



MEMORANDUM

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: May 10, 2019

RE: POSITION ON EXTREME RISK PROTECTION ORDER LEGISLATION UPDATED TO **NEUTRAL**

Last session, the ACLU of Pennsylvania [opposed HB 2227 \(PN 3344\)](#) (Stephens), a proposal to establish an Extreme Risk Protection Order (ERPO) mechanism to temporarily disarm those deemed a threat to themselves or others. Since then, this proposal has been revised to include additional due process and other constitutional protections and has been introduced in the 2019-2020 session as [HB 1075](#) (PN 1235).

Background

When revising the bill from last session, Rep. Todd Stephens invited the ACLU-PA (among others) to provide feedback on the bill language. Following a productive conversation, Rep. Stephens incorporated several of our suggestions. We believe the new language strengthens protections for the respondent, clarifies definitions, and tailors criteria more narrowly, while still accomplishing its fundamental goal. **For this reason, the ACLU-PA has changed its position on this legislation from ‘opposed’ to ‘neutral’.**

In almost all cases, the ACLU-PA opposes legislation that creates a new crime. HB 1075 still creates a new offense by making the failure to relinquish a firearm or firearms license a misdemeanor of the second degree [§ 6105(a.1)(2.1)]. While we are disappointed that this offense remains in HB 1075, the amended language resolves other critical concerns we raised.

Protections

Summarized below are protections included in HB 1075 that allow its ERPO mechanism to function without sacrificing respondents’ due process rights. Some provisions were included in the original bill as filed last session; terms in **bold** are new additions the ACLU-PA supports.

Definition of risk

- The definition of risk has been narrowed to clarify that protection orders require that respondents pose a **substantial** risk or threat. [Definitions of ‘Extreme Risk Protection Order’ and ‘Serious Bodily Injury’; also in § 64A02; 64A05; and 64A09]
- When issuing an ERPO, the court’s decision (1) must be based on a demonstration of risk due to behaviors or events (2) occurring only within the preceding **12 months** (reduced from 24 months). [§ 64A04(b)]

Determination of protection order

- The list of factors / criteria that a judge can consider when deciding whether to issue an ERPO has been more **narrowly tailored** and no longer includes “failure to voluntarily and consistently take medication necessary to control a mental illness” or a “propensity for violent or emotionally unstable conduct.” [§ 64A04(c)]
- To issue a protection order, the court must find that the respondent presents a **substantial** risk by *clear and convincing evidence*—the highest standard of evidentiary proof. [§ 64A09(a)]
- Within 7 days of issuing the protection order, the judge must also issue a non-public **explanatory opinion** that includes the reasons why the judge issued the order. This ensures that respondents have sufficient information upon which to file a petition to terminate or an appeal. [§ 64A09(d)]

Due process

- Guarantees that those subject to an ERPO have the right to counsel. [§ 64A03(d)]
 - Including the right to counsel is to be applauded, as this protection is not routinely guaranteed in other states' red flag laws. However, it must be noted that Pennsylvania remains the only state that does not provide state-level funding for indigent defense, strapping counties with [100% of the costs](#) associated with defending its poorest residents. As a result, this will undoubtedly place additional burdens on the already strained and limited resources of county public defenders.
- Permits respondents to petition the court at any time during the effective period of the order for a hearing to determine whether the order should be terminated. [§ 64A10(a)]
- If the person subject to an ERPO wishes to petition the court to terminate the order early, the respondent must prove that the “**order was issued in error or that circumstances have changed**” by a **preponderance of the evidence**. This provides greater specificity about what the respondent must prove (i.e., order was issued in error; circumstances have changed), instead of requiring respondents to “prove” they are no longer a threat. People cannot be expected to prove a negative. [§ 64A10(d)]
- In the event an interim protection order is issued by a hearing officer, the interim order is set to expire at the end of the next business day that the court “deems itself available,” but **not more than 5 days** after the issuance of the interim order. This establishes a maximum duration of interim orders. [§ 64A05(c)]

Notice

Protection orders provide respondents notification of important rights, including, but not limited to:

- Notice of the right to counsel. [§ 64A03(d)]
- Notice of the right to request a continuance. [§ 64A05(b)(5)(ii)]
- Notice of the right to petition the court for a termination of the order. [§ 64A09(c)(2)]
- Notice of the **right to appeal** to the Superior Court within 30 days. [§ 64A09(c)(6)]