

# HOUSE BILL REPORT

## HB 1817

---

**As Reported by House Committee On:**  
Public Safety

**Title:** An act relating to eligibility and requirements for deferred prosecutions.

**Brief Description:** Concerning eligibility and requirements for deferred prosecutions.

**Sponsors:** Representative Goodman.

**Brief History:**

**Committee Activity:**

Public Safety: 1/18/22, 1/27/22 [DPS].

**Brief Summary of Substitute Bill**

- Authorizes a person who participates in a deferred prosecution for a first-time gross misdemeanor Driving Under the Influence (DUI) or Physical Control of a Vehicle Under the Influence (PC) charge to participate in a second deferred prosecution for a subsequent gross misdemeanor DUI or PC charge.
- Authorizes a person to petition for a second deferred prosecution while still under the court's jurisdiction for a first deferred prosecution, provided that the first deferred prosecution must be revoked before entry of the second.
- Requires a person petitioning for a deferred prosecution to demonstrate amenability to treatment by completing a minimum number of treatment sessions, unless waived by the court for good cause.
- Requires a person petitioning for a deferred prosecution for certain criminal mistreatment crimes to be evaluated and have a plan developed and facilitated by the Department of Children, Youth, and Families.
- Modifies certain requirements for participation in a deferred prosecution depending on the nature of the underlying problem that caused the

---

*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.*

petitioner to commit the charged offense.

- Provides that a deferred prosecution for a second or subsequent DUI or PC offense counts as one point on a defendant's offender score for felony traffic offenses.

---

## HOUSE COMMITTEE ON PUBLIC SAFETY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Goodman, Chair; Johnson, J., Vice Chair; Davis, Hackney, Orwall, Ramos, Simmons, Thai and Young.

**Minority Report:** Do not pass. Signed by 2 members: Representatives Mosbrucker, Ranking Minority Member; Graham.

**Minority Report:** Without recommendation. Signed by 2 members: Representatives Klippert, Assistant Ranking Minority Member; Griffey.

**Staff:** Corey Patton (786-7388).

### **Background:**

#### Eligibility for Deferred Prosecution.

A person charged with a misdemeanor or gross misdemeanor in district or municipal court may petition the court for a deferred prosecution, subject to certain conditions. For example, a petitioner is not eligible for more than one deferred prosecution for gross misdemeanor Driving Under the Influence or Physical Control of a Vehicle Under the Influence charges.

To qualify for a deferred prosecution, the petitioner must allege that a substance use disorder, mental health problem, or domestic violence behavior problem caused the petitioner to commit the charged offense and that treatment is necessary to prevent reoccurrence. A petition must include a case history and risk assessment prepared by an approved treatment provider, health center, or government agency, depending on the nature of the underlying problem that caused the petitioner to commit the charged offense. For example, a petitioner seeking a deferred prosecution related to certain criminal mistreatment crimes must be evaluated by and have a plan developed and facilitated by the Department of Social and Health Services.

#### Evaluation and Treatment Plan.

The court may refer the petitioner for a diagnostic investigation and evaluation by a designated program or department to determine:

- whether the petitioner suffers from the problem described;

- whether the problem, if left untreated, has a probability of causing similar misconduct in the future;
- whether extensive and long-term treatment is required;
- whether effective treatment for the petitioner's problem is available; and
- whether the petitioner is amenable to treatment.

The entity conducting the evaluation must make a written report to the court stating its findings and recommendations. If the entity supports treatment, it must also recommend a treatment plan containing the type, nature, length, schedule, and cost of treatment. If the court approves the plan and the petitioner agrees to comply with its terms and conditions, the court must accept the petitioner's entry for a deferred prosecution.

Requirements for Deferred Prosecution.

A deferred prosecution based on alcoholism must be for a two-year period and impose the following requirements:

- total abstinence from alcohol and all other nonprescribed mind-altering drugs;
- participation in an intensive inpatient or intensive outpatient program in a state-approved substance use disorder treatment program;
- participation in a minimum of two meetings per week of an alcoholism self-help recovery support group for the duration of the treatment program;
- participation in an alcoholism self-help recovery support group from the date of court approval of the plan to entry into intensive treatment;
- no less than weekly approved outpatient counseling, group or individual, for a minimum of six months following the intensive phase of treatment;
- no less than monthly outpatient contact, group or individual, for the remainder of the two-year deferred prosecution period;
- reservation of the decision to include the use of prescribed drugs, including disulfiram, as a condition of treatment to the treating facility and the participant's physician.
- all treatment within or approved by a state-approved substance use disorder treatment program; and
- signing and agreeing to the terms and conditions of the program.

As a condition of granting a deferred prosecution, the court may appoint a probation department or other appropriate person or agency to supervise the petitioner. The supervisor must:

- at least once every six months, request an abstract of the petitioner's driving record if the petitioner's charge relates to operation of a motor vehicle; and
- at least once every month, contact the petitioner or any agency to which the petitioner has been directed for treatment.

The facility or service provider administering treatment or services to the participant must provide the court with a statement every three months for the first year, and every six months for the second year, regarding the participant's cooperation with the treatment plan

and progress or failure with treatment. If the participant successfully completes the two-year treatment program and at least five years have passed following entry of the order for the deferred prosecution, the court must dismiss the pending charges. If the participant violates any terms or conditions of the deferred prosecution, the court must determine whether to revoke the deferred prosecution and enter judgment on the charge.

#### Felony Offender Scores.

For most felony offenses, the Sentencing Reform Act provides a determinate sentencing system in which sentencing courts generally impose sentences within a standard range. The standard range for a person is determined by reference to a grid, which provides a base sentence according to the person's offender score and the seriousness level of the present offense. The offender score is a point total based on the person's prior dispositions and convictions.

---

### **Summary of Substitute Bill:**

#### Eligibility for Deferred Prosecution.

A person who participates in a deferred prosecution for a first-time gross misdemeanor Driving Under the Influence (DUI) or Physical Control of a Vehicle Under the Influence (PC) charge may petition the court for a second deferred prosecution for a subsequent gross misdemeanor DUI or PC charge, provided that the person otherwise meets eligibility requirements, the court makes any necessary findings, and the person has no prior out-of-state convictions that would constitute a prior offense. A person who does not participate in a deferred prosecution for a first-time gross misdemeanor DUI or PC charge is only eligible to petition the court for one deferred prosecution for a subsequent gross misdemeanor DUI or PC charge.

A person may petition the court for a second deferred prosecution while still under the jurisdiction of the court for a first deferred prosecution; however, the court must revoke the first deferred prosecution prior to entry of the second deferred prosecution. A person may not participate in two deferred prosecutions at the same time unless the separate offenses were committed within seven days of each other and the person petitions to consolidate the offenses into a single deferred prosecution.

A petition for deferred prosecution must include a case history and risk assessment prepared by a state-approved behavioral health agency, approved for mental health services or substance use disorder services, or by a state-certified domestic violence treatment provider, depending on the nature of the underlying problem that caused the petitioner to commit the charged offense. A petitioner seeking a deferred prosecution related to certain criminal mistreatment crimes must be evaluated and have a plan developed and facilitated by the Department of Children, Youth, and Families.

#### Evaluation and Treatment Plan.

A program or department performing a diagnostic investigation and evaluation for a petitioner must, depending on the nature of the underlying problem that caused the petitioner to commit the offense, determine whether the petitioner is either:

- amenable to treatment as demonstrated by (1) completion of residential treatment, (2) completion of a minimum of 18 hours of intensive outpatient treatment for substance use disorder petitions, (3) completion of a minimum of six mental health sessions for mental health disorder petitions, or (4) completion of a minimum of six domestic violence treatment sessions for domestic violence petitions; or
- willing to cooperate with child welfare services.

The court may waive the required minimum number of sessions if it finds good cause.

#### Requirements for Deferred Prosecution.

A deferred prosecution based on either substance use disorder or mental health co-occurring disorder must be for a two-year period and impose the following requirements:

- total abstinence from alcohol and all other nonprescribed mind-altering drugs;
- periodic, random urinalysis or breath analysis;
- all treatment within or approved by a state-approved behavioral health agency;
- no less than weekly approved outpatient counseling, whether group or individual, for a minimum of six months following the intensive phase of treatment;
- no less than monthly outpatient contact, whether group or individual, for the remainder of the two-year deferred prosecution period;
- reservation of the decision to include the use of prescribed drugs, including disulfiram, as a condition of treatment to the treating facility and the participant's physician; and
- signing and agreeing to the terms and conditions of the program.

If the participant fails to remain abstinent, the participant must receive a full substance use disorder reassessment and recommended treatment.

A deferred prosecution based on substance use disorder must also impose the following requirements:

- completion of an intensive outpatient treatment program or residential inpatient treatment program, depending on the severity of the diagnosis; and
- participation in a minimum of two meetings per week of a substance use disorder self-help recovery support group, as determined by the assessing agency, for the duration of the treatment program.

A deferred prosecution based on mental health co-occurring disorder must also impose the following requirements:

- completion of the same requirements imposed for a deferred prosecution based on substance use disorder, or completion of an outpatient program as determined by the petitioner's diagnostic evaluation; and
- completion of individual or group mental health services.

A deferred prosecution based on mental health disorder where the wrongful conduct did not involve and was not caused by alcohol, drugs, or a substance use disorder, must include treatment recommended by a state-approved mental health provider.

As a condition of granting a deferred prosecution, the court may appoint a probation department or other appropriate person or agency to supervise the petitioner. The supervisor must:

- at least once every six months, request an abstract of the petitioner's driving record if the petitioner's charge relates to operation of a motor vehicle;
- at least once every month until treatment is completed, contact the petitioner;
- at least once every 90 days until the end of the deferral period, review the petitioner's criminal history; and
- report known violations of supervision or law and noncompliance with conditions of the deferred prosecution to the court within five business days or as soon as practicable.

The facility or service provider administering treatment or services to the participant must provide the court with a statement every month regarding the participant's cooperation with the treatment plan and progress or failure with treatment. If the participant successfully completes the approved treatment plan and at least five years have passed following entry of the order for the deferred prosecution, the court must dismiss the pending charges.

#### Felony Offender Scores.

A deferred prosecution for a second or subsequent DUI or PC offense counts as one point on a defendant's offender score for felony traffic offenses.

#### **Substitute Bill Compared to Original Bill:**

The substitute bill: (1) provides that a deferred prosecution for a second or subsequent Driving Under the Influence or Physical Control of a Vehicle Under the Influence offense counts as one point on a defendant's offender score for felony traffic offenses; (2) requires a person petitioning for a deferred prosecution for certain criminal mistreatment charges to be evaluated and have a plan developed and facilitated by the Department of Children, Youth, and Families, rather than the Department of Health; (3) provides that specific behavioral health agencies and providers involved in performing evaluations and providing treatment services required for deferred prosecutions must be state-certified or approved, rather than Washington state-certified or approved; (4) modifies certain requirements for participation in a deferred prosecution depending on whether the petition is based on substance use disorder, mental health disorder, or mental health co-occurring disorder; (5) requires that certain petitioners receive an evaluation from an approved behavioral health agency approved for mental health services or substance use disorder services, rather than an agency approved for both; and (6) provides an effective date of January 1, 2023.

**Appropriation:** None.

**Fiscal Note:** Available. New fiscal note requested on January 29, 2022.

**Effective Date of Substitute Bill:** The bill takes effect January 1, 2023.

**Staff Summary of Public Testimony:**

(In support) Deferred prosecutions are primarily used to provide intensive treatment to people arrested and charged with crimes related to impaired driving, such as Driving Under the Influence (DUI). The Washington State Institute for Public Policy has found that people who complete a deferred prosecution are about twice as likely to succeed in preventing future instances of impaired driving compared to those who do not complete a deferred prosecution. People who enter treatment via a deferred prosecution re-offend less frequently than those who engage in the same treatment as the result of a court order and conviction. Deferred prosecutions are recognized nationally for their success. However, individuals with substance use disorders do not readily seek recovery and there has been a recent trend where deferred prosecutions have been underutilized. Currently, a defense attorney may advise a client charged with a first-time DUI to save his or her opportunity to elect a deferred prosecution for a potential future DUI, rather than electing a deferred prosecution for the first-time DUI. Perverse outcomes should be avoided and people should be incentivized to elect a deferred prosecution on a first offense.

There is a misconception that allowing people to avoid criminal prosecution by engaging in treatment provides them an easy way out. However, participation in a deferred prosecution requires more effort and expense than serving jail time or paying a fine. The primary goal is to reduce the number of DUIs. Intervention, treatment, and court monitoring have been shown to be more effective at reducing recidivism compared to the imposition of criminal penalties. A person who simply serves a few days in jail may not engage with services. It takes time to heal and incorporate lifestyle changes, and deferred prosecutions provide a better solution for the individual and the community.

This bill improves accountability, access to treatment, and public safety by authorizing a person to participate in a second deferred prosecution in his or her lifetime, with some limitations. A person may only elect a second deferred prosecution for a DUI if he or she also elected a deferred prosecution on his or her first-time DUI. If a person is engaged in a deferred prosecution for a first-time DUI and is charged with a second DUI before completing it, he or she may elect a second deferred prosecution but the first deferred prosecution must be revoked and judgment entered. A future amendment to this bill may allow for felony offender scoring or tracking of deferred prosecutions for second or subsequent DUIs.

(Opposed) There is support for treatment and giving assistance to those who need help, but DUI offenses must be taken seriously. The Center for Disease Control has indicated that

people drive impaired an average of 80 times before they are ever arrested for a DUI. Most people charged with a DUI aren't convicted of the original charge because they often accept a plea agreement to a lesser offense, or they choose to save their single opportunity for a deferred prosecution until they commit a second or subsequent DUI. A person should only be authorized to participate in a single deferred prosecution which must be elected on the person's first-time DUI, eliminating the ability to save the deferred prosecution for a future offense.

(Other) Due to the pandemic and other overwhelming problems, traffic fatality safety has regressed. Drug impairment now exceeds alcohol impairment for DUIs. People need to be incentivized to elect a deferred prosecution on their first-time DUI. Although deferred prosecutions count as predicate crimes for the purpose of escalating towards felony DUI charges, deferred prosecutions do not count towards felony offender score calculations. This bill would be strengthened if it provided that deferred prosecutions count toward felony offender scores for all serious traffic offenses. The opportunity to elect a second deferred prosecution should also be limited to petitions based on substance use disorder or mental health co-occurring with substance use disorder. The Administrative Office of the Courts requires additional time to update and publish relevant court rules and forms. The effective date of this bill should be moved to January 1, 2023, to accommodate these updates.

**Persons Testifying:** (In support) Representative Roger Goodman, prime sponsor; Julie Mitchell, Lakeside Milam Recovery Centers; Linda Grant, Association of Alcoholism and Addiction Programs; Geoffrey Burg, Washington Association of Criminal Defense Lawyers and Washington Defender Association; Linda Thompson; and Scott Munson, Sundown M Ranch.

(Opposed) James McMahan, Washington Association of Sheriffs and Police Chiefs.

(Other) Russell Brown, Washington Association of Prosecuting Attorneys; Brittany Gregory, Administrative Office of the Courts; and Amy Freedheim, King County Prosecutor's Office.

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