DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–3970/P1dn
JEO:cmh:km

December 21, 1999

This is a preliminary draft for your review. Please note the following when reviewing the draft:

1. There are a number of four star notes (****NOTE) in the draft that briefly explain specific provisions in the draft or raise issues or ask questions about specific provisions in the draft. Some of the notes refer to "the information provided with the drafting request"; by that reference I mean the six–page document that you provided to me and that lists the major topics to be covered by the policies (such as use of restraints, forced psychotropic medication, receipt of mail and packages) and provides some details about how the topics might be addressed in the policies.

2. For the most part this draft contains very general grants of authority to DHFS. I went back and forth quite a bit on the level of detail in the draft, but ultimately opted to make only a few specific statements, all of which serve to limit or impose a minimum standard on the policies to be established. See proposed s. 980.066 (3), (4) and (7). I included these specific statements both because they relate to possible legal issues raised by the draft (see item # 5, below) and because the information provided with the drafting request also contained more specific limits or standards on these topics.

Note that the language in the draft could be made either more general or more specific. For instance, the draft could simply require DHFS to establish policies relating to treatment and conduct and say little more than that. One drawback to this approach is that DHFS will be unable to point to a more specific legislative grant of authority to adopt a particular policy in the event the policy is challenged. On the other hand, the draft could create a sort of counterpart to s. 51.61, stats., in ch. 980 that contains a similar level of detail. One drawback to more specificity is that the statute may establish a higher standard than might otherwise be required under the constitution. Thus, while reviewing this draft you should consider whether there are details that should be deleted or added to proposed s. 980.066.

3. The information provided with the drafting request indicated that the policies may allow the facility director to limit a person's access to his or her own treatment and medical records. Current law already provides authority for limiting access to treatment records; see s. 51.30 (4) (d) 1., stats. Are these limitations expansive enough for your purposes, or should the statute give more authority to facility directors with respect to treatment records of persons committed under ch. 980? Also, this draft does not affect s. 146.83 (1), stats., because the patient health care records covered by that section do not include records subject to s. 51.30, stats. See s. 146.81 (4), stats. Okay?

4. The draft creates a new subdivision (proposed s. 51.30 (4) (b) 25.) allowing release of treatment records without informed consent to a law enforcement agency investigating a criminal offense. The language does not specifically refer to "unsolved" crimes (because that might not cover crimes in which a codefendant has been charged or convicted) or to allowing release to provide "closure" for the victim or the victim's family (because that seems to be covered by the reference to investigation of the crime, given that "closure" implies that the crime is still under investigation). Also, because proposed s. 51.30 (4) (b) 25. could involve information otherwise privileged under s. 905.04, stats., and because that privilege would control (see s. 51.30 (6), stats.), the draft also creates a new exception in s. 905.04 (4), stats. Okay?

5. As we discussed briefly at our initial meeting, this draft may raise some constitutional law issues, so before completing the draft I took time to do some research into those issues. The law is still relatively unsettled on some of the issues, so it is impossible to say how they might play out. However, it seems unlikely that proposed s. 980.066 would be found unconstitutional on its face, and that most challenges will be to how the statute is being applied or implemented. Here's a synopsis of the issues:

a) The equal protection guarantee is implicated by providing that a person committed under ch. 980 is not subject to s. 51.61, stats., but to different (and maybe fewer) rights as determined by DHFS policies. If the difference between s. 51.61, stats., and DHFS policies involves a fundamental right, a court will likely require the difference to be necessary to further a compelling state interest; but if the difference does not involve a fundamental right, there need only be some rational relationship between the difference and a legitimate governmental purpose.

Chapter 980 has already been found to serve the state's compelling interest in protecting the public from "distinctively dangerous" sexually violent persons. *State v. Post*, 197 Wis. 2d 279, 321 (1995). This finding should mean that a facial challenge to proposed s. 980.066 would not succeed. In addition, it means that any differences concerning fundamental rights should survive scrutiny as long as they are relevant to and further that compelling interest, while other differences will survive if they are rationally related to that compelling interest or some other legitimate state interest (such as treating the mentally disordered). Needless to say, whether an equal protection challenge succeeds will ultimately depend on the specific differences and the reasons for them.

b) It seems clear that, as a general rule, a person has a right to refuse unwanted treatment. While the protections afforded by this right and how it can be overcome are not all that well settled, the right may be made to yield to the government's interests. When it must do so depends on the treatment involved and on the government's interests, which in turn may depend on the setting in which the treatment is being imposed (for instance, in a mental health institution versus a prison).

In the case of a person committed under ch. 980, it appears that the right to refuse treatment such as psychotherapy, behavior therapy or other therapies that do not involve some sort of bodily intrusion can be overridden by various state police power interests, such as protecting institution staff and others in the institution and, more generally, providing care and treatment to those with mental disorders that predispose

them to sexual violence. *Cf. Post*, 197 Wis. 2d at 302. More intrusive treatments may require more compelling state interests and more justification of medical appropriateness, but I think that the draft minimizes the constitutional issues that might arise with these treatments because proposed s. 980.066 (3) requires consent for the more drastic treatments or, with respect to psychotropic medication, an emergency or a court order.

c) As you know, creating a "levels" or "tier" system will mean that a person who is given a particular status and with it certain rights and privileges will be due some minimal procedural protections before his or her status can be reduced or his or her rights and privileges restricted or denied. This draft requires that DHFS establish a grievance system but provides no specifics as to the workings of the system. Thus, procedural due process challenges will turn entirely on the grievance system ultimately established.

d) At our meeting we briefly discussed the issue of the "least restrictive alternative" requirement. As you know, 1999 Wisconsin Act 9 eliminated the statutory "least restrictive alternative" requirement for persons committed to institutional care. Also, the Kansas law upheld by the U.S. Supreme Court has no explicit "least restrictive alternative" requirement. *Kansas v. Hendricks*, __ U.S. __, 117 S. Ct. 2072, 2094–95 (1997) (Breyer, J., dissenting) (suggesting that lack of requirement shows legislative intent to punish for purposes of *ex post facto* analysis).

However, as between types of treatment, it appears that a person may be entitled to have treatment alternatives not involving bodily invasion imposed before those that do involve bodily invasion (including psychotropic medication), as the latter probably implicate the right to bodily integrity. I think that the draft is consistent with this entitlement because of the provisions of proposed s. 980.066 (3) that require consent for drastic treatments and a court order or an emergency for forced psychotropic medication.

e) Finally, there are two other issues that may arise, depending on the actual content and operation of the policies created under proposed s. 980.066. First, because a person committed under ch. 980 can't be punished, deprivations of privileges will have to be justified as being at least rationally related to some other legitimate governmental purpose, such as the person's own treatment needs, institutional security or the safety of others. Also, because a person involuntarily committed for treatment has a right to certain basic human necessities, such as adequate food, shelter, clothing, sanitation and medical care, deprivations of privileges generally cannot have the effect of denying those basic necessities (though courts have upheld denial of these necessities in some cases where the denial was minimal or limited in time and scope and justified by some other legitimate interest).

Please let me know if you have any questions or changes.

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