

# HOUSE BILL REPORT

## E2SHB 2718

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**As Passed House:**  
February 13, 2018

**Title:** An act relating to seizure and forfeiture procedures and reporting.

**Brief Description:** Concerning seizure and forfeiture procedures and reporting.

**Sponsors:** House Committee on Appropriations (originally sponsored by Representatives Shea and Goodman).

**Brief History:**

**Committee Activity:**

Judiciary: 1/17/18, 1/24/18 [DPS];

Appropriations: 2/3/18, 2/6/18 [DP2S(w/o sub JUDI)].

**Floor Activity:**

Passed House: 2/13/18, 95-3.

**Brief Summary of Engrossed Second Substitute Bill**

- Creates a new chapter governing civil asset forfeiture which is applicable to seizures under a variety of statutes and which, among other things:
  - explicitly provides that the burden of proof is on the seizing agency;
  - allows prevailing claimants to recover attorneys' fees;
  - requires that, when ordered to return property, the seizing agency return it in the same or substantially similar condition as when seized;
  - makes all seizing agencies subject to detailed reporting requirements; and
  - makes similar changes to the Uniform Controlled Substances Act.

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### HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 12 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Rodne, Ranking Minority Member; Graves, Assistant Ranking Minority Member; Goodman, Haler, Hansen, Kirby, Muri, Orwall, Shea and Valdez.

**Minority Report:** Do not pass. Signed by 1 member: Representative Klippert.

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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.*

**Staff:** Cece Clynch (786-7195).

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## HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Judiciary. Signed by 17 members: Representatives Ormsby, Chair; Robinson, Vice Chair; Bergquist, Cody, Fitzgibbon, Hansen, Hudgins, Jinkins, Kagi, Lytton, Pettigrew, Pollet, Sawyer, Senn, Stanford, Sullivan and Tharinger.

**Minority Report:** Do not pass. Signed by 14 members: Representatives Chandler, Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Stokesbary, Assistant Ranking Minority Member; Buys, Caldier, Graves, Haler, Harris, Manweller, Schmick, Taylor, Vick, Volz and Wilcox.

**Minority Report:** Without recommendation. Signed by 1 member: Representative Condotta.

**Staff:** Jordan Clarke (786-7123).

### **Background:**

#### Forfeiture Generally.

When authorized by statute, a law enforcement agency may seize possession of property for the purpose of forfeiting a person's right to own or possess that property. Generally, civil asset forfeiture is permitted when the property itself is illegal, was used to facilitate a crime, is an actual proceed of a crime, or was purchased from proceeds traceable to criminal activity.

Civil asset forfeiture is permitted under a variety of statutes, including in the case of drug crimes, crimes committed with a firearm, and human sex trafficking and sexual exploitation crimes. The seizing agency must comply with specific statutory process requirements, which operate separately from a criminal proceeding. With one exception, these statutes do not require the property owner to be convicted of the alleged crime for the property to be forfeited. Many of the statutes' procedures and requirements are similar, but not identical, to those found in the Uniform Controlled Substances Act (UCSA).

#### Uniform Controlled Substances Act.

*Property Subject to Forfeiture.* Under the UCSA, no property right exists in the controlled substances themselves, anything used to manufacture or pay for them, or proceeds traceable to the sale or exchange of controlled substances. Conveyances, such as vehicles used to facilitate distribution of controlled substances, and other personal property, such as money furnished or intended to be furnished in exchange for a controlled substance or acquired via an exchange in violation of the UCSA, are subject to forfeiture, unless the owner establishes that the act or omission was committed or omitted without his or her knowledge or consent. Real property that is being used with the knowledge of the owner in connection with a crime, or which has been acquired in whole or in part with proceeds of a crime, is subject to forfeiture.

*Seizure Process.* Upon seizure by a law enforcement agency, the agency must serve notice of seizure and possible forfeiture upon the owner within 15 days. If no person notifies the seizing agency in writing of a claim of ownership or right to possession within 45 days of service of notice in the case of personal property, and 90 days in the case of real property, the property is deemed forfeited by default.

*Hearing Process.* A person who timely notifies the seizing agency in writing of a claim of ownership or right to possession is entitled to a hearing. The hearing is before the chief law enforcement officer of the seizing agency, or an administrative law judge if the seizure is by a state agency; however, the person asserting a claim or right may remove the matter to a court of competent jurisdiction. The burden of proof is on the law enforcement agency to establish by a preponderance of the evidence that the property is subject to forfeiture. Claimants who prevail are entitled to reasonable attorneys' fees. In addition, in a court hearing between two or more claimants to the property, the prevailing party is entitled to a judgment for costs and reasonable attorneys' fees.

*Disposition of Forfeited Property.* If property is forfeited, the seizing agency may sell, or retain for official use, anything not required by law to be destroyed. A seizing agency must remit to the State Treasurer 10 percent of the net proceeds of any property forfeited during the preceding calendar year for deposit in the State General Fund. The remaining net proceeds are retained by the seizing agency exclusively for the expansion and improvement of controlled substances-related law enforcement, but must not supplant existing funding sources.

*Record-keeping Requirements.* When property is forfeited, seizing agencies must keep, and retain for at least seven years, a record indicating:

- a) the identity of the prior owner;
- b) a description of the property;
- c) the disposition of the property;
- d) the value of the property at the time of seizure; and
- e) the amount of proceeds realized from disposition.

Quarterly reports detailing the above must be filed by each seizing agency. By January 31 of each year, each seizing agency must remit, for deposit into the State General Fund, an amount equal to 10 percent of any property forfeited during the preceding calendar year.

#### Service Members' Civil Relief Act.

The Washington Service Members' Civil Relief Act (SCRA) contains certain rights for service members and their dependents whose financial and legal obligations may be adversely impacted by active military duty. It applies to any judicial or administrative proceeding commenced in any court or agency in the state in which a service member or his or her dependent is a party. The SCRA also contains provisions restricting contract fines and penalties, restructuring interest rates on certain business loans, and tolling statutes of limitations during military service periods.

#### **Summary of Engrossed Second Substitute Bill:**

### Forfeiture Generally.

A new chapter is created with respect to civil asset forfeiture proceedings. The entirety of the new chapter is applicable to seizures under statutes regarding the following:

- sexual exploitation of children;
- indecent exposure and prostitution;
- money laundering;
- theft of metal;
- driving while under the influence;
- fish and wildlife violations; and
- felony forfeiture (which, unlike the above statutes, requires conviction of the owner).

*Commencement of Forfeiture Proceedings.* Except with respect to contraband items, which shall be seized and summarily forfeited, proceedings for forfeiture are deemed commenced by the seizure. Upon seizure by a law enforcement agency, the agency must serve notice of seizure and possible forfeiture upon the owner within 15 days. If no person notifies the seizing agency in writing of a claim of ownership or right to possession within 60 days of service of notice in the case of personal property, and 120 days in the case of real property, the property is deemed forfeited by default.

The Service Members' Civil Relief Act (SCRA) is applicable to civil asset proceedings.

*Hearing Process.* A person who timely notifies the seizing agency in writing of a claim of ownership or right to possession is entitled to a hearing. The hearing is before a hearing officer who is not in the direct chain of command of the chief law enforcement officer of the seizing agency, or an administrative law judge if the seizure is by a state agency; however, the person asserting a claim or right may remove the matter to a court of competent jurisdiction. In all cases, the burden of proof is on the law enforcement agency to establish by a preponderance of the evidence that the property is subject to forfeiture. No personal or real property may be forfeited to the extent of the interest of an owner by reason of any act or omission committed or omitted without the owner's knowledge or consent.

Upon a determination by a court or hearing officer that the claimant is the present lawful owner or is lawfully entitled to possession, the seizing agency must promptly return seized items in the same or substantially similar condition as when they were seized. Claimants who prevail are entitled to reasonable attorneys' fees.

*Disposition of Forfeited Property and Proceeds.* If property is forfeited and after satisfaction of victim restitution, if required, the seizing agency may sell, retain for official use, request another entity to take custody of, or forward to an appropriate entity, anything not required by law to be destroyed. By January 31 of each year, each seizing agency must remit to the State Treasurer (Treasurer) 10 percent of the proceeds of any property forfeited during the previous calendar year. These moneys are to be deposited into the State General Fund. Forfeited property and net proceeds not required to be paid to the Treasurer shall be retained by the seizing agency exclusively for the expansion and improvement of related enforcement activities. They may not be used to supplant preexisting funding sources.

### Uniform Controlled Substances Act.

The Uniform Controlled Substances Act (UCSA) is amended to:

- strike language regarding forfeiture of conveyances and personal property that requires the owner, in order to avoid forfeiture, to establish that the commission or omission was without the owner's knowledge or consent;
- require that when property is ordered to be returned to a claimant, it shall be returned in the same or substantially similar condition as when seized;
- strike the provision governing recovery of costs and reasonable attorneys' fees in a court hearing between two or more claimants;
- strike the current reporting requirements, and make the UCSA subject to the reporting requirements found in the new chapter; and
- provide that the protections afforded by the SCRA are applicable to proceedings under the UCSA.

#### Reporting Requirements Applicable to All Seizing Agencies.

General reporting requirements are included in the new chapter and made applicable to all seizures by seizing agencies, regardless of whether the seizure was made pursuant to the new chapter, other state statutes, or was conducted in collaboration with a federal agency under federal law. Seizing agencies must keep records about property seized and forfeited, including information regarding multiple specific data points such as date of seizure, type of property, crime for which the suspect was charged, and whether there was a conviction. Annually, seizing agencies must file a report that includes these records with the Treasurer. The Treasurer must establish and maintain a searchable public website that includes these records. Seizing agencies must provide annual updates, and if an agency has made no seizures during the previous year it must file a report to that effect.

The Treasurer must also establish and maintain a searchable public website regarding the expenditure of forfeiture proceeds that includes:

- the total amount of funds expended, in each of eight categories (such as prevention programs, witness protection, expert witnesses, salaries, travel, and operating expenses), which resulted from property seized, forfeited, and reported; and
- the total value of seized and forfeited property held by the agency at the end of the reporting period.

Seizing agencies must report expenditure information to the Treasurer annually by March 1.

One hundred and twenty days after the close of each fiscal year, the Treasurer must submit a report summarizing forfeiture activity in the state to the Speaker of the House of Representatives, the President of the Senate, the Attorney General, and the Governor. The aggregate report must be made available on the Treasurer's website. In the report, the Treasurer may include recommendations to improve statutes, rules, and policies to facilitate seizure, forfeiture, and expenditure processes and reporting that are fair to crime victims, innocent property owners, secured interest holders, citizens, law enforcement, and taxpayers.

An agency failing to file a report as required is first issued a written warning, and any subsequent delinquency is subject to a civil penalty payable to the State General Fund of \$500 or the equivalent of one-quarter of the forfeiture proceeds received during the reporting period, whichever is greater. In addition, the Treasurer is precluded from making any expenditures from the forfeiture fund for that agency until the report is filed.

The Treasurer may recover its costs by charging a fee to seizing agencies filing reports. Agencies may use forfeiture proceeds to pay the costs of compilation, reporting data, and fees.

The data and reports are public information under the Public Records Act.

Application.

The act applies to seizures occurring on or after January 1, 2019.

**Appropriation:** None.

**Fiscal Note:** Available. New fiscal note requested on February 15, 2018.

**Effective Date:** The bill takes effect on January 1, 2019, except for section 6, relating to authorizing the State Treasurer to adopt rules necessary to implement the new chapter, which takes effect July 1, 2018.

**Staff Summary of Public Testimony (Judiciary):**

(In support) The purpose behind this bill is three-fold: (1) to protect the fundamental United States principle that property not be taken without due process; (2) to protect innocent property owners; and (3) to provide for more comprehensive and transparent reporting. Reform of civil asset forfeiture laws is going on all over the country. The nuclear option would be to get rid of the civil asset forfeiture process altogether and require criminal conviction in every case. Consistency is important, and this bill creates a consistent process for civil asset forfeitures under a variety of statutes. The burden of proof remains the preponderance of evidence. Prevailing claimants in a civil asset forfeiture proceeding will be able to recover reasonable attorneys' fees. There has been some feedback from seizing agencies that the reporting requirements in the bill are too burdensome. The uniformity that this bill creates is appreciated, as is the fact that prevailing claimants will be able to recover reasonable attorneys' fees. The provision regarding "contraband" should be stricken as there is no particular definition of this term. Language that is found in an existing statute that allows attorneys' fees to the prevailing party in a contest between two persons claiming the same property has been stripped in this bill, and it should be restored. The felony forfeiture statute should also be brought into this bill and consistent changes made to it as well. Recently, three states have completely abolished civil asset forfeiture, and another 25 have amended their laws in this regard, because there has been abuse by law enforcement. Ideally, the preponderance of the evidence standard should be changed to a clear and convincing standard. The reporting requirements in this bill are important, and reporting is not too much to ask of seizing agencies. A searchable website, as is provided for here, is a good idea and will save on costs that might be incurred if a person had to instead utilize the public records laws to obtain the records.

(Opposed) The uniformity and consistency provided here with respect to the burden of proof standard of evidence and attorneys' fees can be supported; however, there are issues that need to be addressed. The reporting requirements are too onerous. Prevailing claimants should not be entitled to additional damages beyond an award of attorneys' fees. The audit provisions should be stricken. Existing performance audits will suffice. While these reasons

are cause for opposition now, these could be resolved. Contraband is already in existing underlying law, and there is no need to change the language.

(Other) The stakeholders appreciate being involved in the conversations regarding this topic during the interim. The uniformity and consistency is appreciated, but there are several concerns that do need to be addressed. The reporting requirements are too onerous, going from five items to over 30, and some of the required items are simply not known or not in the possession of the seizing agency. Also, there is a financial burden associated with gathering this information. The problems with the increased reporting are compounded with the addition of financial penalties that could be imposed on a seizing agency. The uniformity with respect to attorneys' fees awards to prevailing parties is acceptable, but there should not be additional damages awarded.

**Staff Summary of Public Testimony (Appropriations):**

(In support) None.

(Opposed) None.

(Other) The Association of Washington Cities (AWC) is generally in favor of the bill, though there are a few concerns. The AWC supports the intent of the bill and has been involved with the workgroup. The bill significantly increases the reporting requirements for local governments. The AWC is supportive of these provisions except for the imposition of new civil penalties. The bill also allows the OST to charge a fee to agencies. Right now 10 percent of proceeds from seized assets are sent to the State General Fund, which should more than make up costs to the OST.

**Persons Testifying (Judiciary):** (In support) Representative Shea, prime sponsor; Representative Goodman; Bob Cooper, Washington Association of Criminal Defense Lawyers and Washington Defender Association; and Glen Morgan, Citizens Alliance for Property Rights.

(Opposed) James McMahan, Washington Association of Sheriffs and Police Chiefs; and Logan Bahr, Association of Washington Cities.

(Other) Michele Walker, City of Kent.

**Persons Testifying (Appropriations):** Logan Bahr, Association of Washington Cities.

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

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