

SB 380-1
(LC 2537)
3/14/23 (LAS/ps)

Requested by SENATE COMMITTEE ON JUDICIARY (at the request of Office of Multnomah County District Attorney)

**PROPOSED AMENDMENTS TO
SENATE BILL 380**

1 In line 2 of the printed bill, after “proceedings” insert “; creating new
2 provisions; amending ORS 125.683, 161.362 and 161.370; and prescribing an
3 effective date”.

4 Delete lines 4 through 8 and insert:

5 **“SECTION 1. Section 2 of this 2023 Act is added to and made a part
6 of ORS 125.675 to 125.691.**

7 **“SECTION 2. (1) The Oregon Public Guardian and Conservator shall
8 develop and administer a program to provide guardianship services to
9 defendants whose criminal cases may be or have been suspended or
10 dismissed under ORS 161.370.**

11 **“(2) Participants in the program must satisfy the requirements un-
12 der ORS 125.680 (2) for public guardian and conservator services.**

13 **“(3) A defendant’s eligibility to participate in the program may be
14 determined at any time after a defendant’s fitness to proceed is drawn
15 in question or, if the court found there was no substantial probability
16 that the defendant would, within the foreseeable future, gain or regain
17 the capacity to stand trial, no later than one year following the date
18 on which the defendant’s case is dismissed.**

19 **“(4)(a) In administering the program, the Oregon Public Guardian
20 and Conservator shall collaborate and coordinate with district attor-
21 neys, community mental health programs and facilities in which de-**

1 **defendants are housed, including the Oregon State Hospital.**

2 **“(b) The Oregon Public Guardian and Conservator may provide**
3 **services under this section at any point after the defendant’s fitness**
4 **to proceed is drawn into question.**

5 **“SECTION 3.** ORS 125.683 is amended to read:

6 “125.683. (1) In providing public guardian and conservator services, the
7 Oregon Public Guardian and Conservator shall conduct a needs assessment
8 for a person who claims or is claimed not to have relatives or friends willing
9 or able to assume the duties of guardianship or conservatorship and who
10 claims or is claimed to lack the financial resources to obtain a private
11 guardian or conservator. The purpose of the needs assessment is to determine
12 the person’s eligibility to receive public guardian and conservator services
13 and to determine the appropriateness of filing a petition for the appointment
14 of a fiduciary or other pleading on behalf of the person in a court having
15 probate jurisdiction. The needs assessment shall, at a minimum:

16 “(a) Assess the person’s capacity to:

17 “(A) Care for the person’s own safety;

18 “(B) Manage the person’s own financial affairs; and

19 “(C) Attend to and provide for necessities such as food, shelter, clothing
20 and medical care;

21 “(b) Assess the person’s financial resources;

22 “(c) Determine whether information that is available about the person is
23 sufficient to support a finding that the person is incapacitated or financially
24 incapable and the entry of a court order for the appointment of a fiduciary
25 under ORS 125.010;

26 “(d) Determine whether any other person may be willing and able to serve
27 as the person’s guardian or conservator and, if appropriate, locate and con-
28 tact that other person;

29 “(e) Determine the type of fiduciary, if any, to request in a petition filed
30 under ORS 125.055, giving preference to the least intrusive form of fiduciary

1 relationship consistent with the best interests of the person; and

2 “(f) Determine how best to provide public guardian and conservator ser-
3 vices to the person that are least restrictive to the person’s liberty, that are
4 least intrusive to the person and that provide for the greatest degree of in-
5 dependence that the person is capable of exercising.

6 “(2)(a) If the person is a resident of a nursing home as defined in ORS
7 678.710 or a residential facility as defined in ORS [441.402] **443.400**, the
8 nursing home or residential facility shall provide the Oregon Public Guard-
9 ian and Conservator access to the person’s records as is necessary to conduct
10 the needs assessment required under this section.

11 “(b) Any other public agency that has provided or is providing care or
12 services to the person shall disclose to the Oregon Public Guardian and
13 Conservator, upon request, a minimum amount of information about the
14 person for whom the needs assessment is being conducted, including pro-
15 tected health information as defined in ORS 192.556 and financial informa-
16 tion, as is reasonably necessary to prevent or lessen a serious and imminent
17 threat to the health or safety of the person who is the subject of the needs
18 assessment. For purposes of this paragraph, a request from the Oregon Public
19 Guardian and Conservator for the purpose of conducting a needs assessment
20 is presumed to be a situation that will prevent or lessen a serious and im-
21 minent threat to the health or safety of the person.

22 “(c) Any health care provider not identified in either paragraph (a) or (b)
23 of this subsection may disclose protected health information to the Oregon
24 Public Guardian and Conservator in accordance with 45 C.F.R. 164.512 (j) to
25 prevent or lessen a serious or imminent threat to the health or safety of a
26 person if the health care provider, in good faith, believes the disclosure is
27 necessary to prevent or lessen the threat. For purposes of this paragraph, a
28 request from the Oregon Public Guardian and Conservator for disclosure
29 under this paragraph for the purposes of conducting a needs assessment, or
30 the good faith belief and disclosure of the health care provider under this

1 paragraph, are presumed to be situations that will prevent or lessen a serious
2 and imminent threat to the health or safety of the person.

3 **“(d) If the person is currently or was previously a defendant subject**
4 **to ORS 161.370, the Oregon Public Guardian and Conservator may have**
5 **access to any reports resulting from examinations of the defendant,**
6 **documents containing recommendations of or resulting from consul-**
7 **tations with community mental health programs, documents submit-**
8 **ted to the court by a state mental hospital related to the proceedings**
9 **under ORS 161.370 and any other court records relating to the defend-**
10 **ant.**

11 “(3) For each person determined to be eligible for public guardian and
12 conservator services under this section, the Oregon Public Guardian and
13 Conservator shall develop a written plan setting forth the type and duration
14 of services to be provided by the Oregon Public Guardian and Conservator.
15 The plan shall be included in any nonemergency petition or pleading filed
16 with the court.

17 **“SECTION 4.** ORS 161.362 is amended to read:

18 “161.362. (1) A recommendation provided by a certified evaluator, pursu-
19 ant to ORS 161.355 to 161.371, that a defendant requires a hospital level of
20 care due to the acuity of the defendant’s symptoms must be based upon the
21 defendant’s current diagnosis and symptomology, the defendant’s current
22 ability to engage in treatment, present safety concerns relating to the de-
23 fendant and any other pertinent information known to the evaluator. If the
24 defendant is in a placement in a facility, the evaluator may defer to the
25 treatment provider’s recommendation regarding whether a hospital level of
26 care is needed.

27 “(2) A determination by a community mental health program director, or
28 the director’s designee, pursuant to ORS 161.355 to 161.371, that appropriate
29 community restoration services are not present and available in the commu-
30 nity must include information concerning the specific services necessary to

1 safely allow the defendant to gain or regain fitness to proceed in the com-
2 munity and must specify the necessary services that are not present and
3 available in the community.

4 “(3)(a) Reports resulting from examinations performed by a certified
5 evaluator, and documents containing the recommendations of or resulting
6 from consultations with a community mental health program director or the
7 director’s designee, prepared under ORS 161.355 to 161.371, and any document
8 submitted to the court by a state mental hospital related to the proceedings
9 under ORS 161.355 to 161.371, are confidential and may be made available
10 only:

11 “(A) To the court, prosecuting attorney, defense attorney, agent of the
12 prosecuting or defense attorney, defendant, **Oregon Public Guardian and**
13 **Conservator**, community mental health program director or designee, state
14 mental hospital and any facility in which the defendant is housed; or

15 “(B) As ordered by a court.

16 “(b) Any facility in which a defendant is housed may not use a report or
17 document described in paragraph (a) of this subsection to support a disci-
18 plinary action against the defendant.

19 “(c) Nothing in this subsection prohibits the prosecuting attorney, defense
20 attorney or agent of the prosecuting or defense attorney from discussing the
21 contents of a report or document described in paragraph (a) of this sub-
22 section with witnesses or victims as otherwise permitted by law.

23 “(4) The court shall ensure that an order entered under ORS 161.355 to
24 161.371 is provided, by the end of the next judicial day, to any entity ordered
25 to provide restoration services.

26 “(5) Unless the court orders otherwise or either party objects, a defendant
27 committed to a state mental hospital or other facility, or a certified evalu-
28 ator or other expert witness, may attend hearings held under ORS 161.355
29 to 161.371 via simultaneous electronic transmission.

30 “**SECTION 5.** ORS 161.370 is amended to read:

1 “161.370. (1)(a) When the defendant’s fitness to proceed is drawn in ques-
2 tion, the issue shall be determined by the court.

3 “(b) If neither the prosecuting attorney nor counsel for the defendant
4 contests the finding of the report filed under ORS 161.365, the court may
5 make the determination on the basis of the report. If the finding is contested,
6 the court shall hold a hearing on the issue. If the report is received in evi-
7 dence in the hearing, the party who contests the finding has the right to
8 summon and to cross-examine any certified evaluator who submitted the re-
9 port and to offer evidence upon the issue. Other evidence regarding the
10 defendant’s fitness to proceed may be introduced by either party.

11 “(2)(a) If the court determines that the defendant lacks fitness to proceed,
12 the criminal proceeding against the defendant shall be suspended and the
13 court shall proceed in accordance with this subsection.

14 “(b) After making the determination under paragraph (a) of this sub-
15 section, the court shall receive a recommendation from a community mental
16 health program director or the director’s designee, and from any local entity
17 that would be responsible for treating the defendant if the defendant were
18 to be released in the community, concerning whether appropriate community
19 restoration services are present and available in the community.

20 “(c) If the parties agree as to the appropriate action under this section,
21 the court may, after making all findings required by law, enter any order
22 authorized by this section. If the parties do not agree as to the appropriate
23 action, the court and the parties shall, at a hearing, consider an appropriate
24 action in the case, and the court shall make a determination and enter an
25 order necessary to implement the action. In determining the appropriate
26 action, the court shall consider the primary and secondary release criteria
27 as defined in ORS 135.230, the least restrictive option appropriate for the
28 defendant, the needs of the defendant and the interests of justice. Actions
29 may include but are not limited to:

30 “(A) Commitment for the defendant to gain or regain fitness to proceed

1 under subsection (3) or (4) of this section;

2 “(B) An order to engage in community restoration services, as recom-
3 mended by the community mental health program director or designee, under
4 subsection (6) of this section;

5 “(C) Commencement of a civil commitment proceeding under ORS 426.070
6 to 426.170, 426.701 or 427.235 to 427.290;

7 “(D) Commencement of protective proceedings under ORS chapter 125; or

8 “(E) Dismissal of the charges pursuant to ORS 135.755.

9 “(d) If the court, while considering or ordering an appropriate action un-
10 der this subsection, does not order the defendant committed to a state mental
11 hospital or other facility, but finds that appropriate community restoration
12 services are not present and available in the community, for any defendant
13 remaining in custody after such determination, the court shall set a review
14 hearing seven days from the date of the determination under paragraph (a)
15 of this subsection. At the review hearing, the court shall consider all rele-
16 vant information and determine if commitment to the state mental hospital
17 or other facility is appropriate under subsection (3) or (4) of this section, or
18 if another action described in paragraph (c) of this subsection is appropriate.
19 At the conclusion of the hearing the court shall enter an order in accordance
20 with the defendant’s constitutional rights to due process.

21 “(e) If the court determines that the appropriate action in the case is an
22 order for the defendant to engage in community restoration services, but the
23 defendant has a pending criminal case, warrant or hold in one or more other
24 jurisdictions, the other jurisdictions shall, within two judicial days of be-
25 coming aware of the proceeding under this section, communicate with the
26 court and the other jurisdictions, if applicable, to develop a plan to address
27 the interests of all jurisdictions in the defendant in a timely manner.

28 **“(f) If the court determines that the appropriate action in the case**
29 **is the commencement of a protective proceeding under ORS chapter**
30 **125, the court may, subject to ORS 125.600 and 125.605, appoint a tem-**

1 **porary guardian for the defendant until a permanent guardian can be**
2 **appointed.**

3 “(3)(a) If the most serious offense in the charging instrument is a felony,
4 the court shall commit the defendant to the custody of the superintendent
5 of a state mental hospital or director of a facility designated by the Oregon
6 Health Authority if the defendant is at least 18 years of age, or to the cus-
7 tody of the director of a secure intensive community inpatient facility des-
8 igned by the authority if the defendant is under 18 years of age, if the
9 court makes the following findings:

10 “(A) The defendant requires a hospital level of care due to public safety
11 concerns if the defendant is not hospitalized or in custody or the acuity of
12 symptoms of the defendant’s qualifying mental disorder; and

13 “(B) Based on the findings resulting from a consultation described in ORS
14 161.365 (1), if applicable, from any information provided by community-based
15 mental health providers or any other sources, and primary and secondary
16 release criteria as defined in ORS 135.230, the appropriate community resto-
17 ration services are not present and available in the community.

18 “(b) If the defendant is committed under this subsection, the community
19 mental health program director, or director’s designee, shall at regular in-
20 tervals, during any period of commitment, review available community res-
21 toration services and maintain communication with the defendant and the
22 superintendent of the state mental hospital or director of the facility in order
23 to facilitate an efficient transition to treatment in the community when or-
24 dered.

25 “(c) If the court does not order the commitment of the defendant under
26 this subsection, the court shall proceed in accordance with subsection (2)(c)
27 of this section to determine and order an appropriate action other than
28 commitment.

29 “(4)(a) If the most serious offense in the charging instrument is a
30 misdemeanor, the court may not commit the defendant to the custody of the

1 superintendent of a state mental hospital or director of a facility designated
2 by the Oregon Health Authority if the defendant is at least 18 years of age,
3 or to the custody of the director of a secure intensive community inpatient
4 facility designated by the authority if the defendant is under 18 years of age,
5 unless the court:

6 “(A)(i) Receives a recommendation from a certified evaluator that the
7 defendant requires a hospital level of care due to the acuity of symptoms of
8 the defendant’s qualifying mental disorder; and

9 “(ii) Receives a recommendation from a community mental health program
10 director, or director’s designee, that the appropriate community restoration
11 services are not present and available in the community; or

12 “(B) Determines that the defendant requires a hospital level of care after
13 making all of the following written findings:

14 “(i) The defendant needs a hospital level of care due to the acuity of the
15 symptoms of the defendant’s qualifying mental disorder;

16 “(ii) There are public safety concerns; and

17 “(iii) The appropriate community restoration services are not present and
18 available in the community.

19 “(b) If at the time of determining the appropriate action for the case, the
20 court is considering commitment under paragraph (a)(A) of this subsection
21 and:

22 “(A) Has not received a recommendation from a certified evaluator as to
23 whether the defendant requires a hospital level of care due to the acuity of
24 symptoms of the defendant’s qualifying mental disorder, the court shall order
25 a certified evaluator to make such a recommendation.

26 “(B) Has not received a recommendation from the community mental
27 health program director or designee concerning whether appropriate com-
28 munity restoration services are present and available in the community, the
29 court shall order the director or designee to make such a recommendation.

30 “(c) If the court does not order the commitment of the defendant under

1 this subsection, the court shall proceed in accordance with subsection (2)(c)
2 of this section to determine and order an appropriate action other than
3 commitment.

4 “(d) If the defendant is committed under this subsection, the community
5 mental health program director, or director’s designee, shall at regular in-
6 tervals, during any period of commitment, review available community res-
7 toration services and maintain communication with the defendant and the
8 superintendent of the state mental hospital or director of the facility in order
9 to facilitate an efficient transition to treatment in the community when or-
10 dered.

11 “(5) If the most serious offense in the charging instrument is a violation,
12 the court may not commit the defendant to the custody of the superintendent
13 of a state mental hospital or director of a facility designated by the Oregon
14 Health Authority if the defendant is at least 18 years of age, or to the cus-
15 tody of the director of a secure intensive community inpatient facility des-
16 igned by the authority if the defendant is under 18 years of age.

17 “(6)(a) If the court does not order the commitment of the defendant under
18 subsection (3) or (4) of this section, if commitment is precluded under sub-
19 section (5) of this section or if the court determines that care other than
20 commitment would better serve the defendant and the community, the court
21 shall release the defendant, pursuant to an order that the defendant engage
22 in community restoration services, until the defendant has gained or re-
23 gained fitness to proceed, or until the court finds there is no substantial
24 probability that the defendant will, within the foreseeable future, gain or
25 regain fitness to proceed. The court may not order the defendant to engage
26 in community restoration services in another county without permission
27 from the other county.

28 “(b) The court may order a community mental health program director
29 coordinating the defendant’s treatment in the community to provide the
30 court with status reports on the defendant’s progress in gaining or regaining

1 fitness to proceed. The director shall provide a status report if the defendant
2 is not complying with court-ordered restoration services.

3 “(c) A community mental health program director coordinating the
4 defendant’s treatment in the community shall notify the court if the defend-
5 ant gains or regains fitness to proceed. The notice shall be filed with the
6 court and may be filed electronically. The clerk of the court shall cause
7 copies of the notice to be delivered to both the district attorney and the
8 counsel for the defendant.

9 “(d) When a defendant is ordered to engage in community restoration
10 services under this subsection, the court may place conditions that the court
11 deems appropriate on the release, including the requirement that the de-
12 fendant regularly report to a state mental hospital or a certified evaluator
13 for examination to determine if the defendant has gained or regained fitness
14 to proceed.

15 “(7) The Oregon Health Authority shall establish by rule standards for
16 the recommendation provided to the court described in subsection (2) of this
17 section.

18 **“SECTION 6. In addition to and not in lieu of any other appropri-
19 ation, there is appropriated to the Oregon Public Guardian and
20 Conservator, for the biennium beginning July 1, 2023, out of the Gen-
21 eral Fund, the amount of \$1,696,450 for deposit in the Oregon Public
22 Guardian and Conservator Fund established under ORS 125.689, to
23 carry out the purposes of section 2 of this 2023 Act.**

24 **“SECTION 7. (1) Section 2 of this 2023 Act and the amendments to
25 ORS 125.683, 161.362 and 161.370 by sections 3 to 5 of this 2023 Act be-
26 come operative on January 1, 2024.**

27 **“(2) The Oregon Public Guardian and Conservator may take any
28 action before the operative date specified in subsection (1) of this sec-
29 tion that is necessary for the Oregon Public Guardian and Conservator
30 to exercise, on and after the operative date specified in subsection (1)**

1 of this section, all of the duties, functions and powers conferred on the
2 Oregon Public Guardian and Conservator by section 2 of this 2023 Act
3 and the amendments to ORS 125.683, 161.362 and 161.370 by sections 3
4 to 5 of this 2023 Act.

5 **“SECTION 8. This 2023 Act takes effect on the 91st day after the**
6 **date on which the 2023 regular session of the Eighty-second Legislative**
7 **Assembly adjourns sine die.”.**

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