WASHINGTON DEFENDER ASSOCIATION

WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

March 13, 2020

Governor Jay Inslee
Office of the Governor
PO Box 40002
Olympia, WA 98504-0002

Re: Veto Request 2E2SSB 5270

Dear Governor Inslee:

"At the root of this dilemma is the way we view mental health in this country. Whether an illness affects your heart, your leg or your brain, it's still an illness, and there should be no distinction."
- Michelle Obama

The Washington Defender Association (WDA) and Washington Association of Criminal Defense Lawyers (WACDL) respectfully request that you veto all of SB 5720, The Involuntary Treatment Act (ITA), with the exception of Section 103. That section calls for the appointment of a group of stakeholders from across the state, including those who work in this specialized court system, to explore changes to RCW 71.05 and RCW 71.34 prior to enacting substantial changes to the ITA. It is important that we understand all the ramifications that these extended time periods of detention will have upon our currently underfunded mental health and medical system as well as the health risks that these individuals with mental illness may face before instituting such drastic changes.

Just in the short period of time since this bill's passage, our public health system is struggling to meet the current health crisis related to the COVID 19 virus. It would be extremely unwise to hold those with mental health difficulties in hospital settings where they both will be at greater risk of exposure and also may take up precious hospital resources that should be available for those who are in gravest danger of losing their lives.

While undoubtedly well intentioned, this bill continues the stigmatization of those with mental health difficulties and treats them as less than full members of our society by denying them timely access to justice. The legislature's return to outdated treatment of those with a medical issue is disheartening and fails to address the actual problems within the ITA. We like to believe that the days when we would simply lock people with mental health issues away without advocacy or due process of law are long gone, but this bill harkens to the days of the lunatic asylums and the desire to keep those with mental health issues locked away from society. We continue to stigmatize and brand those with mental health difficulties: they are viewed as less than, as unable, as incompetent and as dangerous. This bill does nothing to rectify those inequities.

SB 5720 does not take into account that each person detained under the ITA is an individual with individual treatment needs. By allowing a person to be involuntary detained for five full days (excluding

weekends and holidays) before a hearing, this bill denies that person access to justice or to be heard on the issue of whether they should be held against their will, in an often less-than-therapeutic environment. Services are severely lacking due to an outrageously overburdened mental health system with neither the capacity nor the resources to provide an acceptable level of care to every patient currently involuntarily committed. This bill would seek to further dilute those minimal resources.

The bill recognizes the problems within our mental health system, but it does not provide the comprehensive, systematic change necessary to address those problems. A clear indication that these proposed amendments will not provide relief for those with mental illness is the recent amendment, codified in section 110, that limits enactment of parts of the bill to a time when single bed certifications fall below 200. Single bed certifications allow the Washington State Health Care Authority to house a person in need of mental health services at a facility not run by the state when there is no available bed in a state run facility. As you wisely stated when presenting your vision for change to the behavioral health system, "We are trying to provide 21st century medical care using a 19th century model of care." Long stays of psychiatric boarding without access to the court is a 19th century model of care.

WDA and WACDL note the following reasons to veto the majority of SB 5720:

Increasing the initial detention period to 120 hours violates the state constitution:
Extending the length of time for filing a 14-day petition for involuntary treatment will not result in more expedient or better treatment: improvement will come with earlier intervention, the employment of more mental health professionals and more community based psychiatric facilities. The amendment to an initial detention period of 120-hours violates Article 1, Section 10 of the Washington State Constitution and the increased infringement on freedom presents constitutional equal protection issues. Our state constitution requires that justice in all cases shall be administered openly, and without unnecessary delay.

SB 5720 contains unnecessary delay in the access to justice for those with alleged behavioral health disorders. Rather than the adhering to the mandate to file a petition for 14-day order within 72 hours, this bill detains our neighbors with behavioral health concerns for a total of 120- hours excluding weekends in and holidays. The addition of 48-hours to the initial period of detention equates to at least a week of loss of liberty, as an individual would not have access to the court until the day following the filing of petition. This change affects individuals who have not committed a crime, but who are alleged to suffer from mental illness**.** This proposal contrasts to a warrantless detention in a criminal setting where the individual gets judicial review of their arrest within 48 hours; this rule is constitutionally mandated. *See* CrR 3.2, CrRLJ 3.2 and JuCR 7.3. Most court conduct a first appearance and probable cause determination within 24 hours.

In detainment proceedings pursuant to RCW 71.09 (Sexually Violent Predators) a preliminary 72-hour detention applies. See RCW 71.09.040. The Washington State Supreme Court and Washington Appellate Courts have found that equal protection analysis is congruent between those civilly detained pursuant to RCW 71.09 and RCW 71.05 until probable cause has been determined. *See In re D.A.H.*, 84 Wn.App.102, 924 P.2d 49 (1996) and *In re Young*, 122 Wn.2d 1, 857 P.2d 989 (1993). The *Young* Court stated:

> [a] person cannot be deprived of procedural protections afforded other individuals merely because the State makes the decision to seek commitment under one statute rather than another statute. Thus, in regard to the *initial*

> *determination* of whether there is probable cause for detention, an individual is entitled to the same opportunity to appear before the court to contest detention in any civil commitment proceeding.

Young, 122 Wn.2d 44-45 (emphasis added).

The two groups diverge for equal protection analysis following the determination of probable cause, with the finding that SVP's can be subject to longer periods of commitment. In *In re Turay,* 139 Wn.2d 379, 411, 986 P.2d 790 (1999), the Court acknowledged:

> . . . '[t]he Legislature has specifically found that "the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act." RCW 71.09.010. Moreover, while individuals committed under the RCW 71.05 do not necessarily constitute a danger to public safety, individuals committed under RCW 71.09 are by definition dangerous to others because they have already committed at least one sexually violent act. *See* RCW 71.09.020(1); RCW 71.09.030.

The Supreme Court determined that until the initial determination of probable cause is found, all civilly detained individuals in the state should be treated the same: thus, if the 71.09 population is entitled to an initial determination of probable cause within 72-hours, then those with behavioral health disorders treated under the ITA must also have a determination of probable cause within 72-hours. The proposed extension to120-hours treats our neighbors with mental health issues with even less parity to other individuals involuntarily restrained and is a violation of the equal protection clause.

This infringement on civil liberties of those with mental health issues, does not comport with Washington's stance of being more protective of individual rights. Washington case law often notes that our rights are more zealously guarded. SB 5720 violates the civil rights of those with mental health issues.

In 2018, a study was published on all 50 states and the District of Columbia entitled "Grading the States: An Analysis of Involuntary Psychiatric Treatment Laws".[i] That study was provided to members of the legislature to justify the extension to a five-day period of involuntary detention. That study reveals that only thirteen states have a period of involuntary detention of longer than 72-hours without a judicial review. Five of those thirteen states received a grade of D or F. The study makes clear that a longer period of detention does not make a better system of involuntary treatment.

Extending the use of single-bed certifications does not address the current problems in meeting the needs of those with mental health and substance abuse issues. According to a 2015 Emergency Medicine Practice Research Network poll, 70% of emergency physicians surveyed reported psychiatry patients being boarded on their last shift. [ii] The vast majority of involuntary behavioral health patients are initially detained in a chaotic hospital emergency room. During this time, patients are often treated in isolation or are in a bed in a hallway. Psychiatric boarding delays treatment and increases psychological stress on the patient and their families. Psychiatric boarding under the single-bed certifications provision of RCW 71.05.745 is an ongoing problem in Washington. It is such a problem that SB 5720 was amended to include provisions in Sec. 110 and Sec. 111 that the new definition of grave disability would not be adopted until a) single-bed certifications are below 200 reports for three

consecutive months for adults and b) the admission for long-term inpatient placement is 30 days of less for two consecutive quarters.

Here, the legislature seeks to extend single-bed certifications to the treatment of those with substance use disorders. Hospital emergency rooms are not conducive to the treatment protocols associated with withdrawal. Why the legislature would encourage the greater use of single-bed certification is a baffling query. Research shows that emergency rooms are not therapeutic.

Washington case law has made clear that psychiatric boarding is impermissible, yet the practice remains and the legislature seeks to expand the warehousing of patients in facilities not equipped to address their treatment needs. "Lack of funds, staff or facilities cannot justify the State's failure to provide [such persons] with [the] treatment necessary for rehabilitation*." Det. of D.W. v. Dep't of Soc. & Health Servs.,* 181 Wn.2d 201, 208, 332 P.3d 423, 426 (2014), citing *Or. Advocacy Ctr. v. Mink,* 322 F.3d 1101, 1121 (9th Cir.2003) (alterations in original) (quoting *Ohlinger,* 652 F.2d at 779).

Expanding the definitions of gravely disabled, violent act and likelihood of serious harm is unnecessary. Legislative amendments to the definitions will likely result in absurd results. As noted earlier, the legislature is proposing enactment of this section only if single-bed certifications are reduced to less than 200 for three consecutive months. That addition is somewhat confusing as it does not indicate when monitoring for three consecutive months would begin. That being said, the proposed changes include such factors as changing the definition of grave disability to use the vague term of "severe deterioration from 'safe behavior.'" If a diabetic patient stops taking their insulin are the subject to an involuntary mental health detention for making a personal choice. What about a cancer patient? What is safe behavior for one, is certainly not viewed as safe behavior by others. The proposed amendment is included in RCW 71.34. Children often fail to engage is safe behavior as a result of seeking independence and testing their wings. A void for vagueness challenge is certainly ahead if this provision is adopted.

Amending the definition of "substantial likelihood of serious harm" to allowing a person to substitute their fear of what might happen to someone else allows for commitment without testimony of the actual witness who fears harm. Detaining someone because another has a fear for a third party makes meaningless the intent of the ITA. It stretches the definition so that inadvertent consequences can become the basis of a commitment.

The amendment to violent act includes the use of the word injury without defining anything about the injury. Since the violent act can occur within the last 10 years, testimony could be presented about a scratch or a pinch, unrelated to any mental illness, that occurred years in the past.

The proposed amendments also allow for hearings to be conducted without the patient being able to be fully observed or to fully observe. In criminal proceedings, the use of video technology is limited and certainly does not apply to a hearing in which the permanent loss of constitutional right may occur.

Of further concerns, the proposed amendments to the definitions lists terms in random order. At this time, the definition sections in RCW 71.05 and RCW 71.34 are alphabetical.

The use of video evaluations, court hearings and translators should not be mainstream.
While there are certainly times when an emergency may prevent an in-person evaluation by a designated crisis responder (i.e., weather-related travel restrictions, a pandemic viral emergency), the use of video should not be par for the course. Are those with mental health issues not worthy of an in-

person evaluation? It is difficult to understand how those with mental illness are not supposed to feel the stigma when we prevent them from seeing someone face to face.

Involuntary medication orders should not be authorized outside of an inpatient setting.
Out-patient treatment providers should not be authorized to involuntarily medicate those on a least restrictive alternative (LRA). Such a course of treatment is extremely dangerous and compromises the health and safety of both the person sought to be involuntarily medicated and the professionals administering the medication. In a hospital setting, patients can be closely monitored. In an outpatient setting, a person is not constantly observed. Many antipsychotic medications can have serious side effects including reduced white blood cells, seizures, increased blood glucose and the development of Type II Diabetes, heart issues, etc. A negative side effect could lead to death if not quickly treated. The process of involuntarily medicating an individual is not a simple process: it is generally done with a show of force, with the patient being held down for an injection or for a tube stuck down their throat. Serious harm could result come from such an exercise. The potential side effects are too great to risk involuntarily treating someone in the community. The reality is that if a person needs to be involuntarily medicated in the community, the person should be brought to hospital for treatment.

We urge you to respect the people that come before the court under the ITA and to treat them as humans who should be afforded the recognition that it is an extreme remedy to, for all intents and purposes, imprison someone for a medical issue. Those detained individuals are worthy of a timely hearing as to that detention and to be treated as people. As proposed, 2E2SSB 5720 violates the very principles that ensure that we are not regressing back to an age of viewing mental health disorders as dangerous, shameful afflictions where the solution is forced isolation and containment

For these reasons, we strongly urge you to veto all sections of 2E2SSB 5720 except for Sec. 103 The work group should be formed to further study appropriate changes to the Involuntary Treatment Act for both adults and children.

Thank you for your consideration. Kari Reardon would be happy to answer any questions you may have at (509) 477-4873 or kreardon@spokanecounty.org.

Sincerely,

Amy Hirotaka
Executive Director, WACDL

Christie Hedman
Executive Director, WDA

[i] https://www.treatmentadvocacycenter.org/grading-the-states.

[ii] "Practical Solutions to Boarding of Psychiatric Patients in the Emergency Department: Does Your Emergency Department Have a Psychiatric Boarding Problem?" American College of Emergency Physicians. (Oct.2015)