 1,195 days per year, the cost to taxpayers was approximately \$61,700 per year.

### **1991-98 Interims**

During the 1991-92, 1993-94, 1995-96, and 1997-98 interims, the Legislative Council's Budget Committee on Government Services monitored the continued development of a continuum of services to the mentally ill and chemically dependent. The committee also studied the change in the role of the State Hospital and the expansion of community services. The committee reviewed programs and enhancements to existing programs identified by each regional human service center which may be needed to provide a comprehensive system of services to seriously mentally ill and chemically dependent individuals in need of services in each region.

The 1991-92 Budget Committee on Government Services expressed its support for a proposed program that enabled individuals with the dual diagnosis of severe mental illness and chemical dependency to live in individual apartments while services are being provided to them at the regional human service center. The committee also expressed its support for proposed meetings between the Department of Human Services and private alcohol and drug abuse treatment providers to develop and organize a partnership for providing treatment services in the state.

The 1993-94 Budget Committee on Government Services recommended the Legislative Assembly continue the clubhouse projects at Minot and Grand Forks for sufficient time to allow for a fair test of the adequate implementation of the clubhouse model in North Dakota and provide proper and adequate funding for the clubhouse projects and psychosocial rehabilitation center.

The 1995-96 Budget Committee on Government Services reviewed services and programs of psychosocial rehabilitation centers and clubhouse projects. The

committee also reviewed the mental health and chemical dependency commitment procedures but did not make any recommendations regarding changes to the procedures.

The 1997-98 Budget Committee on Government Services reviewed the funding and operations of the State Hospital and the impact of welfare reform on mental health services. The committee also received recommendations regarding the expansion of clubhouse projects and a plan for the downsizing of the number of patients at the State Hospital. The committee did not make any recommendations as a result of its monitoring of mental health services during that interim.

### **1999-2000 Interim**

During the 1999-2000 interim, the Legislative Council's Criminal Justice Committee, pursuant to Senate Concurrent Resolution No. 4048, studied the sexual offender commitment treatment and laws. The committee received testimony regarding the need for some amendments to the state's civil commitment of sexually dangerous individuals statutes contained in NDCC Chapter 25-03.3. The testimony indicated that as a result of the civil commitments that have been made in the state, a number of areas have been discovered in which adjustments could be made to the statutes. The committee recommended Senate Bill No. 2034 to provide for changes to the statutes contained in Chapter 25-03.3.

## **2001 LEGISLATION**

Several bills relating to drug offenses, mandatory minimum sentences for drug offenses, and civil commitment were passed by the 2001 Legislative Assembly.

### **Drug Offenses and Sentencing**

**House Bill No. 1364** removed mandatory imprisonment for first-time drug offenses.

**Senate Bill No. 2444** moved the crime for the inhalation of vapors of a volatile chemical and crimes relating to drug paraphernalia from Title 12 to Title 19. The bill added as drug paraphernalia ingredients or components to be used or intended or designed to be used in making drugs whether or not otherwise lawfully obtained, including anhydrous ammonia, nonprescription medications, or lawfully dispensed controlled substances; added as a relevant factor for a court to consider in determining whether an object is drug paraphernalia, the actual or constructive possession of written instructions, directions, or recipes used to make a drug; required the person who violates a drug paraphernalia law to undergo a drug addiction evaluation; required the evaluation to be submitted to the court when imposing punishment for a felony violation

and allows submission for a misdemeanor violation; required a certified copy of an analytical report signed by the State Toxicologist to be accepted as prima facie evidence in an imitation controlled substance case; provided that the state is not required to prove that a conspirator knew the other person to the agreement intended to deliver or possess with the intent to deliver a controlled substance, an imitation controlled substance, or drug paraphernalia to a third person; and clarified the requirements for the sentencing of dangerous special offenders.

**House Bill No. 1367** broadened aggravating factors that result in a one-level increase in the classification of offenses for drug offenses; broadened the aggravating factor of delivering a controlled substance to a minor by lowering the minimum age required of the defendant from age 18 to age 16; lowered the amount of heroin and cocaine needed to be involved in an offense to be an aggravating factor from 100 grams of heroin and 500 grams of cocaine to 50 grams; and expanded the definition of the amount of LSD needed to be involved in an offense to be an aggravating factor from 1 gram to 1 gram, 100 dosage units, or one-half liquid ounce. The bill created 50 grams of methamphetamine; 10 grams, 100 dosage units, or one-half liquid ounce of ecstasy; 100 dosage units or one-half liquid ounce of GHB; 100 dosage units or one-half liquid ounce of flunitrazepam (Rohypnol); and 500 grams of marijuana as aggravating factors.

### **Civil Commitment of Sexual Predators**

**Senate Bill No. 2034** removed the exclusion of individuals with mental retardation from the statute; extended the time period for experts to complete evaluations from 30 days to 60 days; codified the procedures to be used by the Penitentiary for referring inmates scheduled for discharge; clarified what portion of commitment proceedings are open; provided for procedural due process safeguards for individuals with mental retardation; provided rulemaking authority for the Department of Human Services; and provided for individual rights for committed individuals.

### **SUGGESTED STUDY APPROACH**

The committee, in its study of the commitment procedures for individuals with chemical dependency and mandatory minimum sentencing laws for drug offenses, may wish to approach this study as follows:

- Receive testimony from representatives of the Department of Human Services and the State Hospital regarding the voluntary, involuntary, and emergency commitment procedures and the changes in clinical practices and service delivery systems for individuals with chemical dependency and whether the current commitment procedures are compatible with those changes.
- Receive information regarding the commitment laws from other states.
- Receive testimony from the State's Attorney's Association, the judiciary, and mental health professionals regarding issues and concerns of each in civil commitment proceedings.
- Receive testimony from the Attorney General's office regarding the adequacy of commitment laws to deal with chemical addiction problems, the effectiveness of the mandatory sentencing laws for drug offenses in North Dakota and other states, and whether amendments to North Dakota laws would assist in combating illegal drug trafficking and usage in the state.
- Receive information from the Department of Corrections and Rehabilitation on issues and concerns related to chemical dependency in the area of corrections and the impact of mandatory minimum sentences for drug offenses on the prison population.
- Receive information from state, local, and federal agencies regarding the need for legislation to assist in cooperative efforts to combat unlawful drug use and abuse in the state.
- Develop recommendations and prepare legislation necessary to implement the recommendations.

ATTACH:1