DISABILITIES LAW PROGRAM

COMMUNITY LEGAL AID SOCIETY, INC.

100 W. 10th Street, Suite 801
Wilmington, Delaware 19801
(302) 575-0690 (TTY) (302) 575-0696 Fax (302) 575-0840
www.declasi.org

To: State Council for Persons with Disabilities

From: Disabilities Law Program

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Re: HB 285 & HB 302

Introduction

House Bill 285 and House Bill 302, recently introduced in the Delaware House of Representatives, both propose a system for removing firearms from the possession of people with mental illness. While there certainly may be circumstances when such relinquishment is appropriate, both bills are constructed in such a way as to over-include individuals with mental illness while leaving out other individuals who may pose a risk of violence, and lack clarity in essential areas.

HB 285

HB 285 was introduced on December 14, 2017. While the bill includes related clarifications and revisions of other existing statutes, including the definition of a person prohibited from possessing a firearm and the structure and operations of the Relief from Disabilities Board, most notably the bill creates a procedure for the confiscation of weapons and ammunition from individuals with mental illness.

The bill revises § 5402 of Title 16, which details the duty of mental health services providers to take precautions against threatened violence, to make clear that the law applies to "mental health services provider[s], institution[s] agenc[ies] or hospital[s]." The bill proposes to expand the circumstances in which a provider may disclose patient information to law enforcement to include if they conclude that the individual "is dangerous to self or others" as defined by 16 Del C. § 5001, the civil commitment statute. It is not clear that they would be required to report in these circumstances, only that no cause of action would be available against them for the disclosure.

Any person who is reported to a law enforcement agency by a licensed mental health professional, hospital, institution, or agency as "suffering from a mental illness or disorder to the extent that the person allegedly is dangerous to self or dangerous to others as defined in § 5001 of Title 16" shall be investigated by police to determine if they are in possession of guns or ammunition. (Proposed 11 Del. C. §1448C(a)). Although §5402((a)(1) reporting appears to be restricted to explicit, imminent threats of violence, proposed §1448C(a) seems to contemplate the reporting of anyone who meets the commitment standard of 16 Del C. § 5001 without regard to specific threats of violence or even propensity for violence.

The bill does not provide further parameters as to what that investigation may entail once a report has been received. The responding law enforcement agency may determine that weapons should be

relinquished and may remove them, but they shall refer their final report to the Department of Justice. No standard is provided for when weapons should be relinquished to law enforcement on the spot without a warrant or court order.

The DOJ is then tasked with making its own determination, and if it agrees that there is a basis the DOJ may petition the Superior Court for what is referred to as an Order for Relinquishment of Firearms or Ammunition. The DOJ has the burden of proving by clear and convincing evidence that person meets the dangerousness standard (without regard to specific threats of violence or propensity for violence) defined in 16 Del. C. § 5001. The respondent has the right to call witnesses and present evidence in their defense. If Court finds respondent meets the standard, the Court shall issue order for the respondent to relinquish their firearms or ammunition, which would then be reported to the Delaware State Bureau of Investigation. This order would be effective for sixty days, after which the Department would need to re-petition the court to extend the order.

The bill provides for a right to appeal to the Delaware Supreme Court. An individual subject to a relinquishment order or whose weapons were seized by law enforcement without a relinquishment order may also petition the Superior Court to have their firearms returned.

There are a number of troubling aspects to this bill. First, the bill seems to rely on an assumption that all people experiencing mental health crisis are likely to commit acts of violence involving guns. By tying the State's ability to seize a person's firearms to the person meeting the civil commitment standard defined in § 5001 of Title 16, the proposed scheme is not taking into account whether there has been any credible threat of violence or suicide by firearm in an individual case. A person may potentially meet the standard defined in the commitment statute by presenting disorganized and delusional thoughts, neglected hygiene and other self-care, or other emotional symptoms without presenting any threat of violence. In such a case, prioritizing the determination that person should not have access to firearms over ensuring that the person is connected with appropriate treatment or hospitalization seems misguided.

Another problem with conditioning a person's fitness to own a firearm to the definitions provided by the commitment statute is that this bill would potentially subject a person to two concurrent legal proceedings in which a Superior Court judge or commissioner is tasked with deciding the same question: whether the individual meets the standard of dangerous to self or others as defined by the civil commitment statute. This could create confusion if the Court finds different answers in the different matters.

Additionally, HB 285 as written allows law enforcement, presumably without a warrant, to investigate whether an individual has firearms and seize them based on standards that are not defined. In addition to presenting an invasion of the privacy of individuals who may pose no actual threat, such provisions create the potential for conflict between law enforcement officers and individuals with mental illness. If a person with a serious mental illness is experiencing psychosis or decompensation, their symptoms may include paranoid delusions and agitation. Those symptoms are likely to be exacerbated by a law enforcement officer presenting themselves at the person's residence without a warrant asking to look for firearms. This could lead to the individual with mental illness being harmed in an altercation with police or being sent to jail, while they meet the standard for civil commitment and should be taken to a hospital. If this is not the intention of the bill, it should be revised to clarify what measures law

enforcement can take to determine whether the person is in possession of firearms and when a warrant may be required.

Finally, HB 285 modifies the civil commitment statute to extend the duration of emergency detention from 24 hours to 48 hours. This is concerning because increases the amount of time that an individual in psychiatric crisis can be held involuntarily at a facility without any due process.

The synopsis of the bill states: "This Act intends to put Delaware at the forefront of this important issue by not simply looking narrowly for mental illness. Statistically, mental illness has little to do with homicide perpetration but conversely increases the chance of being a victim of violence. This bill looks instead for propensities of violence, a much more reliable and evidence-based metric. This metric will also ensure that we can provide care to those more likely to commit violent acts and help destigmatize mental illness here in Delaware." This stated intent does not match the text of the bill. The bill creates a mechanism that is based primarily on the report of a person's mental illness, and does not use any sort of evidence-based metric to assess the specific risk that an individual will perpetrate gun violence or any sort of violence. The explanation of the process of obtaining a relinquishment order provided in the synopsis is also not entirely consistent with the text of the bill.

HB 302

HB 302 was introduced on January 16, 2018. This bill, proposing a law to be called the "Beau Biden Gun Violence Prevention Act," contains many provisions similar to what is laid out in HB 285.

HB 302 also clarifies the definition of a person prohibited. HB 302 rewrites § 5402 of Title 16 to revise a mental health professional's duty to warn or report. Similar to HB 285, HB 302 clarifies that the statute applies to agencies, institutions, and hospitals, and expands the circumstances in which a provider may disclose patient information to law enforcement to include if they conclude that the individual "is dangerous to self or others" as defined by 16 Del C. § 5001. Again, it is not clear whether they would be required to report in these circumstances, only that no cause of action would be available against them for the disclosure.

Under HB 302's version of the relinquishment procedure, law enforcement shall, upon receiving a report from a mental health professional, investigate "to determine if the individual's firearms and related ammunition should be relinquished." As with HB 285, no clear standard is provided to define when or why firearms "should be" relinquished. There is also no further guidance as to what such investigation should entail and when a warrant may or may not be required. There is a reference in the synopsis to probable cause, but this language is not found in the proposed statutory text.

Law enforcement must then report its findings to the Department of Justice; after reviewing these findings the Department may then petition the Superior Court for an order to relinquish firearms. The Department of Justice must prove by clear and convincing evidence at a hearing that the individual is dangerous to others or self, without regard to specific threats of violence or propensity for violence. In this bill the individual has the "right to notice of a hearing, to be represented by counsel, to present evidence, and to cross-examine witnesses." It is not clear how much notice or whether counsel would be provided by the State if an individual cannot afford to pay a private attorney.

Under HB 302, there is a broader range of what the court can order after a hearing. In addition to the relinquishment of weapons, the order can also direct law enforcement to search for and seize firearms, and can also prohibit the individual subject to the order "from residing with another individual who owns, possesses, or controls firearms or ammunition." In essence, this last provision would mean that if an individual subject to an order had been living with someone who owned a firearm, they would not be able to return to their home so long as a household member has a firearm. In some cases that person may be the respondent's domestic partner, primary caretaker or support person. Per the bill, the household member could not be required to by the Court to dispose of the firearm, so if the household member were unwilling or unable to dispose of the firearm, the individual subject to the order would be required to live elsewhere while the order was in effect. This does not seem practical, particularly in the case of individuals who may not have the financial means to arrange for other living arrangements. Narrower language about the potential accessibility of the weapon owned by a household member might help to address this problem.

HB 302 does not indicate how long such an order would be in effect. As in HB 285, an individual subject to an order of relinquishment may petition the Superior Court for the firearms s to be returned, and any person "aggrieved by a decision of the Superior Court … may appeal to the Supreme Court."

While HB 302 is in some ways less problematic than HB 285, there are still some of the same causes for concern. In relying on the dangerousness standard defined in the commitment statute, as in HB 285, HB 302 is not identifying individuals who may have a higher propensity for violence or pose a clear risk for imminent violent acts. It is identifying anyone with a mental illness whose current condition is sufficiently acute. As discussed above, this could potentially include a range of symptoms and behaviors that are not necessarily indicative of any risk of violence, though providers may still feel the need to report those cases to the police based on the modification to the language of 16 Del. C. § 5402.

Comparable Laws in Other States

In recent years some other states have implemented processes to enable to the state to confiscate weapons from an individual perceived to be a threat to self or others.

Connecticut[1] and Indiana[2] both have processes for law enforcement to obtain what are sometimes referred to as "risk warrants." In both states law enforcement must present a request to the court based on probable cause of an imminent risk of harm, the individual's possession of weapons, and the believed location of those weapons. Risk assessments are not linked to diagnosis or whether a person meets involuntary commitment standards. Upon review of the complaint and any evidence the court can issue a warrant to search for and seize any weapons/ammunition. Within 14 days another hearing must be held where it must be proved by clear and convincing evidence that state should continue to retain the weapons. Indiana's statute does allow for warrantless seizure of a firearm if an officer believes an individual is dangerous, but the law enforcement officer must submit a written statement under oath to the court following the seizure describing the basis for the belief that the individual is dangerous. The court must then decide whether probable cause exists, and the court shall order the firearm to be returned if no

[1] Conn. Gen. Stat. § 29-38c(d), et seq.
[2] Ind. Code Ann. § 35-47-14-2, et seq.

probable cause is found. Again, this procedure is not limited to individuals with mental illness, but anyone that an officer believes to present a substantial risk.

Texas law[3] allows for confiscation of a firearm by a peace officer without a warrant from an individual that the officer is taking into custody based on the belief that the individual has a mental illness and poses a substantial risk of serious harm to self or others. If the individual is being taken into custody, the officer has the responsibility to immediately transport them to the nearest mental health facility. If a firearm is seized in these circumstances, the officer must provide a written receipt for the firearm and written notice of the procedure for seeking return of the firearm. After 30 days of retaining the firearm the law enforcement agency must confirm with the appropriate court whether the person has been civilly committed or released. If the individual has been released, the law enforcement agency is required to verify whether the person may lawfully possess a firearm and provide written notice by certified mail that the firearm may be returned assuming there is no other reason the person would be prohibited from gun ownership. If the individual has been civilly committed, they are considered a person prohibited from owning possessing or purchasing a firearm under federal law. The law enforcement agency in that case would send written notice to the person that they are now considered a person prohibited, with their options for disposing of the firearm and petitioning for relief from firearms disability.

A few states (California,[4] Oregon,[5] and Washington[6]) have created procedures for what are generally referred to as Extreme Risk Protection Orders (California's statute calls them Gun Violence Protection Orders but they are very similar). Under these statutory schemes, all of which became effective in the past few years, a petition can come from a family or household member or a law enforcement agency. An ex parte order may be issued by the court as warranted by the evidence, but a full hearing must take place within a specified amount of time. The court must decide based on multiple risk factors whether a protection order is appropriate.

With the exception of the Texas statute, the decision to confiscate or order relinquishment of a firearm cannot solely be based on a mental illness. While the Texas statute does have a process that specifically applied to individuals with mental illness, it is more limited in its reach and would seem to most likely be applicable in a scenario where the officer were responding to a report of a specific threat or emergency as the officer would be immediately taking an individual into custody and transporting them to the hospital.

The other states that have implemented these laws have a broader definition of a dangerous person for the purposes of determining whether firearms should be taken; they are not limited to individuals with mental illness. Connecticut, California, Oregon and Washington statutes all list various risk factors the court may consider in determining whether a person is dangerous, including prior acts or threats of violence. Connecticut, Oregon, and Washington all include mental illness as one of many factors that may be considered in assessing risk. California's risk factors all relate to specific incidents or threats of violent behavior and do not specifically mention mental illness.

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[3] See Sec. 573.001, Texas Health and Safety Code ; Article 18.191 Texas Code of Criminal Procedure.
[4] CA Penal Code § 18150.
[5] ORS 419B.812, 419B.848 and 419B.851
[6] Rev. Code Wash. 7.94.030(1).

What primarily distinguishes the proposed Delaware legislation is two-fold. First, HB 285 and HB 302 create procedures that are limited to individuals with mental illness as potential perpetrators of gun violence. With the exception of Texas, other state schemes allow for mental illness to be a factor that is considered by the court in assessing risk, but do not base the availability of such an intervention on a person having a mental illness. Texas does have a procedure that solely applies to people believed to have mental illness but it is limited to circumstances in which a peace officer would be responding to taking an individual in mental health crisis into custody to be hospitalized. Second, the proposed law calls broadly for police to investigate an individual and potentially seize weapons prior to the issuance of a court order or petition to the court by the state Department of Justice without any specific threat of violence.

Conclusions

Gun violence is a serious problem in Delaware and in every state in the country. In contrast with the procedures being implemented in states such as Connecticut, Indiana, California, Oregon, and Washington, who have decided to allow state intervention and confiscation of firearms when any person is perceived to meet a requisite level of dangerousness, both HB 285 and HB 302 have created a process that solely applies to people with mental illness, regardless of whether there has been any specific threat of violence or whether the individual is known to possess firearms. It is not clear why this process should not be available in the case of any individual, regardless of their mental health diagnosis, who may pose an imminent risk to self or others and is in the possession of the firearm. Revisions to these bills to be based upon more specific risk factors that may include but are not dependent upon a person's mental illness may be more effective in preventing future violence and not further perpetuate the misconception that individuals with mental illness are more likely than others in the community to engage in gun violence.