

# HOUSE BILL REPORT

## E2SSB 5177

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**As Reported by House Committee On:**

Judiciary  
Appropriations

**Title:** An act relating to improving timeliness of competency evaluation and restoration services, by clarifying alternative locations for the provision of competency restoration services and defining time periods of commitment.

**Brief Description:** Concerning forensic mental health services.

**Sponsors:** Senate Committee on Ways & Means (originally sponsored by Senators O'Ban and Darneille; by request of Department of Social and Health Services).

**Brief History:**

**Committee Activity:**

Judiciary: 3/24/15, 4/1/15 [DPA];  
Appropriations: 4/6/15, 4/7/15 [DPA(JUDI)].

**Brief Summary of Engrossed Second Substitute Bill  
(As Amended by Committee)**

- Encourages the Department of Social and Health Services (DSHS) to develop alternative locations for competency restoration services for persons who do not need inpatient hospitalization, and allows restoration services in a city or county jail under certain conditions during the 2015-17 biennium.
- Provides that competency restoration treatment time periods include only the time the defendant is at the treatment facility and do not include reasonable time for transport.
- Extends the expiration date of a statute that provides for state reimbursement to counties for the costs of appointing competency evaluators for in-custody defendants, and expands the grounds under which a county may seek reimbursement.
- Removes the expiration of the authority of the DSHS to place a person who is criminally insane in a secure Department of Corrections facility under some circumstances, and provides that a statute limiting the correctional confinement of persons under the forensic laws applies only to persons who are criminally insane.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

- Allows a prosecutor in a non-felony case where competency to stand trial is at issue to dismiss the case and refer the defendant for evaluation for mental health, substance use, or developmental disability services.
- Establishes an Office of Forensic Mental Health Services (Office) within the DSHS and specifies responsibilities of the Director of the Office.

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## HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** Do pass as amended. Signed by 12 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Rodne, Ranking Minority Member; Goodman, Haler, Hansen, Kirby, Klippert, Muri, Orwall, Stokesbary and Walkinshaw.

**Minority Report:** Do not pass. Signed by 1 member: Representative Shea, Assistant Ranking Minority Member.

**Staff:** Edie Adams (786-7180).

### **Background:**

#### Incompetent to Stand Trial.

A criminal defendant is incompetent to stand trial if, due to a mental disease or defect, he or she lacks the capacity to understand the nature of the proceedings or is unable to assist in his or her own defense. A defendant who is incompetent may not be tried, convicted, or sentenced for a criminal offense as long as the incompetency continues.

#### Competency Evaluation and Restoration Treatment.

When a defendant's competency is in question, the court must either appoint, or ask the Department of Social and Health Services (DSHS) to designate, a qualified expert to evaluate and report on the defendant's mental condition. The evaluator must assess the defendant in a jail, a detention facility, the community, or the court, to determine whether an inpatient commitment is needed to complete an accurate evaluation. If an inpatient commitment is not necessary, the evaluator will complete the evaluation.

If a defendant charged with a felony is found incompetent, the court may order restoration treatment for up to 90 days, except if the defendant's highest charge is a class C felony or a nonviolent class B felony, the maximum time for the first restoration period is 45 days. A second period of restoration treatment for up to 90 days may be ordered if necessary and reasonably likely to restore competency. Under limited circumstances the court may order a third period of restoration treatment for up to six months.

A defendant charged with a serious non-felony offense is eligible for one period of inpatient competency restoration for up to 14 days plus any unused evaluation time. This restoration treatment period includes only the time the defendant is at the treatment facility and does not include time for transport to or from the facility.

If a defendant cannot be restored to competency within the specified time periods, the criminal case must be dismissed without prejudice and the defendant must be evaluated for potential civil commitment.

The DSHS has historically provided competency restoration services at the state psychiatric hospitals, although there is statutory authority for restoration treatment to be provided in an alternative facility determined by the DSHS.

#### County Reimbursement for Competency Evaluations.

Legislation enacted in 2013 requires the DSHS to reimburse a county for the cost of appointing a qualified expert to conduct a competency evaluation for a defendant in jail if the DSHS has not met performance targets for competency evaluations for in-custody defendants in 50 percent of the cases submitted by the county during the most recent quarter. The DSHS must reimburse the county for the costs of the competency evaluator in an amount that is at least equivalent to the amount for evaluations conducted by the DSHS. Counties must maintain data on the timeliness of competency evaluations performed by appointed evaluators. The reimbursement requirement is subject to funds appropriated for this purpose, and it is set to expire June 30, 2016.

#### Correctional Confinement under Forensic Laws.

State forensic laws govern the criminally insane and competency to stand trial procedures. A person is criminally insane if the person is found not guilty by reason of insanity and is committed to the custody of the DSHS because the person is a substantial danger to other persons or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security.

If the DSHS determines that a person who is criminally insane and committed to its custody presents an unreasonable safety risk that is not manageable in a state hospital setting, the DSHS may place the person in a secure facility of the Department of Corrections (DOC). The person must receive appropriate mental health treatment under a formalized treatment plan, and has the right to periodic evaluation of his or her mental condition and the right to petition for conditional release or release. The DSHS must review the person's placement every three months to determine if the placement remains appropriate. The authority of the DSHS to place a person who is criminally insane in a secure facility of the DOC expires June 30, 2015.

A statute provides that a person confined under the forensic laws must not be incarcerated in a correctional institution, and that any confinement in a county jail while awaiting placement in a treatment program or a court hearing may not exceed seven days. The original statute and all subsequent amendments to the statute were part of legislation relating to the criminally insane. However, the statute does not specifically limit its application to persons who are criminally insane.

#### Forensic System Report.

In 2013 the DSHS contracted with an independent consultant, Groundswell Services Inc. (Groundswell), to conduct a review of the state's provision of forensic mental health services and make recommendations as to whether and how the state's forensic mental health system should be modified. In 2014 the DSHS submitted Groundswell's final report, entitled

*Forensic Mental Health Consultant Review Final Report*, which makes a number of recommendations for reform of the state's forensic mental health system. One recommendation is that Washington establish a centralized Office of Forensic Mental Health Systems to oversee all forensic evaluation services, assist hospitals and community agencies in implementing best practice forensic treatment, work across systems to ensure an integrated approach to the forensic population, and establish adequate data management resources to monitor forensic services and appropriately allocate resources.

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## **Summary of Amended Bill:**

### Competency Restoration Provisions.

The Legislature encourages the DSHS to develop, on a phased-in basis, alternative locations and increased access to competency restoration services for individuals who do not need the level of services provided in inpatient psychiatric hospitalizations. The DSHS must work with counties and the courts to develop a screening process to identify individuals who are safe to receive restoration treatment outside the state hospital. The DSHS also must develop a plan to sufficiently increase capacity to meet the projected 10-year need for forensic and civil mental health bed demand.

Alternate facilities for competency restoration may include community mental health providers or other local facilities that contract with the DSHS and are willing and able to provide competency restoration treatment. During the 2015-2017 biennium, the DSHS may contract with one or more cities or counties to provide competency restoration treatment in a city or county jail if the city or county jail is willing to serve as a location for restoration treatment and if the DSHS determines that there is an emergent need for beds and documents the justification, including a plan to address the emergency.

Patients receiving competency restoration treatment in a jail must be physically separated from other jail populations, the model of restoration treatment services must be substantially equivalent to that provided at the state hospitals, and restoration treatment must be provided as much as possible within a therapeutic environment and performed by staff and professionals with the skills and qualification necessary to provide restoration services comparable to those in a state hospital.

Competency restoration time limits for felony defendants include only the time the defendant is at the facility and do not include reasonable time for transport to or from the facility. Specific language is added to restoration statutes providing that if a court determines a defendant is unlikely to regain competency, the court may dismiss the charges without ordering restoration treatment and refer the defendant for evaluation for civil commitment.

### County Reimbursement for Competency Evaluations.

The statute that requires the DSHS to reimburse counties for the cost of appointing competency evaluators for in-custody defendants is extended from 2016 to 2018, and an additional ground under which a county may seek reimbursement is established. The county may request reimbursement if the DSHS in the most recent quarter did not perform at least one-third of the number of jail-based competency evaluations for in-custody defendants as

were performed by qualified experts appointed by the court. Reimbursement is subject to funds appropriated for this purpose. The county must work with the DSHS to develop and maintain critical data elements, including timeliness of evaluations and share this data with the DSHS upon request.

#### Correctional Confinement under Forensic Laws.

The expiration date on the authority of the DSHS to place a person who is criminally insane in a secure facility of the DOC if the person is not manageable in a state hospital setting is removed. Before exercising this authority, the Secretary of the DSHS must give consideration to reasonable alternatives that would be effective to manage the patient's behavior, and must include written documentation of the decision and reasoning in the patient's medical file.

The statute providing that a person confined under the forensic laws must not be incarcerated in a correctional institution, and that any confinement in a county jail while awaiting treatment or a court hearing may not exceed seven days, applies only to persons who are criminally insane.

#### Diversion of Non-Felony Defendants.

If the issue of competency to stand trial is raised in a non-felony case, the prosecutor may dismiss the charges without prejudice and refer the defendant for assessment by a mental health professional, chemical dependency professional, or developmental disabilities professional to determine appropriate service needs for the defendant. This provision does not apply if the defendant is currently charged with or has a previous conviction for a serious violent offense or sex offense.

#### Office of Forensic Mental Health Services.

An Office of Forensic Mental Health Services (Office) is established within the DSHS in order to prioritize goals of accuracy, prompt service to the court, quality assurance, and integration with other services. The Office must have a clearly delineated budget separate from overall budget for state hospital services.

The Office must be led by a director on the level of at least a deputy assistant secretary within the DSHS. The Director after a reasonable period of transition must have responsibility for the following functions:

- operational control of all forensic evaluation services including budget allocation;
- training of forensic evaluators;
- development of a system to certify forensic evaluators and monitor the quality of forensic evaluation reports;
- communication with courts, jails, and community mental health programs;
- coordination with state hospitals to develop best practices for services unique to forensic patients;
- promotion of congruence across state hospitals where appropriate and promote interventions that flow smoothly into community interventions;
- coordination with appropriate entities regarding community treatment and monitoring of persons on conditional release;
- oversight of state-wide forensic data collection and analysis; and

- oversight of the development, implementation, and maintenance of community forensic programs and services.

### **Amended Bill Compared to Engrossed Second Substitute Bill:**

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**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date of Amended Bill:** The bill takes effect 90 days after adjournment of the session in which the bill is passed, except section 5, relating to reimbursement for competency evaluations, which has an emergency clause and takes effect immediately, and section 12 which, because of a prior delayed effective date, takes effect April 1, 2016.

### **Staff Summary of Public Testimony:**

(In support) Jail-based competency restoration will be an option only on a temporary basis until the state can catch up with the restoration backlog. It applies to only those jurisdictions that are willing and able to provide jail restoration. A county does not have to participate, but it is important to have this option available in the short term. The proposal is based on the recommendation of consultants that the state can both protect public safety and provide community-based treatment for people who do not need the security level of the state hospitals. The DSHS is looking at all options and actively pursuing outpatient services and community sites for restoration treatment. Jail-based restoration is not going to involve a person sitting in a jail cell. It will be a program within the jail that provides a therapeutic environment and a dedicated treatment program with services comparable to those of the state hospitals.

Allowing non-felony cases to be diverted from the criminal system is an important improvement in those cases where there is a clear need for mental health treatment. Allowing a court to dismiss a case where the person is not likely to regain competency makes sense to avoid unnecessary treatment and delay in the process. The requirement to create an Office of Forensic Mental Health Services is based on a recommendation from the consultant report. The DSHS supports this provision but does not have sufficient funding to bring on the staff needed to implement that requirement.

(With concerns) Jails should not be used for competency restoration. The judge in the federal lawsuit has already clearly said that jails are not therapeutic environments. The state needs to develop community-based options and do a better job of using current forensic beds. Allowing restoration outside the state hospitals is a departure from past practice and is only being proposed because of a lack of capacity. Even with additional capacity, demand will outgrow supply in a couple of years. The bill should include a study on how the state will meet the growing bed demand. Nothing in the bill addresses who will provide restoration treatment in the alternative locations where community safety could be an

issue. This work should not be turned over to people who are not in state service since this population needs well-qualified and experienced staff.

(Opposed) The jail restoration provisions are a bad idea and should be taken out. We are concerned that this will not be a stop-gap measure, but instead will continue into the future. People waiting for competency services have not been convicted of any crime and are only being held in jail because of the lack of treatment beds. Confinement in a jail is damaging to a person with mental health issues. Separating restoration patients from inmates is supposed to protect them, but it just increases their isolation which can be quite damaging. There is a federal lawsuit on these issues happening literally as we speak. We should not change the forensic system in this way until we know what it will have to look like in the future. We support the provision that allows for the diversion of low level offenders from the criminal justice system and into the treatment they need.

**Persons Testifying:** (In support) Senator O'Ban, prime sponsor; and Jane Beyer, Department of Social and Health Services.

(With concerns) Bob Cooper, Washington Defenders Association and Washington Association of Criminal Defense Lawyers; and Matt Zuvich, Washington Federation of State Employees.

(Opposed) David Lord, Disability Rights Washington; and Chris Kaasa, American Civil Liberties Union.

**Persons Signed In To Testify But Not Testifying:** None.

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## HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** Do pass as amended by Committee on Judiciary. Signed by 30 members: Representatives Hunter, Chair; Ormsby, Vice Chair; Chandler, Ranking Minority Member; Parker, Assistant Ranking Minority Member; Wilcox, Assistant Ranking Minority Member; Buys, Carlyle, Cody, Dent, Dunshee, Haler, Hansen, Hudgins, G. Hunt, S. Hunt, Jinkins, Kagi, Lytton, MacEwen, Magendanz, Pettigrew, Sawyer, Senn, Springer, Stokesbary, Sullivan, Tharinger, Van Werven, Walkinshaw and Fagan.

**Minority Report:** Do not pass. Signed by 2 members: Representatives Condotta and Taylor.

**Staff:** Andy Toulon (786-7178).

### **Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Judiciary:**

No new changes were recommended.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date of Amended Bill:** The bill takes effect 90 days after adjournment of the session in which the bill is passed, except section 5, relating to reimbursement for competency evaluations, which takes effect immediately, and section 12 which, because of a prior delayed effective date, takes effect April 1, 2016.

**Staff Summary of Public Testimony:**

(In support) The current language in the bill allowing competency restoration in jail settings has been worked with a variety of stakeholders and should address many of the concerns that have previously been raised. It is important to provide every tool and option for reducing the time that people are waiting for forensic services. The concepts of diversion and the Office of Forensic Health Services are positive, though they are not included in the proposed Governor's budget.

(With concerns) The bill makes large policy changes to current practices. Some of the amendments in the policy committee mitigate problems in the bill. The bill, as it stands, still outsources competency evaluation and restoration services. This move should proceed with caution and there needs to be transparency and data back from whoever is doing the services so that there is the same accountability as for services provided by state employees. Provisions related to the extension for allowing correctional confinement of a patient in certain circumstances are positive and in the case where it has been used has resulted in increased safety. The creation of an Office of Forensic Mental Health is also positive and the director of this office should have forensic experience.

(Opposed) In the recent federal court ruling regarding the waiting times for competency evaluation and restoration services, the judge wrote that jails are not therapeutic environments or good places for people with mental illnesses to be housed while they are waiting for treatment services. The judge's order specifically requires the Department of Social and Health Services to, within seven days, admit to the state hospital someone who has been ordered for competency restoration. Given the language of the ruling, it is unlikely that the judge would consider a jail setting to be an appropriate alternative.

The judge ruled that the State of Washington is violating the rights of some of its most vulnerable residents. People with mental illnesses in jails are very vulnerable and it is very unlikely that a jail can be turned into a therapeutic environment. It is also going to be very difficult to provide any oversight to make sure that things don't go wrong in that type of setting. Restoration services should be provided in community settings and not in jails.

The provisions regarding diversion and the option to hire local evaluators, which has worked well in Pierce County, are positive. There is a problem with language in the bill that removes an incentive for the Department of Social and Health Services to provide timely transportation to the hospital.

**Persons Testifying:** (In support) Tim Hunter, Department of Social and Health Services.

(With concerns) Matt Zuvich, Washington Federation of State Employees.

(Opposed) Shankar Narayan, American Civil Liberties Union of Washington; Bob Cooper, Washington Defender Association and Washington Association of Criminal Defense Lawyers; and David Lord, Disability Rights Washington.

**Persons Signed In To Testify But Not Testifying:** None.