

HOUSE BILL REPORT

2ESSB 6151

As Passed House - Amended:

May 22, 2001

Title: An act relating to the management of high-risk sex offenders in the civil commitment and criminal justice systems.

Brief Description: Revising provisions relating to high-risk sex offenders.

Sponsors: By Senate Committee on Human Services & Corrections (originally sponsored by Senators Long and Hargrove).

Brief History:

First Special Session

Floor Activity:

Passed House - Amended: 5/22/01, 75-19.

**Brief Summary of Second Engrossed Substitute Bill
(As Amended by House)**

- Authorizes the Department of Social and Health Services (DSHS) to establish a 15-bed secure community transition facility on McNeil Island for sexually violent predators conditionally released to a less restrictive alternative.
- Requires the DSHS to determine if additional secure community transition facilities are needed, and if so, sets out a process for the equitable distribution of these facilities among counties, and within counties.
- Requires the DSHS to establish criteria for the siting of future secure community transition facilities, and specifies some of those criteria.
- Establishes requirements for the operation, security, and staffing of the McNeil Island facility and other secure community transition facilities.
- Limits the civil liability of a certified sex offender treatment provider to gross negligence or willful and wanton misconduct, and prohibits certified sex offender treatment providers from treating sexually violent predators if the provider has been convicted of a sex offense.
- Establishes an indeterminate sentencing system for certain sex offenses.
- Changes the felony classification of certain crimes when accompanied by a finding of sexual motivation or committed by force, and raises the felony classification for certain attempted crimes.

HOUSE COMMITTEE ON CRIMINAL JUSTICE & CORRECTIONS

Majority/Minority Report: None.

Staff: Jean Ann Quinn (786-7310).

Background:

I. Less Restrictive Alternative Facilities for Sexually Violent Predators

Under the Community Protection Act of 1990, a sexually violent predator may be civilly committed upon the expiration of his or her criminal sentence. A sexually violent predator is a person who has been convicted of, charged with and found not guilty by reason of insanity of, or found to be incompetent to stand trial for, a crime of sexual

violence and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory acts of sexual violence if not confined to a secure facility. Sexually violent predators are committed to the custody of the Department of Social and Health Services (DSHS) and confined at the Special Commitment Center (SCC) for control, care, and individualized treatment.

A person who has been civilly committed is entitled to an annual review of his or her mental condition, including consideration of whether conditional release to a less restrictive alternative (LRA) is in the best interest of the person and would adequately protect the community. Before the court can order that a person be conditionally released to an LRA, the court must find that certain requirements are met, including the requirement that housing is available that is sufficiently secure to protect the community.

Since 1994 the SCC has been operating under a federal court injunction requiring that steps be taken to ensure that constitutionally adequate mental health treatment is being provided to the SCC residents. In November 1999, the state was held in contempt of court for failing to take all reasonable steps toward this goal and for intentionally disregarding the requirements of the injunction. The court ordered sanctions of \$50 per day per SCC resident beginning in May of 2000. To date, the court has deferred imposition of these sanctions, finding that the SCC is making genuine efforts to bring the program into compliance. One area that continues to be of concern to the court, however, is the lack of arrangements for the transition of qualified residents into LRAs.

II. Sex Offender Treatment Providers Subject to Civil Actions for Damages

Before the court can order that a person be conditionally released to an LRA, the court must find, among other things, that the person will be treated by a certified sex offender treatment provider who has developed a specific course of treatment for that person. The treatment provider must agree to assume responsibility for the treatment, make progress reports to the court, and immediately report any violations to the court. Sex offender treatment providers are certified by the Department of Health (DOH) after completing the necessary education, experience, and examination requirements.

In any civil action alleging negligence, one of the essential elements the plaintiff must show is the existence of a legal duty that the defendant owed to the plaintiff. Generally, a person does not have a duty to protect another from the criminal acts of third persons. However, Washington courts have recognized an exception to this general rule where a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party. Whether a person has a duty to protect another from the intentional acts of a third person, therefore, depends upon the relationship between the parties and the extent to which the third party's conduct was foreseeable. Washington's supreme court has held that a therapist may incur a duty to take reasonable precautions to protect another person who might foreseeably be endangered by the patient's mental illness.

Gross negligence is negligence substantially and appreciably greater than ordinary negligence. Willful or wanton misconduct is intentional activity done in reckless disregard of the consequences under circumstances such that a reasonable person would know that substantial harm to another is highly likely.

III. Sex Offender Sentencing

Since the enactment of the Sentencing Reform Act (SRA), all offenders, including sex offenders, receive determinate sentences based on the seriousness of the offense and the offender's prior criminal history. Under the SRA, the court must impose a sentence within the standard sentence range established for the offense, except in certain specified instances, or unless the court finds that there are substantial and compelling reasons justifying an exceptional sentence.

Under Washington's persistent offender provisions for sex offenders (also known as "two strikes"), an offender who has two separate convictions for a sex crime "strike" offense is sentenced to life in prison without possibility of release. The qualifying crimes include rape in the first or second degree, rape of a child in the first or second degree, child molestation in the first degree, some serious violent felonies, such as first and second degree murder and first and second degree kidnapping, found to have been committed with sexual motivation, and attempts to commit any of these offenses.

IV. Attempt Crimes

A person is guilty of an attempt to commit a crime if he or she does any act that is a substantial step toward the commission of that crime, with the intent to commit the crime. The attempt is a class A felony when the attempted crime is one of the following class A felonies: first or second degree murder or first degree arson. The attempt is a class B felony when the attempted crime is any other class A felony. The attempt is a class C felony when the attempted crime is a class B felony. The attempt is a gross misdemeanor when the attempted crime is a class C felony, and a misdemeanor when the attempted crime is a gross misdemeanor or misdemeanor.

V. Assault; Kidnapping; Indecent Liberties

Assault in the second degree is committed in several ways, such as by inflicting substantial bodily harm, by using a deadly weapon, and by knowingly inflicting harm that is the equivalent of torture. Second degree assault is a class B felony.

A person is guilty of second degree kidnapping if he or she intentionally abducts another person under circumstances not amounting to first degree kidnapping. The crime is a class B felony.

A person is guilty of indecent liberties if he or she knowingly causes another person who is not his or her spouse, to have sexual contact: (1) by forcible compulsion; (2) if the

victim is incapable of consent; or (3) under certain circumstances, if the victim is developmentally disabled, a patient, a resident of a facility for mentally disordered or chemically dependent persons, or a frail or vulnerable adult. The crime is a class B felony.

VI. Sexually Violent Predator Escape

A sexually violent predator who has been conditionally released is guilty of escape in the second degree, a class C felony, if he or she leaves the state of Washington without prior court authorization.

Summary of Amended Bill:

I. Less Restrictive Alternative Facilities for Sexually Violent Predators

A secure community transition facility (SCTF) is defined to mean a residential facility for persons civilly committed and conditionally released to a less restrictive alternative. The DSHS is authorized to site and operate a 400-bed relocation of the SCC and a 15-bed secure community transition facility on McNeil Island. The DSHS is also authorized to operate a correctional facility on McNeil Island. Local comprehensive plans, development regulations, permitting requirements, and other laws that are inconsistent with the siting or operation of such facilities are preempted.

The DSHS must submit a report to the Legislature regarding policies for the subsequent placement of residents of the McNeil Island SCTF, including policies to ensure that they will be equitably distributed among the counties, and jurisdictions of the counties. Before ordering a subsequent placement, the court must consider whether the person is able to withstand changes in routine and situation without regressing to the point that the person presents a danger that cannot reasonably be addressed in the proposed placement. To the greatest extent possible, until June 30, 2003, persons who were not civilly committed by Pierce County may not be subsequently released to that county.

The DSHS must immediately enter into negotiations for a mitigation agreement with Pierce County, affected communities, and other parties impacted by the siting of the McNeil Island SCTF. The purpose of the agreement is to provide state funding, as appropriated for this purpose, for increased public safety costs resulting from the siting of the facility on McNeil Island. The DSHS must make reasonable efforts to distribute the impact of the employment, education, and social service needs of the residents among the adjacent counties. By August 1, 2001, the DSHS must hold three public hearings in the affected communities regarding the operations and security of the SCTF facility.

Before any person is placed in the SCTF, there must be a 24-hour law enforcement presence on McNeil Island. Law enforcement must coordinate with the prison Emergency Response Team, and up to 10 members of that team shall have the powers

and duties of a general authority peace officer. The facility must include a fence.

The DSHS must provide the Legislature with a transportation plan by July 1, 2001, to address the issue of coordinating the movement of residents of the SCTF between McNeil Island and the mainland. Residents must be kept separate from minors and vulnerable adults who are not sexually violent predators when traveling between McNeil Island and the mainland, and there must be a separate waiting area at the points of debarkation. Local law enforcement agencies are to be provided with information about each resident that will be present in the community.

The DSHS is required to cease its current efforts to site additional SCTFs. If the DSHS, in consultation with the attorney general, determines that future SCTFs are needed, the DSHS must prepare a projected list of counties where the facilities need to be sited over the next six years, and every six years thereafter. The DSHS must provide for the equitable distribution of these facilities among and within counties after consulting with the joint select committee established in the bill and local governments. No additional SCTFs may be sited in Pierce County until after June 30, 2008. The total number of beds sited between the effective date of the act and June 30, 2008, in a county cannot exceed the number of persons civilly committed from that county as of April 2001. The same rule is repeated for 2008-2015, with the cap calculated based on the number of persons civilly committed as of July 1, 2008. The equitable distribution is to be based on an analysis of the number of persons civilly committed from each county as of April 1, 2001, per thousand residents of the county; the number of existing and projected state mental hospital, SCTF, and correctional facility beds in each county per thousand residents of the county; and the number of registered level II, III, and homeless sex offenders per thousand residents of the county.

Siting requirements are established for all future SCTFs, to include an average response time by law enforcement of five minutes or less, and a requirement that the facilities not be located adjacent to, immediately across the street or parking lot from, or within the line of sight of a risk potential activity. The secretary of the DSHS is required to adopt rules that include criteria to be considered when evaluating the appropriateness of a site. All SCTFs, including the facility established on McNeil Island, are required to meet specified security and staffing requirements. Residents are required to wear electronic monitoring devices and have one-on-one escorts, unless otherwise ordered by the court.

The DSHS must develop a policy requiring written documentation by the DSHS and service providers of all violations, and establishing criteria for returning a violator to the SCC or a higher level of security. The policy must include a mandatory immediate return to the SCC, for any serious violation unless the person is arrested.

Secure community transition facilities may only be operated following appropriate public participation. This includes two public hearings in each of the three finalist communities and at least one more public hearing in the selected community. If only one site is under

consideration, at least two public hearings must be held in that community. Fourteen days notice of the hearing must be given through radio, television, and newspapers of general circulation, and to local persons and organizations. If a special use or conditional use permit is required for the siting of a facility, and that process requires similar public notice and hearings, duplication is not required.

A sexually violent predator conditionally released to a less restrictive alternative is subject to the registration and community notification requirements of existing law. An employer who hires such an individual must notify other employees of that person's status.

A joint select committee is established to review and make recommendations regarding factors for the equitable distribution of SCTFs, siting and operation criteria, security measures, and a method for determining mitigation for future SCTFs.

II. Sex Offender Treatment Providers Subject to Civil Actions for Damages

Only certified sex offender treatment providers may provide treatment to sexually violent predators released to an LRA unless specified exceptions apply. A certified sex offender treatment provider may not provide treatment to sexually violent predators if the provider has been convicted of a sex offense or restricted from practicing any health care profession.

A certified sex offender treatment provider is not liable in a civil action for damages for the injuries or death of another caused by a sexually violent predator or level III sex offender receiving treatment by the provider if the provider is acting within the course of his or her duties and the provider's act or omission did not constitute gross negligence or willful or wanton misconduct. The limited liability does not affect the provider's civil liability for damages caused by the provider's breach of any duty to warn or protect imposed by law. The limited liability does not affect the state's civil liability for damages for injuries or death of another. The certified sex offender treatment provider must report any expressions of intent to harm or other predatory behavior, whether or not there is an ascertainable victim, in progress reports. A certified sex offender treatment provider acts within the scope of his or her profession when he or she provides services to the DOC by identifying and notifying the department of risk factors of sex offenders who are not amenable to treatment but who are required under court order to receive treatment.

A treatment provider approved by the DSHS who is not certified must consult with a certified provider during the person's period of treatment to ensure compliance with rules adopted by the DOH. Qualified experts who are not certified may evaluate persons in a LRA for purposes of presenting an opinion in court proceedings.

III. Sentencing of Sex Offenders

Unless the "two-strikes" provisions apply, the following persons are subject to a minimum and maximum term sentence:

- (1) Any person convicted of a first time two-strikes offense committed after the effective date of the act; and
- (2) Any person who has a prior two-strikes offense who is convicted of any other felony sex offense committed after the effective date of the act.

If the court finds that this sentencing system applies, the court must impose a minimum term within the standard sentence range or an exceptional sentence, if applicable, and a maximum term equal to the statutory maximum sentence for the offense. The statutory maximum for a class A felony is life; for a class B felony, 10 years; and for a class C felony, five years. All sentences under this system must be served in a state operated or contracted facility. Such offenders are subject to sex offender registration and community notification.

Offenders sentenced under this system must be given an opportunity for treatment. As part of the end-of-sentence review process, the Department of Corrections (DOC) must conduct an examination of the offender, including an evaluation of the probability that the offender will commit a sex offense if released. The DOC must make recommendations to the ISRB related to conditions of release. Ninety days prior to release, the ISRB must hold a hearing to determine the likelihood of the offender committing a predatory crime of sexual violence if released on conditions set by the ISRB. An offender's refusal to be evaluated can be considered in making this determination. Unless the board determines that it is more likely than not that the offender will commit sex offenses if released, the offender must be released under conditions set by the board. Otherwise, a new minimum term must be established, not to exceed an additional two years. If the person is released, the ISRB must impose conditions of community custody on the person, and the person is supervised by the DOC for compliance with the required conditions until the expiration of the maximum term of the sentence. The DOC is considered to be performing a quasi-judicial function when setting, modifying, or enforcing conditions of community custody.

An offender who violates a condition of community custody can be arrested and detained by any community corrections officer. A system of graduated sanctions may be imposed on an offender who violates his or her community custody or the offender's release to community custody may be suspended or revoked. The offender is entitled to an administrative hearing prior to the imposition of sanctions. The procedures that apply, and the rights of the offender, are the same as those that apply to any violation of community custody under the Offender Accountability Act, except that if revocation of community custody is a possible sanction, the person has a right to an attorney. Hearings are to be conducted by the ISRB, unless the ISRB otherwise contracts with the DOC to conduct the hearings.

II. Attempt Crimes

When the attempted crime is first degree child molestation, indecent liberties by forcible compulsion, first or second degree rape, or rape of a child in the first or second degrees, the attempt is a class A felony.

III. Assault; Kidnapping; Indecent Liberties

Assault in the second degree and kidnapping in the second degree become class A felonies when accompanied by a finding of sexual motivation. Indecent liberties is a class A felony when committed by forcible compulsion.

V. Sexually Violent Predator Escape

A person is guilty of sexually violent predator escape if he or she escapes from the special commitment center or other secure facility; while under an order of conditional release, leaves or remains absent from the state without permission; without authorization leaves or remains absent from his or her residence, employment, educational institution, or authorized outing; tampers with his or her electronic monitoring device; or escapes from his or her escort. The crime is a class A, level X felony with a minimum term of five years and is sentenced under the system described section II above.

Appropriation: None.

Fiscal Note: Not Requested.

Effective Date of Amended Bill: The bill contains an emergency clause and takes effect on July 1, 2001, except sections 101-225, which take effect immediately.

Testimony For: None.

Testimony Against: None.

Testified: None.