

# SENATE BILL REPORT

## ESSB 5122

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As Passed Senate, March 6, 2001

**Title:** An act relating to civil commitment and related proceedings for sexually violent predators under chapter 71.09 RCW.

**Brief Description:** Revising procedures and standards for commitment of sexually violent predators.

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

**Brief History:**

**Committee Activity:** Human Services & Corrections: 1/25/01, 2/15/01 [DPS].

Passed Senate: 3/6/01, 46-0.

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### SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

**Majority Report:** That Substitute Senate Bill No. 5122 be substituted therefor, and the substitute bill do pass.

Signed by Senators Hargrove, Chair; Costa, Vice Chair; Carlson, Franklin, Hewitt, Kastama, Kohl-Welles, Long and Stevens.

**Staff:** Fara Daun (786-7459)

**Background:** Since the Community Protection Act of 1990 was amended in 1995 to require the possibility of less restrictive alternatives, the less restrictive alternative provisions have been heavily litigated at the trial level and have been subject to a number of interpretations in the appellate courts. In August 2000, the appellate court in Division II decided a case, *In re the Detention of Ross* (102 Wn. App. 108, 6 P.3d 625 (2000)), which made a substantial change in the law. This case held that the subject of a civil commitment petition under the sexually violent predator statute must be allowed to present evidence of conditions under which he or she is not likely to engage in predatory acts of sexual violence, whether or not the court would have the authority to order those conditions. The court did not allow the prosecutor to present evidence that the court could not order the very conditions the person argued would make him unlikely to commit such acts if the jury did not find that he was a sexually violent predator. This places the state in a "catch-22" in which the person it seeks to commit can present entirely speculative conditions that are beyond the authority of the court to order but the prosecutor cannot inform the jury that the conditions on which it is basing its decision will not, and cannot, be ordered, if the person is not civilly committed as a sexually violent predator.

In 2000, the Senate Subcommittee on Sexually Violent Predators considered a number of issues related to civil commitment and release to less restrictive alternatives, including the issues raised by the *Ross* decision. This bill is one of the products of that subcommittee.

**Summary of Bill:** The standard for continued civil commitment is distinguished from the standard for eligibility for a less restrictive alternative (LRA). In determining whether a person would be more likely than not to commit acts of sexual violence if not confined to a secure facility, the court or jury can consider only those conditions which would be in existence if the person was not committed.

The standard for eligibility for an LRA is that an LRA is in the best interest of the person and conditions can be imposed that adequately protect the community. A person must be civilly committed before the court can consider conditional release to an LRA. The first time that the court considers whether an LRA is appropriate, the court must consider the question without considering whether the person's condition has changed.

If a jury is unable to reach a unanimous verdict, the court must declare a mistrial and set a retrial within 45 days unless the prosecuting agency earlier moves to dismiss the petition. The person may not be released from confinement prior to the retrial or dismissal of the case.

A spouse's testimonial privilege in a proceeding for civil commitment of a sexually violent predator is the same as the privilege under the general civil commitment and criminal insanity statutes. Under this standard, the person who is subject to the petition cannot prevent their spouse from testifying, but the spouse cannot be compelled to testify. A person who has agreed to treat, monitor, or supervise a sexually violent predator on a less restrictive alternative has no privilege in court proceedings and may be compelled to testify.

A witness for either side in the probable cause hearing prior to an initial petition hearing may testify by telephone. The court may determine whether the conditions of a proposed LRA meet the legal standard through a summary judgment proceeding.

The Department of Social and Health Services (DSHS) must check with the victim witness programs operated by DSHS, the Department of Corrections, the Secretary of State and any other appropriate program to ensure that a proposed LRA for a sexually violent predator is not within 25 miles of the last known address of any of the person's registered victims.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill contains an emergency clause and takes effect immediately.

**Testimony For:** The bill fine tunes what is already in place and addresses recent court decisions. The two most significant issues are the jury needs to be fully informed of the actual conditions that will exist if the person is found not to be a sexually violent offender and that persons committed as sexually violent predators may not be released to an LRA unless conditions can be imposed that adequately protect the community. The Attorney General and King County prosecutor believe the changes in the bill meet all constitutional standards and will be upheld on challenge. While case law development can be appropriate, it is equally important for the Legislature to refine the procedures as the law develops because case law can introduce inconsistencies and the Legislature can bring statewide consistency based on experience in using the law. This legislation primarily brings consistency to these cases. It is very appropriate to look realistically at conditions and whether they can be imposed.

This legislation improves the coherence of the civil commitment procedures. Sexually violent predators suffer complex abnormalities and these need to be evaluated carefully prior to placement in an LRA.

**Testimony Against:** Not every sex offender needs to be treated in confinement. This is very expensive and there is no reason to use maximum confinement if a person can be treated in the community. There will be a significant fiscal impact. There is no reason for a substantive change at this time as the state has historically won these cases. This legislation distracts the Legislature's attention from funding and treatment deficiencies addressed by the federal court. LRA must be considered at every step and the more the state moves from treatment to punishment as a focus, the more likely the bill will be found unconstitutional.

**Testified:** Senator Jeri Costa, sponsor (pro); Christine Gregoire, Washington State Attorney General (pro); Norm Maleng, King County Prosecuting Attorney (pro); Bob Boruchowitz, Washington Defenders' Association (con); Dennis Carroll, Washington Defenders' Association (con); Suzanne Brown, Washington Coalition of Sexual Assault Programs (pro); Marc Selig, Director, Special Commitment Center (pro).

**House Amendment(s):** The House amendment corrects a drafting error in the bill that inadvertently deleted language allowing a committed person the right to request a jury in an LRA hearing. The amendment replaces the provision requiring DSHS to verify that the proposed less restrictive alternative housing is not within 25 miles of any of the person's registered victims with a requirement that DSHS work with interested parties to develop improved procedures for notifying victims when a sexually violent predator is released to an LRA, while maintaining the confidentiality of victim information.