DISABILITY LAW CENTER

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February 21, 2023 by scan and e-mail to Senate.Health.and.Social Services@akleg.gov

The Honorable David Wilson
Chair, Senate Health and Social Services Committee
State Capitol
120 Fourth St., M/S 3100
Juneau, Alaska 99801-1182

Re: SB 53

Dear Chair Wilson and Members of the Committee:

Up to five years in involuntary civil commitment means a massive curtailment of someone's civil liberties. SB 53 would not only make it possible for a person found incompetent to stand trial to be held for that period, but would also make it quite difficult for the person to be released, even if staff at a place like API believes that this should be done. Striking the balance between protecting the public and curtailing someone's civil liberties is not easy, and there is no precedent one way or the other on whether the system SB 53 would set up would be constitutional under the Alaska Constitution, but the Committee should not proceed without careful consideration of the issues involved.

Disability Law Center of Alaska is the State-designated Protection and Advocacy organization for Alaska. We have litigated over civil commitment procedures for many years, perhaps most notably in the *Disability Law Center v. State* ex parte holds case, and have also represented guilty-but-mentally-ill inmates seeking release. We welcome the opportunity to raise to the Committee our concerns about what SB 53 would do. Our concerns are mostly legal ones, but there are also practical and even moral problems that should draw this Committee's attention.

A practical question is where a person being held in what amounts to protective custody should be held, API having limited space for people going through competency restoration in any event. A moral question is whether it is right to hold someone for years with no real mandate for the person to receive meaningful treatment.

As the Committee considers those questions, it should be aware that SB 53 enters constitutionally questionable territory.

Federal law does feature a system for long-term commitment of a person found both incompetent to stand trial and dangerous, 18 U.S.C. §§ 4241-4247, and the Ninth Circuit has found the long-term commitment part of this system to be constitutional, *U.S. v. Sahhar*, 917 F.2d 1197 (9th Cir. 1990), but there are some important differences between this federal system and the system SB 53 would enact.

Start with the standard of review. Under both the U.S. Constitution and the Alaska Constitution, no person may be deprived of liberty without due process of law, but the Alaska Supreme Court has "declared Alaska's constitutional guarantee of individual liberty to be more protective" than its federal counterpart.[1] In contrast to Federal law, the Alaska Constitution guarantees the right to rehabilitation, to be considered together with the need for protection of the public.[2]

There are no criteria in SB 53 for determining how long "up to five years" will be in a particular case. More specifically, there is no clear link between the sentence that might be imposed on the person if competent and the length of the commitment. In *State v. Alto*, 589 P.2d 402, 408 (Alaska 1979), involving a commitment of someone found innocent by reason of insanity,

> We do note our concurrence with the approach taken by both parties that periodic review should be available as in cases of civil commitment. The burden and standard of proof at the periodic review hearings should be the same as at the initial hearing, so long as the commitment under AS 12.45.090 is still in effect. However, an AS 12.45.090 commitment is not indefinite. It should have a fixed length, taking into account individualized factors similar to those relevant to sentencing, [footnote citing *Chaney* omitted] and should in no event exceed the maximum sentence for the offense. Continued detention following expiration of the AS 12.45.090 term should be governed by the same standard and burden of proof as in civil commitments. [Citation omitted.]

Here, the Alaska Constitution's protections appear to restrict commitment more than the protections available under the U.S. Constitution, which allows someone to be civilly committed even though the sentence that might have been imposed in a criminal case has run. *Jones v. U.S.*, 463 U.S. 354 (1983).

Additionally, SB 53 would restrict the degree to which someone could seek release before the expiration of the up-to-five-years commitment.

SB 53's restriction on when a person may file a petition for release – no more often than once per year -- is significantly more severe than federal law's restriction, which rules out petitions within 180 days of the initial long-term commitment order. 18 U.S.C. § 4247(h).

SB 53 reverses the burden of proof when a person files for release – the person, not the State, must make showings by clear and convincing evidence.

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[1] *In re Naomi B.*, 435 P.3d 918, 931 (Alaska 2019) citing *Myers v. API,* 138 P.3d 238, 245 (Alaska 2006), citing *Breese v. Smith*, 501 P.2d 159, 170 (Alaska 1972).

[2] Alaska Constitution, Article I, sec. 12, interpreted in, e.g., *Abraham v. State*, 585 P.2d 526 (Alaska 1978).

Although some of these procedures may be modeled on AS 12.47.090, a statute which applies when someone has been found not guilty on the basis of insanity, a person found incompetent to stand trial is less blameworthy than a person who has successfully raised an insanity defense.

Under the bill as drafted, there might be limits on the degree to which prior findings (of incompetence? of dangerousness to self or others?) could be challenged, but it is hard to tell how, and that section probably will need to be redrafted.

As drafted, the bill would allow up to five years' commitment simply because a person had repeatedly attempted suicide. Suicide attempts are already grounds for civil commitment under existing law and it is not clear what standards a court would use in imposing an up-to-five-years commitment. This part of the bill does not protect the public. The long-term commitment standard under federal law, 18 U.S.C. § 4246(a), is "whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another."

Finally, there are questions about how SB 53 might work in practice. At present, API operates a competency restoration system on-premises, generally limited to 10 beds. That system is overloaded and many people have been held in jail after being found not competent waiting for a bed at API to open up. True, there have been people who have been held long-term at API without reference to competency restoration, but not very many of them. If the State is going to expand this system of holding people long-term, it needs to have in mind a place where people will be held – with treatment? What sort of treatment? – that is not jail, and is actually able to hold them.

As noted, there is no clear precedent for whether or not the system SB 53 would enact would be constitutional. Disability Law Center urges the Committee carefully to consider the constitutional and practical aspects of long-term post-incompetency commitment and to act with caution in revising the system.

Thank you very much for the opportunity to comment.

Sincerely,

s/
Mark Regan
Legal Director

CITIZENS COMMISSION ON HUMAN RIGHTS

March 9, 2023

Re: SB 53 - An Act relating to involuntary civil commitments

Dear Senator:

SB 53 should not be approved. SB 53 creates a 5-year involuntary commitment period. This is a huge overreach and an effort to solve a problem that creates a vehicle for future human rights violations due to endless commitments. This bill also may not stand up to constitutional legal challenges, according to testimony.

The way to protect public safety is to utilize the existing legal framework of 180-day commitments.

The flaw in the mental health system is that psychiatry is not able to adequately or properly predict violence. In 1979, an American Psychiatric Association's task force admitted in its Brief Amicus Curiae to the U.S. Supreme Court (Case No. 79-1127) that psychiatrists could not predict dangerousness. It informed the court that "'dangerousness' is neither a psychiatric nor a medical diagnosis, but involves issues of legal judgment and definition, as well as issues of social policy. Psychiatric expertise in the prediction of 'dangerousness' is not established and clinicians should avoid 'conclusory judgments in this regard.'"

We request legislators review the message this bill sends, which is that psychiatric treatments are ineffective so we need to hold people indefinitely. This then raises the question of why should the State of Alaska condone failed and ineffective treatment and human rights abuses?

The need to move in a new direction is very clear. Leading figures in psychiatry have acknowledged treatment failures, such as this from Thomas Insel, former NIMH [National Institute of Mental Health] director:

> "Whatever we've been doing for five decades, it ain't working. And when I look at the numbers—the number of suicides, number of disabilities, mortality data—it's abysmal, and it's not getting any better."

And we must address the ***health*** part of mental health.

> "We have a mistaken view of what psychiatric drugs are doing." … "This idea that they work by targeting the underlying biological mechanisms that produce the symptoms of mental disorders is actually not supported by evidence for any type of mental disorder, whether that's depression or schizophrenia or whatever." - *Antidepressants Work Better Than Sugar Pills Only 15 Percent of the Time* - Newsweek Magazine 9-12-22

The legislature should look at engaging in a novel approach to the health of individuals trapped in the mental health system.

> "Were you told that your only hope is to manage your symptoms by taking lifelong medications? What if you could eliminate this diagnosis by simply fixing nutrient deficiencies or correcting physiologic imbalances? As such, proper blood tests can highlight these vulnerabilities and guide healing protocols." … "This is why it's all the more important to explore reversible causes of what we are calling depression." – Kelly Brogan, M.D. - *Five Lab Tests Your Doctor Isn't Ordering*

SB 53 is an attempt to deal with mental health treatment system failures. To be effective, it must actually address the failures, not *continue* the failures.

Sincerely,

Steven Pearce

Steven Pearce
Director

"The task we set ourselves—to combat psychiatric coercion—is important. It is a noble task in the pursuit of which we must, regardless of obstacles, persevere. Our conscience commands that we do no less." – Dr. Thomas Szasz, Professor of Psychiatry

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March 10, 2023

by scan and e-mail to Senate.Judiciary@akleg.gov

The Honorable Matt Claman
Chair, Senate Judiciary Committee
State Capitol
120 Fourth St., M/S 3100
Juneau, Alaska 99801-1182

Re: CSSB 53

Dear Chair Claman and Members of the Committee:

Up to five years in involuntary civil commitment means a massive curtailment of someone's civil liberties. CSSB 53 would not only make it possible for a person found incompetent to stand trial and found dangerous to be held for that period, probably after being held for two years of competency restoration, but it would also make it quite difficult for the person to be released, even if trained medical staff at a place like API believe that the person no longer meets civil commitment criteria. So far as involuntary civil commitment is concerned, the bill would partially replace a system under which some people found to be dangerous to themselves or others can be held for a series of 180-day civil commitments. It is not clear why partially replacing this specific part of the system is necessary to protect the public. Striking the balance between protecting the public and curtailing someone's civil liberties is not easy, and there is no precedent one way or the other on whether the system CSSB 53 would set up would be constitutional under the Alaska Constitution, but the Committee should not proceed without careful consideration of the issues involved.

Disability Law Center of Alaska is the State-designated Protection and Advocacy organization for Alaska. We have litigated over civil commitment procedures for many years, perhaps most notably in the *Disability Law Center v. State* ex parte holds case, and have also represented guilty-but-mentally-ill inmates seeking release. We welcome the opportunity to raise to the Committee our concerns about what CSSB 53 would do. We did raise some of those concerns to the Senate Health and Social Services Committee, and anticipate raising other concerns to the Senate Judiciary Committee once a constitutional analysis has been provided to you, but had some factual questions now for the Judiciary Committee and for the various experts who were ready to testify when Health and Social Services passed the bill over to you yesterday. Dr. Kristy Becker, from API, did testify yesterday, but her testimony raises questions about the competency restoration and civil commitment processes which we would like to reflect back to you.

As Dr. Becker explained, API is the only place in Alaska that currently does competency restoration. Only 10 of API's 80 beds are devoted to that general purpose, and there is a very substantial waiting list. Alaska does not now have either an outpatient competency restoration program or a jail-based competency restoration program. It typically operates for two 90-day competency restoration periods. Under AS 12.47.110(b), a defendant who is charged with a crime involving force against a person and who is found to present a substantial danger of physical injury to other persons, and who may regain competency within a reasonable period of time, may be held for an additional competency restoration period of six months. (CSSB 53 would, among other things, change this period from six months to 18 months.) At that point, holding the defendant switches over to the civil commitment system, under which someone can be held for a series of 180-day periods if the person is dangerous to self or others and there is no less restrictive alternative available. (For dangerous people who meet certain criteria, CSSB 53 would substitute a period of up to 5 years for these 180-day commitments.)

The API fiscal note in the Senate Health and Social Services record essentially says that because API is budgeted for 80 beds, including 10 beds for competency restoration, increased use of competency restoration and of long-term civil commitment will not have any fiscal consequences for API. If this is true, it nevertheless raises questions about fiscal consequences for other parts of the system, most notably Corrections. So, at long last, here are those fiscal questions:

1. If CSSB 53 were to pass in its current form, which includes an additional year of competency restoration for some defendants, about how many more people per year would be subject to competency restoration? What is the current average time that someone spends undergoing competency restoration?
2. Is there an estimate of how much adding an additional year of competency restoration for some defendants would increase the API waiting list for competency restoration, and how much it would increase average waiting times on that list?
3. Do you have a breakdown on how many people on the API competency restoration waiting list are waiting in jail, and how many people are out of custody on conditions of release?
4. Presuming that API is overloaded and that in the abstract competency restoration can be done elsewhere, would statutory changes be necessary for there to be outpatient competency restoration or, in the other direction, jail-based competency restoration?

Here are questions about the way treatment now works, and would work under CSSB 53:

5. Is everyone undergoing competency restoration now held in a particular 10-bed unit at API? Is any Alaska defendant now undergoing competency restoration treatment at an institution out of state, and if so, how many people are doing this? (How many people have had competency restoration at an Outside institution in the past?)
6. Would everyone undergoing additional competency restoration at API under CSSB 53 be treated in that same unit, with the same 10-bed limitation?
7. When under current law a person whose competency is not restorable, or who reaches the end of the six-month additional competency restoration period, is committed for 180 days under civil commitment procedures, does that person get treatment in the same competency restoration unit as before, or might the person reside elsewhere in API or at another designated treatment facility? What, if any, are the differences in the treatment the person receives under civil commitment from the treatment the person received during competency restoration?

8. If CSSB 53 were passed in current form, would a person held for the up-to-five-year period be held in the competency restoration unit at API, and would there be any changes in the type of treatment the person receives at API?
9. For comparison purposes, when people are found not guilty by reason of insanity or guilty but mentally ill, and committed to the custody of the Department of Family and Community Services (I think), are they typically housed in API at the same unit that handles competency restoration, or are they typically held elsewhere?

We hope that answers to these questions will assist the Judiciary Committee in its consideration of CSSB 53. Thank you very much for the opportunity to comment.

Sincerely,

s/
Mark Regan
Legal Director

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April 4, 2023

By scan and e-mail to Senate.Judiciary@akleg.gov

The Honorable Matt Claman
Chair, Senate Judiciary Committee
State Capitol
120 Fourth St., M/S 3100
Juneau, Alaska 99801-1182

Re: CSSB 53 (JUD)

Dear Chair Claman and Members of the Senate Judiciary Committee:

This is to commend the Committee for taking up a bill that now encourages outpatient competency restoration, and to raise five issues that I hope and trust the Committee will consider as it takes invited and public testimony on CSSB 53 (JUD).

The first issue is whether the distinction the bill draws between renewable 180-day civil commitments, for most people subject to civil commitment, and renewable up-to-five-years civil commitments, for people likely to pose serious harm to self or others and who have had particular criminal charges dismissed on the ground that they are not competent to stand trial, is constitutional. The Alaska Constitution requires distinctions of this sort to bear a fair and substantial relationship to a legitimate governmental objective. E.g., *Ross v. State, Dep't of Revenue*, 292 P.3d 906 (Alaska 2012). So far, there has been no constitutional analysis of the bill, and there has been no showing that the existing renewable 180-day commitment system is not fully adequate to protect the public.

The second issue is whether CSSB 53 (JUD) is consistent with the Americans with Disabilities Act. The Americans with Disabilities Act requires disabilities-based placements to take into account the possibility of less restrictive settings. *Olmstead ex rel L.C. v. Zimring*, 527 U.S. 581 (1999); see also, e.g., AS 47.30.730 (at 30-day commitment stage, requiring consideration of less restrictive alternatives). There has been no analysis as to whether renewable up-to-five-years civil commitments would violate this requirement under the ADA, and there has been no showing that the existing renewable 180-day commitment system is inadequate to protect the public.

The third issue is whether the bill's extended competency restoration period must be limited to the maximum sentence that someone found not competent might have to serve if convicted of the most serious charge against the person. See *State v. Alto*, 589 P.2d 402 (Alaska 1979); *J.K. v. State*, 439 P.3d 464 (Alaska App. 2020) (apparently applying this rule); and compare section 4 of HB 80.

The fourth issue is what standards a judge is to use in determining what period of civil commitment to require – that is, if the period is "up to five years," whether the period in a particular case is to be two years, or three years, or five years. The bill does not now provide standards.

The fifth issue is a technical one. In section 3, proposed AS 12.47.100(j), the bill would prompt people conducting competency examinations also to evaluate whether the defendant meets civil commitment criteria. At the hearing Judge Morse held in the *Disability Law Center v. State* civil commitment case, we learned that the two types of examinations are quite distinct and typically conducted by different people. It might be possible for the Department of Law to explain whether as a practical matter the same person can conduct both types of examinations.

Thank you very much, again, for the opportunity to comment.

Sincerely,
s/
Mark Regan
Legal Director
Disability Law Center of Alaska

April 4, 2023

The Honorable Matt Claman, Chair
Senate Judiciary Committee
Alaska Capitol Building
Juneau, AK 99801

Re: Version Y of Senate Bill 53: FIVE-YEAR INVOLUNTARY COMMITTMENTS

Dear Chair Claman and members of the Senate Judiciary Committee,

The ACLU of Alaska writes to express our views on work draft Version Y of Senate Bill 53 (Five-Year Involuntary Commitments), which we oppose because it unnecessarily expands the scope of involuntary commitments at great risk to the due process rights of Alaskans.

No one can deny that what happened to Angela Harris was horrific, and her attack rightfully points to the need to look at policy and practice changes that can prevent others from going through a similar experience.

We appreciate that this version attempts to narrow the scope of the bill by limiting applicability to arson charges at the felony level, and removing people with histories of self-harm from the bill. However, Version Y remains fundamentally problematic because it would erode the constitutional rights of Alaskans, and disregards ways the current involuntary commitment system can be used to advance community safety.

- **A five-year involuntary commitment term runs afoul of Alaskans' constitutional rights.** Committing someone to a psychiatric facility against their will is a massive curtailment of liberty that implicates their constitutional rights to due process under both the United States and Alaska Constitutions. Alaska law is consistent with those constitutional guarantees, providing that a person should be held in the least restrictive manner and treated in a mental health treatment facility that is "no more harsh, hazardous, or intrusive than necessary to achieve the treatment objectives of the patient."[1] Involuntary commitments are accordingly limited in time to reflect these crucial rights. But under SB 53, Alaska would match New Hampshire as having the longest defined involuntary commitment period in the country.[2] It would also make Alaska an extreme outlier — almost every state with a defined extended commitment period has a maximum duration of 6 months to one year.[3]

[1] AS 47.30.915(11)(a).
[2] Chart comparing states' extended commitment periods, distributed by the Office of Senator Claman (March 13, 2023), https://www.akleg.gov/basis/get_documents.asp?session=33&docid=2770.
[3] Summary of maximum periods of extended commitment, distributed by the Office of Senator Claman (March 13, 2023), https://www.akleg.gov/basis/get_documents.asp?session=33&docid=2771.

- **SB 53 lacks necessary judicial oversight.** While the legislation requires the court system to receive summary reports of people subject to commitments under the five-year framework, it does not require judicial oversight needed to preserve Alaskans' constitutional rights.
- **The early discharge petition framework further erodes due process rights.** Only allowing people to file a petition for release once per year is not frequent enough to ensure people are not held longer than necessary. The bill also reverses the burden of proof when a person files for release by requiring the person to show by clear and convincing evidence that there is factual and medical basis to believe they are no longer likely to harm themselves or others — as opposed to requiring the government to show that continued confinement is justified. This framework would create an extraordinary challenge for a person who has been involuntarily committed and must, from within that setting, advocate for themselves and navigate the legal and medical system.
- **Version Y is likely to incarcerate Alaskans with mental illness.** Section 6 of the new work draft obligates the state to seek confinement and evaluation of a person who has merely been charged with a qualifying offense because they have been found to be incompetent to stand trial. The legislation states that an initial commitment hearing take place within 72 hours, and that a person in this situation cannot be placed in a jail or correctional facility. However, it is likely that people in this situation will nevertheless be confined in prison. The bill would allow a person to be imprisoned for "protective custody" and while waiting for transportation to an evaluation facility — enormous loopholes that, when combined with a general lack of psychiatric facility capacity, will lead to further incarceration of Alaskans with mental illness.
- **Alaska's current commitment framework can be used to preserve both public safety and the constitutional rights of Alaskans.** We are aware of people who have been held for 10 or more years based on consecutive 180-day commitments. But utilizing Alaska's current system for long-term commitment appropriately requires the government to demonstrate that commitment is necessary.

SB 53 attempts to solve failures in the mental health treatment system by unnecessarily expanding the scope of involuntary commitments at great cost to the constitutional rights of people with mental illness. We urge the committee to examine ways the current system can be strengthened, and not advance this legislation.

Thank you for your consideration of our views. If you have any questions, please do not hesitate to contact me at mgarvey@acluak.org.

Sincerely,

Michael Garvey
Advocacy Director