

2SSB 6274 - S AMD 636

By Senators Regala, Hargrove, Stevens

ADOPTED 02/12/2004

1       Strike everything after the enacting clause and insert the  
2 following:

3       "NEW SECTION.   **Sec. 1.** The legislature finds that recent state and  
4 federal case law requires clarification of state statutes with regard  
5 to competency evaluations and involuntary medication ordered in the  
6 context of competency restoration.

7       The legislature finds that the court in *Born v. Thompson*, 117 Wn.  
8 App. 57 (2003) interpreted the term "nonfatal injuries" in a manner  
9 that conflicts with the stated intent of the legislature to: "(1)  
10 Clarify that it is the nature of a person's current conduct, current  
11 mental condition, history, and likelihood of committing future acts  
12 that pose a threat to public safety or himself or herself, rather than  
13 simple categorization of offenses, that should determine treatment  
14 procedures and level; ... and (3) provide additional opportunities for  
15 mental health treatment for persons whose conduct threatens himself or  
16 herself or threatens public safety and has led to contact with the  
17 criminal justice system" as stated in section 1, chapter 297, Laws of  
18 1998. Consequently, the legislature intends to clarify that it  
19 intended "nonfatal injuries" to be interpreted in a manner consistent  
20 with the purposes of the competency restoration statutes.

21       The legislature also finds that the decision in *Sell v. United*  
22 *States*, \_\_\_U.S. \_\_\_ (2003), requires a determination whether a  
23 particular criminal offense is "serious" in the context of competency  
24 restoration and the state's duty to protect the public. The  
25 legislature further finds that, in order to adequately protect the  
26 public and in order to provide additional opportunities for mental  
27 health treatment for persons whose conduct threatens themselves or  
28 threatens public safety and has led to contact with the criminal  
29 justice system in the state, the determination of those criminal  
30 offenses that are "serious" offenses must be made consistently

1 throughout the state. In order to facilitate this consistency, the  
2 legislature intends to determine those offenses that are serious in  
3 every case as well as the standards by which other offenses may be  
4 determined to be serious. The legislature also intends to clarify that  
5 a court may, to the extent permitted by federal law and required by the  
6 *Sell* decision, inquire into the civil commitment status of a defendant  
7 and may be told, if known.

8 **Sec. 2.** RCW 10.77.010 and 2000 c 94 s 12 are each amended to read  
9 as follows:

10 As used in this chapter:

11 (1) "Admission" means acceptance based on medical necessity, of a  
12 person as a patient.

13 (2) "Commitment" means the determination by a court that a person  
14 should be detained for a period of either evaluation or treatment, or  
15 both, in an inpatient or a less-restrictive setting.

16 (3) "Conditional release" means modification of a court-ordered  
17 commitment, which may be revoked upon violation of any of its terms.

18 (4) "County designated mental health professional" has the same  
19 meaning as provided in RCW 71.05.020.

20 (5) A "criminally insane" person means any person who has been  
21 acquitted of a crime charged by reason of insanity, and thereupon found  
22 to be a substantial danger to other persons or to present a substantial  
23 likelihood of committing criminal acts jeopardizing public safety or  
24 security unless kept under further control by the court or other  
25 persons or institutions.

26 (6) "Department" means the state department of social and health  
27 services.

28 (7) "Detention" or "detain" means the lawful confinement of a  
29 person, under the provisions of this chapter, pending evaluation.

30 (8) "Developmental disabilities professional" means a person who  
31 has specialized training and three years of experience in directly  
32 treating or working with persons with developmental disabilities and is  
33 a psychiatrist or psychologist, or a social worker, and such other  
34 developmental disabilities professionals as may be defined by rules  
35 adopted by the secretary.

1 (9) "Developmental disability" means the condition as defined in  
2 RCW 71A.10.020(3).

3 (10) "Discharge" means the termination of hospital medical  
4 authority. The commitment may remain in place, be terminated, or be  
5 amended by court order.

6 (11) "Furlough" means an authorized leave of absence for a resident  
7 of a state institution operated by the department designated for the  
8 custody, care, and treatment of the criminally insane, consistent with  
9 an order of conditional release from the court under this chapter,  
10 without any requirement that the resident be accompanied by, or be in  
11 the custody of, any law enforcement or institutional staff, while on  
12 such unescorted leave.

13 (12) "Habilitative services" means those services provided by  
14 program personnel to assist persons in acquiring and maintaining life  
15 skills and in raising their levels of physical, mental, social, and  
16 vocational functioning. Habilitative services include education,  
17 training for employment, and therapy. The habilitative process shall  
18 be undertaken with recognition of the risk to the public safety  
19 presented by the individual being assisted as manifested by prior  
20 charged criminal conduct.

21 (13) "History of one or more violent acts" means violent acts  
22 committed during: (a) The ten-year period of time prior to the filing  
23 of criminal charges; plus (b) the amount of time equal to time spent  
24 during the ten-year period in a mental health facility or in  
25 confinement as a result of a criminal conviction.

26 (14) "Incompetency" means a person lacks the capacity to understand  
27 the nature of the proceedings against him or her or to assist in his or  
28 her own defense as a result of mental disease or defect.

29 (15) "Indigent" means any person who is financially unable to  
30 obtain counsel or other necessary expert or professional services  
31 without causing substantial hardship to the person or his or her  
32 family.

33 (16) "Individualized service plan" means a plan prepared by a  
34 developmental disabilities professional with other professionals as a  
35 team, for an individual with developmental disabilities, which shall  
36 state:

1 (a) The nature of the person's specific problems, prior charged  
2 criminal behavior, and habilitation needs;

3 (b) The conditions and strategies necessary to achieve the purposes  
4 of habilitation;

5 (c) The intermediate and long-range goals of the habilitation  
6 program, with a projected timetable for the attainment;

7 (d) The rationale for using this plan of habilitation to achieve  
8 those intermediate and long-range goals;

9 (e) The staff responsible for carrying out the plan;

10 (f) Where relevant in light of past criminal behavior and due  
11 consideration for public safety, the criteria for proposed movement to  
12 less-restrictive settings, criteria for proposed eventual release, and  
13 a projected possible date for release; and

14 (g) The type of residence immediately anticipated for the person  
15 and possible future types of residences.

16 (17) "Professional person" means:

17 (a) A psychiatrist licensed as a physician and surgeon in this  
18 state who has, in addition, completed three years of graduate training  
19 in psychiatry in a program approved by the American medical association  
20 or the American osteopathic association and is certified or eligible to  
21 be certified by the American board of psychiatry and neurology or the  
22 American osteopathic board of neurology and psychiatry;

23 (b) A psychologist licensed as a psychologist pursuant to chapter  
24 18.83 RCW; or

25 (c) A social worker with a master's or further advanced degree from  
26 an accredited school of social work or a degree deemed equivalent under  
27 rules adopted by the secretary.

28 (18) "Release" means legal termination of the court-ordered  
29 commitment under the provisions of this chapter.

30 (19) "Secretary" means the secretary of the department of social  
31 and health services or his or her designee.

32 (20) "Treatment" means any currently standardized medical or mental  
33 health procedure including medication.

34 (21) "Violent act" means behavior that: (a)(i) Resulted in; (ii)  
35 if completed as intended would have resulted in; or (iii) was  
36 threatened to be carried out by a person who had the intent and  
37 opportunity to carry out the threat and would have resulted in,

1 homicide, nonfatal injuries, or substantial damage to property; or (b)  
2 recklessly creates an immediate risk of serious physical injury to  
3 another person. As used in this subsection, "nonfatal injuries" means  
4 physical pain or injury, illness, or an impairment of physical  
5 condition. "Nonfatal injuries" shall be construed to be consistent  
6 with the definition of "bodily injury," as defined in RCW 9A.04.110.

7 NEW SECTION. Sec. 3. A new section is added to chapter 10.77 RCW  
8 to read as follows:

9 (1) For purposes of determining whether a court may authorize  
10 involuntary medication for the purpose of competency restoration  
11 pursuant to RCW 10.77.090, a pending charge involving any one or more  
12 of the following crimes is a serious offense per se in the context of  
13 competency restoration:

14 (a) Any violent offense, sex offense, serious traffic offense, and  
15 most serious offense, as those terms are defined in RCW 9.94A.030;

16 (b) Any offense, except nonfelony counterfeiting offenses, included  
17 in crimes against persons in RCW 9.94A.411;

18 (c) Any offense contained in chapter 9.41 RCW (firearms and  
19 dangerous weapons);

20 (d) Any offense listed as domestic violence in RCW 10.99.020;

21 (e) Any offense listed as a harassment offense in chapter 9A.46  
22 RCW;

23 (f) Any violation of chapter 69.50 RCW that is a class B felony; or

24 (g) Any city or county ordinance or statute that is equivalent to  
25 an offense referenced in this subsection.

26 (2)(a) In a particular case, a court may determine that a pending  
27 charge not otherwise defined as serious by state or federal law or by  
28 a city or county ordinance is, nevertheless, a serious offense within  
29 the context of competency restoration treatment when the conduct in the  
30 charged offense falls within the standards established in (b) of this  
31 subsection.

32 (b) To determine that the particular case is a serious offense  
33 within the context of competency restoration, the court must consider  
34 the following factors and determine that one or more of the following  
35 factors creates a situation in which the offense is serious:

1 (i) The charge includes an allegation that the defendant actually  
2 inflicted bodily or emotional harm on another person or that the  
3 defendant created a reasonable apprehension of bodily or emotional harm  
4 to another;

5 (ii) The extent of the impact of the alleged offense on the basic  
6 human need for security of the citizens within the jurisdiction;

7 (iii) The number and nature of related charges pending against the  
8 defendant;

9 (iv) The length of potential confinement if the defendant is  
10 convicted; and

11 (v) The number of potential and actual victims or persons impacted  
12 by the defendant's alleged acts.

13 (3)(a) Any city or county may, by ordinance, determine that  
14 nonfelony offenses not otherwise defined as serious by state or federal  
15 law are nonetheless "serious offenses" within the context of competency  
16 restoration treatment when the offense falls within the standards  
17 established in (b) of this subsection.

18 (b) The city or county must consider the following factors and  
19 determine that one or more of the following factors creates a situation  
20 in which the offense is serious:

21 (i) The offense includes an element that the defendant actually  
22 inflicted bodily or emotional harm on another person or that the  
23 defendant created a reasonable apprehension of bodily or emotional harm  
24 to another person;

25 (ii) The extent of the impact of the offense on the basic human  
26 need for security of the citizens within the jurisdiction;

27 (iii) The length of potential confinement applicable to the  
28 offense; and

29 (iv) The number of potential and actual victims or persons impacted  
30 by the defendant's alleged acts.

31 NEW SECTION. **Sec. 4.** A new section is added to chapter 10.77 RCW  
32 to read as follows:

33 When the court must make a determination whether to order  
34 involuntary medications for the purpose of competency restoration or  
35 for maintenance of competency, the court shall inquire, and shall be  
36 told, and to the extent that the prosecutor or defense attorney is

1 aware, whether the defendant is the subject of a pending civil  
2 commitment proceeding or has been ordered into involuntary treatment  
3 pursuant to a civil commitment proceeding.

4 **Sec. 5.** RCW 71.05.390 and 2000 c 94 s 9, 2000 c 75 s 6, and 2000  
5 c 74 s 7 are each reenacted and amended to read as follows:

6 Except as provided in this section, the fact of admission and all  
7 information and records compiled, obtained, or maintained in the course  
8 of providing services to either voluntary or involuntary recipients of  
9 services at public or private agencies shall be confidential.

10 Information and records may be disclosed only:

11 (1) In communications between qualified professional persons to  
12 meet the requirements of this chapter, in the provision of services or  
13 appropriate referrals, or in the course of guardianship proceedings.  
14 The consent of the patient, or his or her guardian, shall be obtained  
15 before information or records may be disclosed by a professional person  
16 employed by a facility unless provided to a professional person: (a)  
17 Employed by the facility; (b) who has medical responsibility for the  
18 patient's care; (c) who is a county designated mental health  
19 professional; (d) who is providing services under chapter 71.24 RCW;  
20 (e) who is employed by a state or local correctional facility where the  
21 person is confined; or (f) who is providing evaluation, treatment, or  
22 follow-up services under chapter 10.77 RCW.

23 (2) When the communications regard the special needs of a patient  
24 and the necessary circumstances giving rise to such needs and the  
25 disclosure is made by a facility providing outpatient services to the  
26 operator of a care facility in which the patient resides.

27 (3) When the person receiving services, or his or her guardian,  
28 designates persons to whom information or records may be released, or  
29 if the person is a minor, when his or her parents make such  
30 designation.

31 (4) To the extent necessary for a recipient to make a claim, or for  
32 a claim to be made on behalf of a recipient for aid, insurance, or  
33 medical assistance to which he or she may be entitled.

34 (5) For either program evaluation or research, or both: PROVIDED,  
35 That the secretary adopts rules for the conduct of the evaluation or

1 research, or both. Such rules shall include, but need not be limited  
2 to, the requirement that all evaluators and researchers must sign an  
3 oath of confidentiality substantially as follows:

4 "As a condition of conducting evaluation or research concerning  
5 persons who have received services from (fill in the facility, agency,  
6 or person) I, . . . . ., agree not to divulge, publish, or  
7 otherwise make known to unauthorized persons or the public any  
8 information obtained in the course of such evaluation or research  
9 regarding persons who have received services such that the person who  
10 received such services is identifiable.

11 I recognize that unauthorized release of confidential information  
12 may subject me to civil liability under the provisions of state law.

13 /s/ ..... "

14 (6)(a) To the courts as necessary to the administration of this  
15 chapter or to a court ordering an evaluation or treatment under chapter  
16 10.77 RCW solely for the purpose of preventing the entry of any  
17 evaluation or treatment order that is inconsistent with any order  
18 entered under this chapter.

19 (b) To a court or its designee in which a motion under chapter  
20 10.77 RCW has been made for involuntary medication of a defendant for  
21 the purpose of competency restoration.

22 (c) Disclosure under this subsection is mandatory for the purpose  
23 of the health insurance portability and accountability act.

24 (7) To law enforcement officers, public health officers, or  
25 personnel of the department of corrections or the indeterminate  
26 sentence review board for persons who are the subject of the records  
27 and who are committed to the custody of the department of corrections  
28 or indeterminate sentence review board which information or records are  
29 necessary to carry out the responsibilities of their office. Except  
30 for dissemination of information released pursuant to RCW 71.05.425 and  
31 4.24.550, regarding persons committed under this chapter under RCW  
32 71.05.280(3) and 71.05.320(2)(c) after dismissal of a sex offense as  
33 defined in RCW 9.94A.030, the extent of information that may be  
34 released is limited as follows:



1 (a) Only the fact, place, and date of involuntary commitment, the  
2 fact and date of discharge or release, and the last known address shall  
3 be disclosed upon request; and

4 (b) The law enforcement and public health officers or personnel of  
5 the department of corrections or indeterminate sentence review board  
6 shall be obligated to keep such information confidential in accordance  
7 with this chapter; and

8 (c) Additional information shall be disclosed only after giving  
9 notice to said person and his or her counsel and upon a showing of  
10 clear, cogent, and convincing evidence that such information is  
11 necessary and that appropriate safeguards for strict confidentiality  
12 are and will be maintained. However, in the event the said person has  
13 escaped from custody, said notice prior to disclosure is not necessary  
14 and that the facility from which the person escaped shall include an  
15 evaluation as to whether the person is of danger to persons or property  
16 and has a propensity toward violence.

17 (8) To the attorney of the detained person.

18 (9) To the prosecuting attorney as necessary to carry out the  
19 responsibilities of the office under RCW 71.05.330(2) and  
20 71.05.340(1)(b) and 71.05.335. The prosecutor shall be provided access  
21 to records regarding the committed person's treatment and prognosis,  
22 medication, behavior problems, and other records relevant to the issue  
23 of whether treatment less restrictive than inpatient treatment is in  
24 the best interest of the committed person or others. Information shall  
25 be disclosed only after giving notice to the committed person and the  
26 person's counsel.

27 (10) To appropriate law enforcement agencies and to a person, when  
28 the identity of the person is known to the public or private agency,  
29 whose health and safety has been threatened, or who is known to have  
30 been repeatedly harassed, by the patient. The person may designate a  
31 representative to receive the disclosure. The disclosure shall be made  
32 by the professional person in charge of the public or private agency or  
33 his or her designee and shall include the dates of commitment,  
34 admission, discharge, or release, authorized or unauthorized absence  
35 from the agency's facility, and only such other information that is  
36 pertinent to the threat or harassment. The decision to disclose or not

1 shall not result in civil liability for the agency or its employees so  
2 long as the decision was reached in good faith and without gross  
3 negligence.

4 (11) To appropriate law enforcement agencies, upon request, all  
5 necessary and relevant information in the event of a crisis or emergent  
6 situation that poses a significant and imminent risk to the public.  
7 The decision to disclose or not shall not result in civil liability for  
8 the mental health service provider or its employees so long as the  
9 decision was reached in good faith and without gross negligence.

10 (12) To the persons designated in RCW 71.05.425 for the purposes  
11 described in that section.

12 (13) Civil liability and immunity for the release of information  
13 about a particular person who is committed to the department under RCW  
14 71.05.280(3) and 71.05.320(2)(c) after dismissal of a sex offense as  
15 defined in RCW 9.94A.030, is governed by RCW 4.24.550.

16 (14) To a patient's next of kin, guardian, or conservator, if any,  
17 in the event of death, as provided in RCW 71.05.400.

18 (15) To the department of health for the purposes of determining  
19 compliance with state or federal licensure, certification, or  
20 registration rules or laws. However, the information and records  
21 obtained under this subsection are exempt from public inspection and  
22 copying pursuant to chapter 42.17 RCW.

23 The fact of admission, as well as all records, files, evidence,  
24 findings, or orders made, prepared, collected, or maintained pursuant  
25 to this chapter shall not be admissible as evidence in any legal  
26 proceeding outside this chapter without the written consent of the  
27 person who was the subject of the proceeding except in a subsequent  
28 criminal prosecution of a person committed pursuant to RCW 71.05.280(3)  
29 or 71.05.320(2)(c) on charges that were dismissed pursuant to chapter  
30 10.77 RCW due to incompetency to stand trial or in a civil commitment  
31 proceeding pursuant to chapter 71.09 RCW. The records and files  
32 maintained in any court proceeding pursuant to this chapter shall be  
33 confidential and available subsequent to such proceedings only to the  
34 person who was the subject of the proceeding or his or her attorney.  
35 In addition, the court may order the subsequent release or use of such  
36 records or files only upon good cause shown if the court finds that

1 appropriate safeguards for strict confidentiality are and will be  
2 maintained.

3 NEW SECTION. **Sec. 6.** The department of social and health services  
4 shall study and identify in its budget request to the office of  
5 financial management the need, options, and plans to address the  
6 increasing need for capacity in the forensic units of the state  
7 hospitals.

8 NEW SECTION. **Sec. 7.** If any provision of this act or its  
9 application to any person or circumstance is held invalid, the  
10 remainder of the act or the application of the provision to other  
11 persons or circumstances is not affected.

12 NEW SECTION. **Sec. 8.** This act is necessary for the immediate  
13 preservation of the public peace, health, or safety, or support of the  
14 state government and its existing public institutions, and takes effect  
15 immediately."

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**ADOPTED 02/12/2004**

16 On page 1, line 1 of the title, after "restoration;" strike the  
17 remainder of the title and insert "amending RCW 10.77.010; reenacting  
18 and amending RCW 71.05.390; adding new sections to chapter 10.77 RCW;  
19 creating new sections; and declaring an emergency."

EFFECT: Confirms the intent statement to the remaining substance  
in the second substitute. Makes the disclosure under section 5  
parallel to the receipt of the information under section 4.

--- END ---