

Draft SAS (“Department of State’s Attorneys and Sheriffs”) Comments

In Response to Draft(s) of S.89 (2023)

Fall 2023

- **General Comments.** Draft comments are submitted in the interest of providing perspective¹ and feedback to the Act 27 working group. Comments are submitted in response to language presented in drafts of S.89.
 - In reviewing draft language, SAS prosecutors noted that details concerning how the new regime would be structured, and operate in practice, were difficult to understand. If the Legislature is to set forth a new process it is essential to clearly detail each step to avoid ambiguity and lack of clarity.
 - In addition to the interests of the accused it is essential to highlight and include, in every step of the process, the interests of public safety and the voices of victims of crime.
 - Prosecutors generally agree that a defendant who has been charged with a crime that qualifies for hold without bail should be eligible for placement at a forensic facility. This scope of potential eligibility may be too narrow to account for the full range of circumstances that could benefit from potential placement.
 - Many prosecutors believe that, on a case-by-case basis, certain circumstances that may not qualify for a hold without bail should also be eligible for placement. Prosecutors also emphasized the importance of highlighting repeat offenders where there is an ongoing issue risk to community or victim safety. Prosecutors broadly agree that crimes involving victims should weigh heavily in the analysis concerning eligibility. While those who qualify for a hold without bail may be an appropriate starting point for discussion, it is possible that other circumstances and offense-categories, on a case-by-case basis, may be appropriate.
 - Prosecutors expressed concern that the draft statute appears to continue the existing model wherein DAIL and DMH are the final arbiters of placement and maintains the existing diagnostic silos that artificially limit access to security and treatment for justice-involved persons and the community. The process concerning a forensic facility should be specific to persons who are justice-involved and should be substantively distinct from the process that occurs in the family division.
 - Prosecutors and victims of crime are interested parties in cases involving justice-involved persons – as such prosecutors and victims should receive information about the placement and status of defendants. Prosecutors have noted concern that opaque proceedings in family division, for justice-involved persons, will not serve the interests of victims and public safety.
 - Because the forensic facility is intended to apply only for justice-involved persons, commitment and discharge proceedings should be in public in the

¹ *Comments are submitted in draft form to advance the discussion but may not reflect or summarize the opinion of all SAS staff.*

criminal division.² Information about the commitment should be provided to parties that have an interest (State's Attorneys and victims, etc.). In addition, because forensic facility eligibility will involve justice-involved persons the Court, not DMH/DAIL, should make the decisions concerning placement by clearly articulated standards – not yet accounted for in drafts of S.89.

- **2023 SAS Legislative Testimony.** In relevant part, with *some noted changes that deviate from SAS 2023 testimony*,³ the process should include the following elements:
- Notwithstanding any other provision of law to the contrary, any party to a commitment hearing under Section 4820 of this title concerning a defendant charged with a felony who has been held without bail under section 7553 or section 7553a of this title, or who is otherwise deemed eligible, may argue for commitment at a forensic facility. The Court may so order if it finds that:
 - (a) The defendant is in need of commitment as set forth above;
 - (b) the defendant is not in need of inpatient hospitalization;
 - (c) commitment to a forensic facility is the least restrictive placement consistent with both the Defendant's
 - 1. treatment needs, and
 - 2. the need for public safety.
 - Any such order shall be treated as an exception to the court's mittimus. The mittimus so excepted shall remain in force pending placement at the facility and after the defendant is discharged therefrom.
 - (d) notwithstanding subsection (b) above, the Court may issue an order for commitment to the forensic facility which takes effect upon the defendant's discharge from the inpatient hospitalization.
 - SAS-suggested changes concern serious cases and contemplate a seven-factor test to consider when placing a person at the forensic facility on the basis of their needs as well as those of public safety. This proposal would allow a judge to place only people:
 - 1-who have committed a serious crime (including those held without bail / life sentences and violent felonies);
 - 2-who were adjudicated not competent or not sane;
 - 3-who do not require inpatient care;
 - 4-whose treatment needs can be met properly in the facility;
 - 5-for whom public safety requires they be held;
 - 6-who a judge ordered to the facility;

² Perhaps with carve-outs for certain situations.

³ Please see, linked below, 2023 SAS legislative testimony for information that could assist in improving the process contemplated in drafts of S.89: [S.89: Testimony from the State's Attorney Office](#); and [S.89: Proposed Amendment from State's Attorneys Office](#).

- and, 7-for whom this option is the least restrictive placement consistent with needs and public safety.
- The process suggested above aims to address an exceedingly small but exceedingly challenging population of cases.
- **Comments pertaining to language presented in drafts of S.89.**
 - The phrase “for which bail is not available” is vague. Bail is theoretically available for all crimes.
 - Question: Does the draft aim to include those who are, in fact, held without bail under Section 7553 or 7553a, or those who qualify?⁴ As noted above, although SAS understands the practical reasons for limitation, we would note that it may be too narrowly focused and would only make beds in the forensic facility available to people held without bail or qualifying for a hold without bail under sections 7553 or 7553a.
 - As noted above, there are sections of drafts of S.89 where prosecutors should be represented as well as victims.
 - Labelling an order for commitment to a forensic facility as an Order of Non-hospitalization (“ONH”) is confusing. The order should be entitled, something to the effect of a: “*Forensic Facility Commitment Order.*” It is vital to note that a forensic order is not an ONH: a clearly articulated court-driven process is better situated to address justice-involved persons who may be eligible.
 - We believe that the Court, not DMH/DAIL, should be making decisions concerning placement and discharge.
 - As to references to 90 days: 90 days for an initial commitment is not an appropriate period. Initial commitment should be for up to a year, with required and optional review provisions built into the law. This is consistent with our Supreme Court’s previous holdings on the requirements of due process.
 - As noted above, commitment and discharge should be controlled by the Courts. Absent in draft-language in S.89 is the standard that would control the discharge hearing. Historically, discharge hearings as allowed by chapter 157 of Title 13 have failed to address concerns because DMH maintained exclusive authority to discharge. Standards for commitment to and discharge from a Forensic Facility should be set by the Court, not DMH/DAIL.
 - Proceedings should be public proceedings in the Criminal Division of the Vermont Superior Court.⁵

⁴ As referenced in the proposed revision to 13 VSA Sec. 4821(b)(2).

⁵ Perhaps with limited carve-outs for certain exceptional situations.

- Questions: Is the plan to get rid of Act 248 as it currently exists, and to replace it with the forensic facility commitment model? Where is this process going to be litigated? Who will be handling the litigation? To what extent will prosecutors be involved? To what extent will the interests of victims and public safety be considered? Is protection of the public now going to be addressed by DMH/DAIL?
- Some prosecutors have noted that it would be important to separate the procedure in Title 13 for evaluation/hearing/discharge, rather than jumping back and forth between Title 13 and Title 18. The process may be similar, but the Title 18 procedure encompasses a larger population than the criminal court involved MH/IDD populations. Cross referencing creates confusion and attempts to modify Title 18 to better fit the needs of the Title 13 population presents risks of creating a process and procedure that is more complicated (incidentally) for non-criminal Title 18 individuals.
- Some SAS staff noted concern that if the State is not also, and simultaneously, prepared to make significant investments in the entire continuum of care for MH and I/DD clients and persons, then the forensic facility will be helpful but only part of the solution. Myriad evidence suggests that the existing ecosystem of care is insufficient to meet the need and demand. The State should also invest in quality step-down care.
- Discharge: any newly contemplated process, in law, should articulate a clear standard for when a patient can be discharged that reflects the specific circumstances of each case and best practices as to both the care of the justice-involved person and public safety. The hearing could be held within a short-window of time, but with adequate time for parties to effectively prepare, and with relaxed evidentiary standards to reduce the burden on clinicians. DMH/DAIL should be required to show what care the patient has received and show whether or not the care received has achieved improved status. DMH/DAIL should also be required to show that they have worked with the patient on discharge/aftercare planning and should be required to present that plan.