

September 26, 2019

Joint Committee on Mental Health, Substance Use and Recovery
Sen. Julian Cyr & Rep. Marjorie Decker

SUPPORT S.1145/H.1700
AN ACT ENSURING ACCESS TO ADDICTION SERVICES

Chairwoman Decker, Chairman Cyr, and members of the Joint Committee on Mental Health, Substance Use and Recovery:

The ACLU of Massachusetts is in strong support of S.1145/H.1700. The current practice of incarcerating civilly committed men raises significant constitutional concerns, violates the Americans with Disabilities Act, has done little to effectively treat people with opioid use disorders, and, in some cases, has made recovery more challenging. The Commonwealth recently ended the practice of sending civilly committed women to DOC and HOC facilities. The legislature can and should do the same for men.

The ACLU has long been concerned about the practice of incarcerating people suffering from addiction who have not been convicted of any crime. There is almost no data on the efficacy of compulsory treatment, and what little data exists shows that these programs are even harmful.¹ Massachusetts has the dubious distinction of being the only state that incarcerates people living with addiction who have not been convicted of crimes. And now, because Massachusetts no longer incarcerates women under Section 35, the state is engaged in gender-based discrimination against men as well.

In June 2014, the ACLU of Massachusetts, Prisoners' Legal Services, and the Center for Public Representation filed a federal class-action suit challenging the imprisonment of Massachusetts women who were civilly committed for addictions to drugs or alcohol. The suit, brought on behalf of women committed solely under Section 35, alleged that their imprisonment violated their rights to due process and discriminated based on disability.

Soon after the ACLU and others filed suit, the legislature and Baker Administration acted to change Section 35 to ensure that civilly committed women would not be sent to correctional facilities. Chapter 8 of the Acts of 2016 repealed the provision of Section 35 that allowed women to be incarcerated solely for treatment. The Commonwealth simultaneously fast-tracked the creation of 73 new inpatient beds, appropriately under the jurisdiction of DPH and DMH, explicitly for women committed under Section 35.

Unfortunately, the 2016 law left men behind. While women no longer suffer the indignity of imprisonment for the "offense" of needing treatment for drug or alcohol addiction, men continue to be sectioned to jail. By incarcerating individuals who have not been convicted of a crime, Section 35

¹ Dan Werb et al., *The Effectiveness of Compulsory Drug Treatment: A Systematic Review*, Int. J. Drug Policy, 2016 (available at <https://www.mass.gov/files/documents/2019/06/28/Werb%20et%20al%20-%20The%20Effectiveness%20of%20Compulsory%20Drug%20Treatment%20%282016%29.pdf>).

commitments violate the substantive due process rights of Massachusetts men suffering from addiction. These men, who are not even accused of criminal conduct, are nevertheless treated as prisoners, not patients. They are shackled and handcuffed during transport, they are subjected to invasive searches, and their communication with family is strictly limited and monitored.²

Much has been made of the HOC facility in Hampden, which is currently home to civilly committed men solely because no treatment beds exist anywhere other than the jail. If the program at Stonybrook is truly effective – and no conclusive data has been presented to support this belief – then the state should consider implementing a similar program at a DPH or DMH facility. But the quality of a jail-based program does not cure the constitutional infirmities of incarcerating someone who has *not even been charged with, let alone convicted of, a crime*. The United States and Massachusetts constitutions are clear: there is one path to prison, and it begins with a criminal charge that triggers multiple procedural and substantive process protections.

In addition to being illegal, Section 35 commitments to DOC or HOC facilities are stigmatizing and counter-therapeutic. Placing civilly committed men in prison or jail, rather than an appropriate treatment facility, is traumatic and incompatible with professional judgment regarding the treatment of people with substance use disorders. It occurs only because of a lack of appropriate treatment beds in community facilities to meet the needs of civilly committed men. Some have presented anecdotes that men who are sectioned are getting good treatment, however the state has only begun to collect and analyze meaningful data on these programs and their outcomes. Meanwhile, the available research from other countries suggests that these programs do not work³ – and indeed, Massachusetts is the only state that does this. The fact that Massachusetts men seem to be the only people in the country who are incarcerated solely for treatment should give this Committee pause.

The Committee should follow the recommendations of the Section 35 Commission, which recommends prohibiting incarceration for civilly-committed men, investing in community-based treatment, and implementing data collection and analysis to promote evidence-based practices. The Commission, to which the ACLU of Massachusetts was appointed, thoroughly studied Section 35 commitments, and produced a comprehensive report. We highlight three recommendations that are particularly relevant to this bill:

1. The Commission members who voted⁴ unanimously recommended (18-0) that the Commonwealth “expand development of low-threshold, treatment on demand models, including harm reduction interventions in community-based settings.” (emphasis added)
2. The Commission members who voted unanimously recommended (18-0) that the Commonwealth collect data “to determine the effectiveness of the current Section 35 process as it relates to relapse, ongoing treatment and recovery within the next two years.”

² Complaint at 13, *Doe v. Mici et al.*, Docket No. 19-08288, filed Mar. 2019.

³ Dan Werb et al., *The Effectiveness of Compulsory Drug Treatment: A Systematic Review*, Int. J. Drug Policy, 2016 (available at <https://www.mass.gov/files/documents/2019/06/28/Werb%20et%20al%20-%20The%20Effectiveness%20of%20Compulsory%20Drug%20Treatment%20%282016%29.pdf>).

⁴ Members of the Executive Branch abstained from voting because of an ongoing lawsuit, *Doe v. Mici et al.*, Docket No. 19-08288, brought on behalf of men who are incarcerated solely because they are civilly committed and in need of treatment for addiction.

3. The Commission members who voted overwhelmingly recommended (13-1) that the Commonwealth should “prohibit civilly-committed men from receiving treatment for addictions at any criminal justice facility, provided that the Commonwealth fund and/or procure vendor or state-operated beds in Western Massachusetts and other parts of the Commonwealth to offset on a one-to-one basis diminished bed capacity resulting from the prohibition on placing individuals in criminal justice settings.”

The Commonwealth, like many other states, is in the midst of an opioid crisis. If the Committee truly believes that this is a public health issue, then the response must be guided by the agencies with the expertise in protecting and promoting health. The General Court has already acknowledged that Section 35 commitments were hurting women and acted swiftly to put alternatives into place. Massachusetts must do the same for men. We urge you to pass S.1145/H.1700 and invest in treatment outside the criminal justice system.