HARRIS S. MATARAZZO
ATTORNEY AT LAW
121 S.W. MORRISON, SUITE 1020
PORTLAND, OREGON 97204-3140

PORTLAND (503) 226-0306
SALEM (503) 588-3114
FAX (503) 226-4290

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JOINT COMMITTEE ON WAYS AND MEANS
HUMAN SEVICES SUBCOMMITTEE
Senator Elizabeth Steiner Hayward, Co-Chair
Representative Dan Rayfield, Co-Chair

RE: Senate Bill 65A

Co-Chairs Senator Steiner Hayward and Representative Rayfield, and Members of the Sub-Committee:

As an attorney who works closely with the mental health community and individuals under the jurisdiction of the Adult Psychiatric Security Review Board (PSRB) and Oregon Health Authority (OHA), I oppose SB 65A. This proposed legislation includes empowering PSRB to create a "Restorative Justice" program, as well as the elimination of Oregon Health Authority (OHA) Hearings for individuals found "Guilty Except for Insanity" of certain criminal matters. In my opinion, the creation of the first, and elimination of the other would be ill-advised.

I have almost thirty years of experience representing individuals before the PSRB, OHA, and Oregon's appellate courts in mental health matters involving criminal law. In addition, since 1994, I have co-authored each version of the Oregon State Bar's Chapter entitled "Mental Illness and Incapacity" in its "Criminal Law" publication, as well as made presentations on the subject at the undergraduate, graduate, and practicing mental health professional levels. Similarly, I am involved in the credentialing process of mental health professionals allowed to evaluate persons alleged to be mentally ill, and facing criminal action. To date, my office has represented more than two-thousand individuals under PSRB/ OHA jurisdiction in many more thousands of hearings.

RESTORATIVE JUSTICE

In April 2015, the PSRB assembled a task force to consider the establishment of a "Restorative Justice" Program for individuals found "Guilty Except for Insanity". The group of about one dozen, included myself, another attorney, mental health professionals, and a parole and probation officer. Initially, I inquired whether PSRB had the authority to establish such a

program. We were told that it did, and that an opinion letter from the Attorney General's Office had been issued. The group was then shown a film about the process, followed by a brief presentation. No support for the effort was voiced by those gathered. A second meeting produced the same result, as did the third. Finally, the task force was asked if someone else would like to lead the review effort. I agreed, and became part of a smaller group. Our charge was to recommend whether or not a "Restorative Justice" program would be appropriate for this population and, if so, whether PSRB should move forward with it as a subset of its authority. Cost was not to be considered.

Because PSRB staff did not have Restorative Justice certification or mediation training, it seemed important that someone in our subgroup obtain it so that we could knowledgeably explore the issue posed to us. At our expense, one of my staff agreed. Through that process, as well as our own investigation, we were unable to discover any comparable "Restorative Justice" models involving individuals successfully using the "Insanity defense". Collateral resources were then explored, including: 1) US Department of Justice Model; 2) United Nations Model; 3) Mental Health Courts, including Oregon (aka Therapeutic Jurisprudence); 4) Established Restorative Justice Programs, including Oregon's DOC; Scholarly reviews; Local and National Providers (OSH Staff, OHSU Staff; Pacific University; Non Profit Providers); and, Concerned Individuals. Through this process, we discovered that, although the possible use and related outcomes are discussed in related literature, the success of "Restorative Justice" in the mental health system is unknown, and is the subject of ongoing discussion and study.

All discovered programs generally require: Participant capacity; Confidentiality; Voluntary participation/ Non coercion of the parties; Participation/ Cooperation must have no impact on the case (sentence or privileges); Appropriate screening of the parties; No harm to any of the parties must result. This would include a relapse of mental health related systems induced by participation in the proceeding.

We also identified several key obstacles which would disqualify PSRB from participating in this process:

> Confidentiality. SB 65A proposes that all "Restorative Justice" records and communications are confidential, and not subject to public records disclosure. By statute, at all PSRB/OHA hearings, victims are allowed to make unsworn Victim Impact Statements in open public hearings. There is no current way to stop a victim from repeating what might be said in a "Restorative Justice" setting. The outcome could be highly prejudicial.
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> PSRB staff would be required to maintain client "Restorative Justice" records and related information away from Board members to ensure that this data not influence PSRB decisions. In addition, staff would be prohibited from discussing this material. Maintaining this "in house" secrecy seems problematic.

Procedural Justice."Procedural Justice" requires that decision makers be viewed as unbiased, consistent, and neutral. Combining Board functions could negatively influence its perception by the community.

Voluntary participation/ Non coercion of the parties. A key feature of "Restorative Justice" is that the participation, or not, of the client have no impact on their sentence or the disposition of the case, especially release. This works well in criminal actions where sentences are established by the Court, and post trial reconciliations cannot be deemed to influence release status. Including "Restorative Justice" responsibilities with PSRB's existing judicial functions is contrary, by definition, to the "Restorative Justice" Model. The Board is constantly reviewing cases to determine the propriety of release. PSRB involvement in "Restorative Justice" could have a coercive effect on a client's participation. This includes those who may be deemed as psychiatrically fragile. The potential negative impact on victims is no less important.

Appropriate screening. Rather than merely adjudicating cases, enactment of SB 65A will require that PSRB to involve itself in treatment and screening related matters for those seeking involvement in the "Restorative Justice" program.

In my opinion, the issue of confidentiality is particularly problematic. Fundamental fairness requires exclusivity of the record in order for any legal proceeding to be lawful. As currently configured, the Board's Executive Director joins Board members as they privately deliberate hearings outcomes. The job of Executive Director entails working closely with Oregon State Hospital and Community providers, with detailed discussions concerning client activity, and specialized knowledge often not presented in a hearing. The propriety of including the Executive Director in deliberations has been an ongoing concern, despite periodic PSRB member assurances that this person does not speak during those meetings. Observations by others seem at odds with this. Accepting such assurances as true would make the Executive Director's presence unnecessary. Periodically, Board decisions appear to reflect information not in the hearings record. Efforts to challenge this practice in the appellate court were met with a swift change in the Board's own administrative rules, the adoption of a temporary one allowing this conduct and, ultimately, the adoption of its current rule allowing this practice. Authorizing Board staff to oversee a Restorative Justice Program would provide an opportunity for confidential information to be inadvertently provided to Board members.

Given the concerns noted, our subgroup made some suggestions as to how these impediments might be addressed. However, because of concerns about PSRB involvement in this process at all, we also identified four alternative or existing programs for consideration. The two most promising include:

a) The Oregon State Hospital (OSH).

Assets Include:

- Familiar with client population and issues;

- Testing and evaluations for client competency, as well as the ability to participate in "Restorative Justice", already exist;
- Trained staff, especially in the Psychology Department, who already practice "Restorative Justice", particularly when family are victims;
- Letter Bank Program. The collection of letters written by clients seeking to make amends for their wrongdoing has existed for years, and has been especially useful in OSH 12 Step Programs where a victim is deceased, or has a restraining or related contact prohibition.
- Existence of therapeutic relationships already exist, which could maximize beneficial outcomes (Part of Procedural Justice);
- Providers are more likely to "do no harm" to the client due to their familiarity with the person, and that person's limitations;
- A possible, related and positive, impact on client treatment needs.
- OSH is independent of the PSRB, State, and Defense Bar. Use of OSH eliminates conflicts and the potential that the PSRB will be exposed to unintended materials.

b) Department of Corrections (DOC).

Assets include:

- DOC already has an existing "Restorative Justice" Program.
- It is separate from PSRB and so does not have the various associated confidentiality and other potential "Restorative Justice" conflicts.

- DOC has a large number of mentally ill inmates, so the issues posed are not new.

The Oregon Health Authority (OHA) currently oversees the State Hospital Review Panel (SHRP), which functions similarly to PSRB, but adjudicates individuals found "Guilty Except for Insanity" of lesser offenses. Unlike PSRB, it does not include its Executive Director in its private deliberations. Measures to maintain confidential records are already in place. Given this, and that OHA authority also includes oversight of the Oregon State Hospital, if a Restorative Justice Program is created, in my opinion, the Oregon Health Authority would be the preferred agency to operate it. The cost, if any, would likely be minimal since its operations are within the Oregon State Hospital, where clients and their Treatment Teams already interact.

Although we were specifically told not to consider it, and did not, the cost to establish a new PSRB program should be studied. There will be an expenditure of funds should the Board take on restorative justice responsibilities, whether in agency staff time, or subcontracted to an educational or similar institution. While difficult to know exactly, the cost will not be small. In light of current budget constraints, the advisability of creating a new program at this time seems poorly timed.

During this Legislative Session, PSRB is seeking to amend ORS 161.346 (10), which requires that it issue Orders within fifteen days of a hearing. The amendment provides that this be increased to thirty days. The stated purpose for the change is that the Board has too much work to meet the existing statutory mandate, and needs the additional time. In this context, it makes little sense to provide the agency with additional duties. The failure to issue timely Orders, sometimes for many months or more, is prejudicial to clients seeking appellate review of Board decisions. OHA Orders are generally issued within one day of a hearing.

Similarly, by statute, PSRB is mandated to schedule a hearing date no more than sixty days from receipt of a hearings request. A number of years ago, when it was understaffed, the Board determined that, through presumed Legislative oversight, this mandate did not apply to "Outpatient Hearings". Now, there is no statutorily mandated time limit within which to schedule "outpatient" initiated hearings. These can take four to six months, or longer, to be heard. A hearing, which was to be held this week, was requested ten months ago. The cost of unnecessarily prolonging an outpatient under Board jurisdiction has both financial and human costs. Again, I would advocate that PSRB resources be directed toward reducing this time, and not seeking new responsibilities.

We were also not asked to consider the necessity of a PSRB "Restorative Justice" program. As an attorney who has practiced before the Psychiatric Security Review Board for almost thirty years, I am aware of only one instance where it might have been useful. This was a very unusual case where, working with the State, following a hearing, and out of the Board's presence, my client and the Victim met and spoke. It occurred at the Oregon State Hospital, and

did not require any Board involvement. The situation was monitored by Hospital staff. The PSRB has often cited this single case as a reason to create its "Restorative Justice" Program.

ELIMINATION OF OREGON HEALTH AUTHORITY HEARINGS

Early this month, SB 65 was amended to provide for the immediate elimination of Oregon Health Authority (OHA) involvement in hearings for individuals found "Guilty Except for Insanity" of "Tier 2" offenses. OHA created the State Hospital Review Panel (SHRP) to conduct these hearings. If enacted, all individuals found "Guilty Except for Insanity" would be placed under the authority of the Psychiatric Security Review Board (PSRB). As an attorney who works closely with the mental health community and individuals under the jurisdiction of the Adult Psychiatric Security Review Board and Oregon Health Authority, I oppose this measure.

SHRP was created in 2012, following the enactment of Senate Bill 420. It divided individuals under PSRB jurisdiction into two categories, "Tier 1" and "Tier 2". "Tier 2" persons were removed from PSRB oversight, and were placed under OHA/SHRP. Although not providing any testimony in the matter, I was opposed to this change as a needless expenditure of funds, and duplicative of effort. After appearing before both PSRB and SHRP for many years, I have now reached a different conclusion.

At the time of its creation, the Oregon State Hospital was overcrowded, and populated predominantly by individuals found "Guilty Except for Insanity" (GEI). Whether valid or not, PSRB was identified as at least one of the primary causes for this condition, refusing to release individuals who either no longer met jurisdictional criteria, or could be treated in the community on "conditional release".

It is my understanding that the per person cost of care and treatment at the Oregon State Hospital is approximately $24,000 per month. Within its first year, SHRP found that of those 109 persons transferred to it from PSRB, twelve (approximately 17 per cent) did not meet statutory criteria to be maintained under jurisdiction. In its second year, six (approximately 6 per cent) were similarly adjudicated. These persons were released, at a savings of $432,000 per month. (18 x $24,000)

During that same two-year period, it ordered one-hundred evaluations to determine if others could be safely monitored and treated in the community. Many of these individuals have since been placed at a monthly cost of only several thousand dollars per person. (Seventy-eight persons were "conditionally released" from the Hospital in the last three years.) Because individuals successfully employing the "Insanity" Defense generally receive the maximum sentence allowed by law, the fiscal impact of an inappropriate placement can be long lasting, and substantial.

Between 2012 and 2017, the number of Tier 2 clients has decreased from 109 to 71. Taxpayers, the community, and residents have greatly benefitted from SHRP's excellent work. I firmly believe that, without SHRP's continued presence, the GEI population at the Oregon State Hospital will again climb significantly.

In contrast to PSRB, SHRP has not sought to assign new meaning to statutory law which it knew was contrary to the Legislature's intent, and resulted in the inappropriate placement, and retention, of persons with solely sexual or substance use disorders within its jurisdiction. (See Beiswenger v. PSRB , 192 Or App 38 (2004) and Tharp v. PSRB, 338 Or 413(2005). Many of the individuals were retained at the Oregon State Hospital for years. Recent PSRB administrative rule changes, followed by an initial draft of SB 64, have sought to thwart the 1983 Legislature's mandate that substance use and sexual disorders alone, are not conditions sufficient to employ an "Insanity" Defense, or to maintain an individual under jurisdiction. This is concerning. Similarly, unlike PSRB, SHRP has not been the subject of investigation by the Oregonian. In December 2013, that newspaper reported allegations by Board staff that its Executive Director, inter alia, was inappropriately altering PSRB member Orders. An independent investigation was requested by defense counsel, however the agency refused alleging a lack of proof. To date, PSRB has not adopted rules which could prevent a potential future recurrence of such activity. In contrast, since its creation, SHRP has disallowed its Executive Director from attending deliberations, except when summoned to provide legal advice. Orders are generally drafted and reviewed for SHRP member review on the day of the hearing, meaning that they are less likely to be compromised over time. Exclusivity of the record has not been a concern.

It is my understanding that the discussion regarding the potential dissolution of SHRP is purely budget driven. The Panel's administrative rules provide that it shall meet at least twice every two months, unless its Chair determines there is insufficient business to transact. (OAR 309-092-0030) Member cost is limited to those days when hearings are held. I am advised that only a single staff position is dedicated exclusively to assist the Panel. Given its work, and the savings realized to date, OHA involvement should be maintained until a detailed analysis of both PSRB and SHRP cost is provided. Ultimately, it may be that a significant cost savings would be best achieved by maintaining both, but dividing their responsibilities to allow SHRP oversight of all hospitalized individuals, with PSRB overseeing those in the community on "conditional release". Savings may also be realized by eliminating the Juvenile PSRB panel, which has very few clients, and empowering the Adult Board to hear those cases. Many opportunities likely exist.

A cost which cannot be quantified is the message sent to the legal community, ie the Oregon State Hospital can no longer be used for inappropriate placements. In my opinion, thanks, in large part, to SHRP's efforts, the Hospital's GEI population no longer represents the majority of residents. I also believe it also has served to improve PSRB decision making, ie decision making and outcomes between the agencies can now be compared. SHRP has helped ensure existing law is properly executed. To eliminate a program that has worked so well, and has been proven to save money, would be unfortunate, and expensive in the long run.

CONCLUSION

I continue to oppose the establishment of a "Restorative Justice" program to be overseen by the PSRB. If one is to be established, it must remain separate and outside of all Board,

including staff, control. The recent release of PSRB records, including treatment related documents, to a newspaper in an ongoing, highly publicized, case is also of concern. Finally, as the Legislature is seeking to save monies, the creation of a new program, with no shown need, seems unwarranted. There will be a cost. Other, existing, entities, such as the Oregon Health Authority/ SHRP, Oregon State Hospital, and Department of Corrections can, or already, provide these services.

Similarly, I oppose the Oregon Health Authority hearings for individuals found "Guilty Except for Insanity" of Tier two offenses. The agency has an established record of cost savings and integrity which has reduced the population of inappropriately placed persons at the Oregon State Hospital, and serves to dissuade others in the community from attempting inappropriate Hospital admission.

For the reasons stated above, I oppose passage of senate Bill 65A. Thank you for the opportunity to address the Committee.