

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3351/1dn
CMH:jld:jf

January 14, 2004

Dave and Jessica:

This bill could raise an equal protection issue. The Equal Protection Clause requires similar treatment for similarly situated individuals unless reasonable and practical grounds exist for a distinction. *State of Wisconsin v. Hezzie R.*, 219 Wis. 2d 849, 580 N.W.2d 660 (1998). The court has found that persons who are committed under ch. 980 are similarly situated to persons who are committed under ch. 51. *State v. Post*, 197 Wis. 2d 279, 541 N.W.2d 115 (1995).

The term “substantially probable” was adopted in ch. 980 to provide consistency with ch. 51 (see Drafter’s Note to 1994 AB-3). In ch. 51, the term is used in a manner similar to its use in ch. 980 — to describe the degree to which a person is likely to harm others before he or she is found to be dangerous. The court has interpreted the term as “much more likely than not” in both chs. 51 and 980. *State v. Curiel*, 227 Wis. 2d 389, 597 N.W.2d 697 (1999). In *Curiel*, the equal protection challenge failed because the plaintiff did not demonstrate that persons committed under ch. 51 are treated differently than persons committed under ch. 980. This bill, however, changes the term to mean “more likely than not” in only ch. 980 so a party could demonstrate that persons committed under ch. 51 are treated differently than persons committed under ch. 980. Therefore, without reasonable and practical grounds for the distinction, a court could find that this definition change violates the Equal Protection Clause.

The court, however, may find reasonable and practical grounds for the distinction. The court has upheld provisions that did not afford persons committed under ch. 980 the same privacy and confidentiality as individuals committed under ch. 51 because the legislature determined that persons predisposed to sexual violence pose a higher level of danger and require different treatment than do other classes of mentally ill or mentally disabled persons, justifying distinct legislative approaches. *State v. Burgess*, 2003 WI 71, 262 Wis. 2d 354, 665 N.W.2d 124. Likewise, the court may find that the differences in commitment standards that this bill creates does not deny equal protection of the law to persons committed under ch. 980 due to their level of danger and unique treatment needs. In any case, I wanted you to be aware of the issue.

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