

HOUSE BILL REPORT

ESHB 2353

As Passed House:

February 16, 2002

Title: An act relating to state agency loss prevention.

Brief Description: Providing for loss prevention review teams.

Sponsors: By House Committee on Judiciary (originally sponsored by Representatives Alexander, Lantz, Miloscia and Esser; by request of Governor Locke and Attorney General).

Brief History:

Committee Activity:

Judiciary: 1/24/02, 1/31/02 [DPS];

Appropriations: 2/5/02, 2/9/02 [DPS(JUDI)].

Floor Activity:

Passed House: 2/16/02, 85-13.

Brief Summary of Engrossed Substitute Bill

- Requires the Office of Financial Management to form a loss prevention review team to review a death, serious injury or other substantial loss that allegedly involves a state agency.
- Makes the final report and any documents prepared by or for a loss prevention review team inadmissible in a civil or administrative proceeding, except for impeaching a witness.
- Prevents a member of a loss prevention review team from testifying in a civil or administrative proceeding as to the work of the review team or the incident under review.
- Prevents a person who has provided statements to a loss prevention review team from being examined in a civil or administrative proceeding regarding the person's interactions with the loss prevention review team.
- Requires an agency to respond to the final report of a loss prevention review team.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Lantz, Chair; Hurst, Vice Chair; Dickerson, Esser, Jarrett, Lovick and Lysen.

Minority Report: Do not pass. Signed by 2 members: Representatives Carrell, Ranking Minority Member; and Boldt.

Staff: Edie Adams (786-7180).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The substitute bill by Committee on Judiciary be substituted therefor and the substitute bill do pass. Signed by 25 members: Representatives Sommers, Chair; Doumit, 1st Vice Chair; Fromhold, 2nd Vice Chair; Sehlin, Ranking Minority Member; Alexander, Boldt, Buck, Clements, Cody, Cox, Dunshee, Grant, Kagi, Kenney, Kessler, Linville, Lisk, Mastin, McIntire, Pearson, Pflug, Ruderman, Schual-Berke, Talcott and Tokuda.

Staff: Linda Brooks (786-7153).

Background:

During the 2001 interim, Governor Locke and Attorney General Gregoire sponsored a Risk Management Task Force in response to increasing attention to incidents of severe harm to citizens and the increasing liability of the state for injuries and losses. The purpose of the task force was to identify how the state can deliver its difficult and risky programs and services in a way that better protects citizens of the state from harm or injury and that engages in the most effective risk management possible. The task force was comprised of a number of groups, including; the Attorney General, legislators, agency directors and budget officials, risk managers, attorneys, and advisors from the University of Washington.

The Risk Management Task Force issued a number of recommendations in its final report. One of the recommendations of the task force was to require agencies to conduct post-incident reviews that would provide recommendations on how to avoid or reduce losses in the future. The recommendation states that these reviews should be made available to the public and the Legislature, but should not be admissible as evidence in civil proceedings, so as to encourage open and frank discussions of the problems that led to the loss and how improvements may be made to reduce further losses.

Under state evidence laws, all relevant evidence is admissible unless specifically barred by some other rule of evidence. One such exclusion of potentially relevant evidence is Evidence Rule 407, which prohibits evidence of subsequent remedial measures to be admitted for the purpose of proving negligence or culpable conduct relating to the

incident. Evidence of subsequent remedial measures may be introduced for other purposes, however, such as to prove ownership, control or feasibility of precautionary measures or for impeachment purposes. This rule is limited to remedial measures and does not address the issue of accident investigations or reviews.

Summary of Engrossed Substitute Bill:

Whenever a death, serious injury, or other substantial loss is alleged or suspected to be caused in part by the actions of a state agency, the director of the Office of Financial Management (OFM) must appoint a loss prevention review team, unless the director determines the incident does not merit review. In addition, a loss prevention review team may also be appointed when a substantial loss occurs as a result of agency policies, litigation or defense practices, or other management practices. State agencies are required, pursuant to guidelines established by the director, to immediately report to OFM a death, serious injury, or other substantial loss that may have been caused by the agency. If the director does not appoint a loss prevention review team, the director must issue a statement of reasons for not appointing the review team and this statement must be made available on the OFM's web site. The director's decision to appoint or not appoint a loss prevention review team is not admissible in a civil or administrative proceeding.

A loss prevention review team must consist of between three and five members and may include independent consultants, contractors, or state employees. A loss prevention review team may not include any person employed by the agency involved in the loss or risk of loss giving rise to the review nor any person with testimonial knowledge of the incident. At least one member of the review team must have expertise relevant to the matter under review.

The loss prevention review team must review the incident, evaluate its causes, and recommend steps to reduce the risks of such incidents recurring by reviewing relevant documents and interviewing people with relevant knowledge. The final report of the team may not disclose the contents of any documents required by law to be kept confidential.

The final report of a loss prevention review team must be made public by the director and is subject to public disclosure. The final report is subject to discovery in a civil or administrative proceeding. However, the final report, and any documents prepared by or for the loss prevention review team, are not admissible in a civil or administrative proceeding except for the purpose of impeaching a witness.

Excerpts from the final report or any documents prepared by or for the team may only be used to impeach a witness if the party wishing to use the excerpts for impeachment purposes shows by clear and convincing evidence that the witness has contradicted a previous statement to the team on an issue of fact that is material to the present

proceeding. The party may only introduce the portions of the final report or documents that are necessary to prove the contradiction.

A member of a loss prevention review team may not be examined in a civil or administrative proceeding as to the work of the team, the incident reviewed by the team, or the thoughts, deliberations, statements or analysis of the member, any other member of the team, or any person who provided information to the team, that relates to the work of the team or the incident under review.

A document that is available prior to the creation of a loss prevention review team or that is created independently of a team does not become inadmissible as a result of the team's consideration of the document. Similarly, a person who has been interviewed by or provided statements to a loss prevention review team does not become unavailable as a witness as a result, and is available to testify about his or her knowledge of the incident under review. However, the person may not be examined regarding the person's interactions with the loss prevention review team, such as the questions the review team asked and what answers the person provided.

An agency must respond to a final report of the loss prevention review team, within 120 days, indicating which of the report's recommendations the agency hopes to implement, whether implementation will require additional funding or legislation, and other information the director may require. The agency response is considered part of the final report and subject to the restrictions on admissibility and use in civil or administrative proceedings and the obligation of the director to make the final report public.

The restrictions of the act do not apply to a licensing or disciplinary proceeding in which an agency is attempting to revoke or suspend the license of a person for alleged wrongdoing in connection with an incident reviewed by a loss prevention review team.

A statement is made that nothing in the act is intended to limit the scope of a legislative inquiry into or review of an incident that is the subject of a loss prevention review. In addition, nothing in the act affects the application of chapter 70.41 RCW (licensing and regulation of hospitals) to state-owned or managed hospitals licensed under that chapter.

Appropriation: None.

Fiscal Note: Available.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: (Judiciary) (In support) The purpose of the Risk Management Task Force was to respond to the dramatic increase of financial responsibility of the state in tort claims and the terrible tragedies and loss of life that this represents. The goal was to be proactive so the state can deliver services in a manner that doesn't harm citizens and

that engages in the lowest risk management possible.

This bill is important to improve the state's risk management system. Victims and their family members told the task force they at least want some good to come out of the tragedy by making sure a similar tragedy won't happen in the future. Loss prevention review teams will enable the state to understand what is causing losses and how those losses can be prevented. They aren't being done now because of the fear they will be used against the state in a lawsuit. The bill strikes a fine balance of interests on the issue of admissibility.

Counties have a lot of the same liability issues as the state. Even though the bill is directed at the state, counties have a relationship with the state and might be involved in a review and we want to make sure the reviews could not be used against the county. It would be a good idea to allow counties to do the same thing.

(With concerns) There are several ways the bill can be improved to increase its effectiveness and make it more meaningful for victims. The director should issue a statement of reasons for not appointing a review team and the team should include people with expertise in the matter under review. The provisions concerning the final report should be enhanced to address the issues of what happens to the recommendations and whether they were implemented by the agency.

Testimony For: (Appropriations) Torts are a high rising cost for the state, and this legislation is about looking for a way to reduce tort costs. The legislation would provide for a post-incident review to occur while an incident is still fresh in people's memories. The aim of the bill is save the state money by preventing future, preventable tragedies. A small ounce of prevention is worth many pounds of cure.

Testimony Against: (Judiciary) None.

Testimony Against: (Appropriations) None.

Testified: (Judiciary) (In support) Representative Alexander, prime sponsor; Christine O. Gregoire, Attorney General; Marty Brown, Office of Financial Management; Larry Shannon, Washington State Trial Lawyers Association; and Sophia Byrd, Washington State Association of Counties.

(With concerns) Lonnie Johns-Brown, Washington Coalition of Sexual Assault Programs.

Testified: (Appropriations) Dave Horn, Office of the Attorney General; and Larry Shannon, Washington State Trial Lawyers' Association.