

# SENATE BILL REPORT

## E2SHB 1114

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As Reported by Senate Committee On:  
Human Services & Corrections, April 1, 2013  
Ways & Means, April 9, 2013

**Title:** An act relating to criminal incompetency and civil commitment.

**Brief Description:** Addressing criminal incompetency and civil commitment.

**Sponsors:** House Committee on Appropriations (originally sponsored by Representatives Pedersen, Rodne, Morrell, Nealey, Green and Jinkins).

**Brief History:** Passed House: 3/11/13, 87-11.

**Committee Activity:** Human Services & Corrections: 3/25/13, 4/01/13 [DPA-WM].  
Ways & Means: 4/08/13, 4/09/13 [DPA, w/oRec].

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### SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

**Majority Report:** Do pass as amended and be referred to Committee on Ways & Means.

Signed by Senators Pearson, Vice Chair; Darneille, Ranking Member; Harper and Padden.

**Staff:** Kevin Black (786-7747)

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### SENATE COMMITTEE ON WAYS & MEANS

**Majority Report:** Do pass as amended.

Signed by Senators Hill, Chair; Baumgartner, Vice Chair; Honeyford, Capital Budget Chair; Hargrove, Ranking Member; Nelson, Assistant Ranking Member; Bailey, Becker, Braun, Conway, Dammeier, Fraser, Hatfield, Keiser, Kohl-Welles, Murray, Padden, Ranker, Rivers, Schoesler and Tom.

**Minority Report:** That it be referred without recommendation.

Signed by Senator Parlette.

**Staff:** Megan Atkinson (786-7446)

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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.*

**Background:** A person is incompetent to stand trial when, due to a mental disease or defect, the person lacks the capacity to understand the nature of the criminal proceedings against them or assist in their own defense.

A person may be subject to civil commitment when, due to a mental disorder, the person presents a likelihood of serious harm or is gravely disabled. A person whose felony charges were dismissed based on incompetency to stand trial may additionally be subject to civil commitment if it is proven that the person committed acts constituting a felony and, due to a mental disorder, presents a substantial likelihood of repeating similar acts. The superintendent of the mental health facility must notify the sheriff and police chief of the county where such a person will reside 30 days before the person's release if the felony is classified as a sex, violent, or felony harassment offense.

The longest time period allowed by state law for civil commitment under the Involuntary Treatment Act is 180 days. New petitions for civil commitment must set forth the legal grounds supporting the commitment and be supported by the affidavits of one witness who is an examining physician or psychiatric advanced registered nurse practitioner and a second witness who is an examining physician, psychiatric advanced registered nurse practitioner, or mental health professional. The affidavits must describe in detail the behavior of the detained person that supports the petition and explain which, if any, less-restrictive alternatives to detention are available to the person. The superintendent may release the person before the expiration of the commitment period if the superintendent determines that the person no longer presents a likelihood of serious harm.

A person subject to commitment has the following rights:

- to not be presumed incompetent as a consequence of receiving an evaluation;
- to a judicial hearing in a superior court;
- to have an attorney appointed if they are indigent;
- to present evidence on their own behalf;
- to cross-examine witnesses who testify against them;
- to be proceeded against by the rules of evidence;
- to remain silent; and
- to have access to all petitions and reports in the court file.

If the petition is for 90 days or more, the person has a right to a jury trial. The burden of proof is by clear, cogent, and convincing evidence and is placed upon the petitioner.

When a defendant is incompetent to stand trial, the court may order up to 360 days of competency restoration treatment for felony defendants and 29 days for defendants charged with serious misdemeanors. If treatment is unsuccessful, the court must dismiss the charges without prejudice. For a felony defendant, the court must either release the defendant or transfer the defendant to a hospital or secure mental health facility. For a defendant charged with a serious misdemeanor, the court must send the defendant to an evaluation and treatment facility. The defendant must then be evaluated for civil commitment. For a felony defendant, the hospital or secure mental health facility may directly file a 180-day civil commitment petition. For a defendant charged with a serious misdemeanor, the evaluation and treatment facility may directly file a 90-day civil commitment petition.

In 2010, the Public Safety Review Panel (PSRP) was created to provide advice to the Secretary of the Department of Social and Health Services (DSHS) concerning persons committed to the state hospitals as criminally insane, and to review release recommendations pertaining to those individuals. The PSRP consists of seven volunteer members representing different affiliations appointed by the Governor for renewable three-year terms.

**Summary of Bill (Recommended Amendments):** A felony defendant whose charges are dismissed based on incompetent to stand trial must be sent to a state hospital for civil commitment. Court discretion to release a felony defendant is eliminated.

For a person facing civil commitment after felony charges are dismissed based on incompetence to stand trial, on the grounds that the person committed acts constituting a felony, and due to a mental disorder is likely to repeat similar acts, the court must determine whether the felony charges were for a violent felony and whether the person committed acts constituting a violent felony. If the court so finds, during subsequent commitment hearings, the court must continue the commitment for 180 days without an evidentiary hearing if the petition for commitment filed by the facility presents a prima facie case. The person who is the subject of the petition must not be permitted to challenge the facts supporting the commitment petition unless the person first presents proof in the form of admissible expert testimony establishing that the person no longer meets grounds for civil commitment. The committed person must be provided with counsel when a petition for commitment is filed.

Language added to the civil commitment statute states that the initial or additional commitment period of a person committed pursuant to a finding that the person committed acts constituting a violent felony may include transfer to a specialized program of intensive support and treatment, which may be initiated prior to or after discharge from the state hospital.

The PSRP must provide advice to DSHS regarding all decisions related to persons committed pursuant to a finding that they committed acts constituting a violent felony. DSHS must give the PSRP access to any records it deems necessary.

The superintendent must notify the prosecuting attorney in the county where the criminal charges were dismissed at least 30 days before release of a person civilly committed on the basis that the person committed acts constituting a felony classified as a sex, violent, or felony harassment offense, and, due to a mental disorder, presents a substantial likelihood of repeating similar acts; or immediately notify the prosecuting attorney if such a person escapes.

When a person committed as criminally insane petitions a superior court for release from commitment, the person must serve the petition upon DSHS. Upon receipt of service, DSHS must determine whether reasonable grounds exist for release and provide the recommendation to all parties and the court.

When petitioning for the release of a person committed as criminally insane who will be transferred upon release to a correctional facility to serve a sentence for a class A felony, the petitioner must show that the person's mental disease or defect is manageable within a correctional facility, but must not be required to prove that the person does not present a

substantial danger to other persons or a substantial likelihood of committing criminal acts that jeopardize public safety or security.

A null and void clause applies if funding is not provided by June 30, 2013, in the Omnibus Appropriations Act.

**EFFECT OF CHANGES MADE BY WAYS & MEANS COMMITTEE (Recommended Amendments):** The amendment removes changes made by the Senate Committee on Human Services and Corrections and amends the underlying bill by adding language allowing transfer of a committed person to a specialized program before or after discharge from a state hospital; adds provisions relating to petitions for the release of persons committed as criminally insane; and adds a null and void clause.

**EFFECT OF CHANGES MADE BY HUMAN SERVICES & CORRECTIONS COMMITTEE (Recommended Amendments):** The duration of commitment for persons who are found to have committed acts constituting a violent felony and, due to a mental disorder, present a likelihood of committing similar acts is until such time as the person no longer meets grounds for civil commitment provided that the facility files a petition for court review every 180 days. Provisions are added for screening of misdemeanor defendants before transportation to an E&T, to provide notice to the prosecutor and defense attorney when a civil commitment petition is not filed for a person whose charges were dismissed based on incompetence to stand trial, and relating to release petitions for persons committed as criminally insane.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony Engrossed Second Substitute House Bill (Human Services & Corrections):** PRO: There was great, bipartisan work done on this bill. This bill concerns persons who committed violent crimes but cannot be prosecuted and do not receive the help they need from the civil system. We do not object to adding provisions from the Senate bill related to persons committed as criminally insane. We can do a better job treating the mental illnesses of persons whose violent felony charges were dismissed based on incompetent to stand trial and provide them with more continuity of care. The bill provides for a full civil trial at the outset of the commitment process. Please amend the bill to allow misdemeanor defendants whose criminal charges are dismissed based on incompetent to stand trial to be transported to state hospitals or evaluation and treatment facilities. The fiscal impact of the bill is likely to be lower than stated. This bill takes a small but important step in the direction toward preventing violence.

CON: Please restore provisions that would provide community services to persons with developmental disabilities. This bill would substantially impact an already overburdened system, increasing risk of harm. The bill must be amended to avoid due process violations.

The state cannot shift the burden of proof onto committed persons to establish a change in their condition. The best way to enhance public safety is to adequately fund mental health treatment. Do not waste public money on appellate litigation by passing a constitutionally flawed bill. Psychiatric drugs have terrible side effects and neither cure mental illness nor prevent violence.

OTHER: There is significant confusion about responsibility for misdemeanor defendants whose charges are dismissed based on incompetent to stand trial. The emergency room at Harborview admitted over 30 patients for whom neither the regional support network or the state hospital claim responsibility. We do not have adequate facilities for this and funding must be provided for the care of these patients. There are limited involuntary treatment beds in the community and state hospitals. We appreciate the language added in the House that would authorize use of the Offender Re-entry Community Safety program for patients to provide intensive treatment and supervision after release. The lack of state hospital beds means any increases in state hospital responsibility requires opening and staffing an additional ward.

**Persons Testifying (Human Services & Corrections):** PRO: Representative Pedersen, prime sponsor; Tom McBride, WA Assn. of Prosecuting Attorneys; Mark Lindquist, Pierce County Prosecutor; Don Pierce, WA Assn. of Sheriffs and Police Chiefs.

CON: Emily Cooper, Disability Rights WA; Bob Cooper, WA Assn. of Criminal Defense Lawyers, WA Defender Assn.; Shankar Narayan, American Civil Liberties Union of WA; Ruth Martin, Citizens Commission on Human Rights.

OTHER: Darcy Jaffe, Harborview Medical Center; Jane Beyer, DSHS.

**Staff Summary of Public Testimony on Bill as Amended by Human Services & Corrections (Ways & Means):** PRO: This bill will save money by addressing the most violent offenders. The bill addresses so-called gap cases where individuals who commit violent felonies are found incompetent to stand trial but are not able to be held on a civil commitment. We do not believe there is much fiscal risk; over time this bill will save the state money.

CON: This bill is inviting lawsuits and has elements that are unconstitutional because it shifts the burden of proof off the state.

OTHER: We need to provide more oversight on these offenders if they are released into the community. DSHS is exploring a less restrictive option other than maintaining them in the state hospital. The alternative model must be agreed to by the court, with a court order, and any non-compliance by the individual must result in them being brought back in. The individuals at issue here are fairly dangerous individuals. Our concerns are primarily around staff safety and the safety of others on the hospital floor.

**Persons Testifying (Ways & Means):** PRO: Tom McBride, WA Assn. of Prosecuting Attorneys; Don Pierce, WA Assn. of Sheriffs and Police Chiefs.

CON: Bob Cooper, WA Defender Assn., WA Assn. of Criminal Defense Lawyers.

OTHER: Jane Beyer, DSHS; Matt Zuvich, WA Federation of State Employees.