

HOUSE BILL REPORT

SSB 5415

As Passed House:

April 7, 2023

Title: An act relating to public defense services for persons committed as not guilty by reason of insanity.

Brief Description: Concerning public defense services for persons committed as not guilty by reason of insanity.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Trudeau, Pedersen, Dhingra, Saldaña, Valdez and Wilson, C.).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 3/15/23, 3/17/23 [DP];

Appropriations: 4/1/23, 4/4/23 [DP].

Floor Activity:

Passed House: 4/7/23, 96-1.

Brief Summary of Substitute Bill

- Transfers responsibility to provide representation for persons not guilty by reason of insanity and committed to state psychiatric care to the Office of Public Defense (OPD).
- Directs the OPD to contract with attorneys and other entities for legal representation for such persons throughout their term of commitment.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: Do pass. Signed by 11 members: Representatives Hansen, Chair; Farivar, Vice Chair; Walsh, Ranking Minority Member; Graham, Assistant Ranking Minority Member; Cheney, Entenman, Goodman, Peterson, Rude, Thai and Walen.

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

Staff: Matt Sterling (786-7289).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: Do pass. Signed by 28 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Stokesbary, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Corry, Assistant Ranking Minority Member; Berg, Chandler, Connors, Couture, Davis, Dye, Fitzgibbon, Hansen, Harris, Lekanoff, Pollet, Riccelli, Rude, Ryu, Sandlin, Schmick, Simmons, Slatter, Steele, Stonier and Tharinger.

Minority Report: Without recommendation. Signed by 1 member: Representative Senn.

Staff: Yvonne Walker (786-7841).

Background:

Acquittal by Reason of Insanity.

A person is not guilty by reason of insanity (NGRI) of a criminal offense if, at the time of the act, as a result of a mental disease or defect, the person was unable to perceive the nature and quality of the act or unable to tell right from wrong.

A defendant who is found NGRI may be committed to a state hospital if a judge or jury finds that the defendant presents a substantial danger to other persons or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, and there is no less restrictive treatment than detention in a state hospital. The term of commitment may not exceed the maximum sentence for the offense for which the defendant was acquitted by reason of insanity.

Commitment to a State Facility.

A person committed by reason of insanity may apply for conditional release to the superior court of the county of acquittal no more frequently than once every six months. The person's application for conditional release must be reviewed by the Department of Social and Health Services (DSHS) and the Public Safety Review Panel which provides the court with recommendations about release. The court must determine whether the person may be released conditionally to less restrictive alternative treatment under the supervision of a multidisciplinary transition team without substantial danger to other persons or substantial likelihood of committing criminal acts jeopardizing public safety or security.

A person acquitted by reason of insanity who obtains conditional release to the community may apply for final release. To order final release, the court must find that the person no longer has a mental disease or defect that will pose a substantial danger to other persons or cause the person to commit criminal acts that jeopardize public safety or security.

Office of Public Defense.

The Office of Public Defense (OPD) is an independent office in the judicial branch of government established to implement the constitutional and statutory guarantees of counsel and ensure the effective and efficient delivery of indigent defense services that are funded by the state. The OPD contracts with attorneys, local governments, and law firms to provide representation for indigent client appeals, indigent parents in dependency cases, persons committed as sexually violent predators, and initial consultations for youth who are stopped or arrested by law enforcement.

The OPD was directed by proviso in the 2022 Supplemental State Operating Budget to develop a proposal for the OPD to assume statewide administration of legal defense services for post-commitment proceedings for indigent persons who are found NGRI. The OPD report was published on December 8, 2022.

Summary of Bill:

Office of Public Defense.

The OPD must administer all state-funded services related to representation of indigent persons who are acquitted by reason of insanity and committed to state psychiatric care. The OPD must contract with lawyers to provide the representation throughout the term of commitment, including any periods of conditional release until legal termination of commitment and final unconditional release, either directly or through local governments or nongovernment organizations.

The definition of indigent for the purpose of NGRI persons is updated to include anyone who receives public assistance, is involuntarily committed to a public health facility, receives an annual income of less than or equal to 125 percent of the federal poverty level, or has insufficient funds available to pay any amount for retention of counsel.

The OPD's responsibilities in administering post-commitment NGRI public defense services include:

- establishing annual contract fees for public defense legal services within amounts appropriated;
- contracting with individual attorneys, government agencies, and nongovernment organizations who provide indigent representation;
- establishing office policies and procedures for the payment of expert, professional, litigation and investigation costs;
- reviewing and analyzing existing caseload standards and updating the standards as necessary; and
- periodically submitting reports regarding the program and any necessary policy changes.

The OPD is required to assist indigent post-commitment NGRI persons through the provision of counsel to represent the patient throughout their term of commitment and in

obtaining qualified experts or professional services for an examination or evaluation:

- anytime a conditional release is being considered, modified, or revoked for increased privileges during a conditional release; and
- for release when the Secretary of the DSHS believes there are reasonable grounds for the patient's discharge.

Notice Provided to the Office of Public Defense.

The court must notify the OPD of the need for representation at the time an individual is acquitted by reason of insanity and committed to state psychiatric care. An expert or professional person who is obtained by a person who is committed to state psychiatric care for NGRI is compensated by the OPD. The DSHS must notify the attorney of record of a person who is NGRI and committed to a state psychiatric facility if the person escapes or disappears from conditional release or when a person on conditional release is detained on the grounds they are failing to adhere to the conditions of release.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony (Civil Rights & Judiciary):

(In support) The 2022 budget proviso directed the OPD to propose a program for representation of indigent persons found NGRI and committed to either Eastern or Western State Hospital. Once they are committed, they can be held in the hospital up to the statutory maximum penalty for the crime. This bill implements the report that was based on interviewing over 45 patients and meeting with many stakeholders. There is already a statutory right to counsel, but because public defense is decentralized and this involves the State of Washington, the OPD has experience taking on this kind of representation. This bill will just take this responsibility away from counties and give it to the OPD who is equipped to deal with these cases. A lawyer is a necessity for these patients and a difficult area of law for counsel to represent these persons. A lawyer can arrange for experts to conduct forensic risk assessments, draft and file pleadings, and arrange court hearings and depositions. Specific patients with developmental disabilities and elder populations face additional barriers moving through the NGRI system. Once these people have an attorney, they can obtain additional privileges. Any change in treatment or condition requires a court hearing. It is a necessity to get a court order to modify treatment that is not available at the hospital or even just increased access to areas of the hospital. The patient cannot do this on their own in this highly specialized area. This representation is not something that is a want, but is one of great need for the patient, the hospital, and the state. Our current state practice is not sustainable without funding from the state. This bill will save the state money because it costs \$800 to \$1300 a day for these individuals. If NGRI patients can move through the system more quickly, more *Trueblood* patients can be provided with

beds. This proposal will benefit everyone from the patients, the counties, and the state.

(Opposed) There are concerns with the emergency clause at the end of the bill. Is there an emergency or is the OPD having problems paying their budget? There is concern that this is an inappropriate situation to rush into law without input from the public through referendum. This bill seems to be an expansion of the state capturing county issues and transferring that authority to the OPD. County involvement in these cases is needed.

Staff Summary of Public Testimony (Appropriations):

(In support) Not guilty by reason of insanity (NGRI) is a very complex area of law that is unlike other typical criminal cases. Currently, there is no organized criminal defense representation for individuals committed to NGRI and most patients are unrepresented. It is estimated that there are 307 patients between the two state hospitals, with an estimated 25 NGRI patients whom the Department of Social and Health Services has deemed ready to progress through the hospital ward system. More defense counsel for patients would open up much needed beds for *Trueblood* patients. However, without counsel, these patients are stuck, as the statute requires the patient's public defense attorney to initiate these actions. Every day a patient's movement is delayed, it costs the state between \$800 and \$1,600 per day. Without effective attorneys, these patients can linger for decades at the hospitals, unnecessarily costing the state millions of dollars.

Patients committed as NGRI are some of the most vulnerable patients in the criminal justice system. Lower level NGRI patients are using the same forensic beds as *Trueblood* competency restoration patients and the state is currently dealing with millions of dollars in past *Trueblood* contempt fines. When NGRI patients are properly represented, they can often advance one to two levels within the hospital or are released into the community. Access to counsel is necessary for access to treatment.

(Opposed) None.

Persons Testifying (Civil Rights & Judiciary): (In support) Jennifer Bartlett; Shoshana Kehoe-Ehlers, Washington State Office of Public Defense; and Chloe Merino, Disability Rights Washington.

(Opposed) Eric Pratt.

Persons Testifying (Appropriations): Kari Reardon, Public Safety Review Panel; Shoshana Kehoe-Ehlers, Washington State Office of Public Defense; Chloe Merino, Disability Rights Washington; and Jennifer Bartlett, Snohomish County Public Defender.

Persons Signed In To Testify But Not Testifying (Civil Rights & Judiciary): None.

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