

# HOUSE BILL REPORT

## HB 2400

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**As Reported by House Committee On:**  
Criminal Justice & Corrections  
Appropriations

**Title:** An act relating to sentence enhancement for sex crimes against minors.

**Brief Description:** Providing enhanced penalties for sex crimes against children.

**Sponsors:** Representatives McMahan, Carrell, Mielke, Talcott, Crouse, Bush, Ahern, Newhouse, G. Simpson, Woods and Orcutt.

**Brief History:**

**Committee Activity:**

Criminal Justice & Corrections: 2/13/04 [DP];

Appropriations: 2/28/04, 3/1/04 [DPS].

**Brief Summary of Substitute Bill**

- Increases the standard sentence ranges for rape of a child in the first degree and rape of a child in the second degree.
- Makes changes to the Special Sex Offender Sentencing Alternative.
- Requires the Washington Institute for Public Policy to perform an analysis and evaluation of sex offender sentencing.

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### HOUSE COMMITTEE ON CRIMINAL JUSTICE & CORRECTIONS

**Majority Report:** Do pass. Signed by 7 members: Representatives O'Brien, Chair; Darneille, Vice Chair; Mielke, Ranking Minority Member; Ahern, Assistant Ranking Minority Member; Kagi, Pearson and Veloria.

**Staff:** Jim Morishima (786-7191).

**Background:**

I. Rape of a Child

Rape of a child, also known as statutory rape, occurs when an adult, who is a certain number of months older than the victim, has sexual intercourse with a child under 16 years of age. For purposes of this crime, it is not necessary to prove lack of consent on the part of the victim. It is generally not a defense to this crime that the defendant did not know the victim's age or

believed that the victim was older (unless the defendant reasonably believed the victim to be older based on declarations made by the victim).

The punishment for rape of a child depends on the age of the offender and the age of the victim:

If the victim is less than 12 years old and the offender is at least 24 months older than the victim, the offender is guilty of rape of a child in the 1st degree, which is a class A felony with a seriousness level of XII. Rape of a child in the 1st degree is a two strikes offense. If the victim is at least 12 years old, but less than 14 years old, and the offender is at least 36 months older than the victim, the offender is guilty of rape of a child in the 2nd degree, which is a class A felony with a seriousness level of XI. Rape of a child in the 2nd degree is a two strikes offense. If the victim is at least 14 years old, but less than 16 years old, and the offender is at least 48 months older than the victim, the offender is guilty of rape of a child in the 3rd degree, which is a class C felony with a seriousness level of VI. Rape of a child in the 3rd degree is not a two strikes offense.

## II. The Special Sex Offender Sentencing Alternative

The Special Sex Offender Sentencing Alternative (SSOSA) is an alternative to standard sentencing wherein the court suspends the offender's sentence in exchange for treatment and other conditions.

### A. Eligibility for SSOSA

An offender is eligible for a SSOSA sentence if he or she:

Is convicted of a sex offense other than a serious violent offense or rape in the second degree;  
Has no prior conviction for a sex offense; and  
Has a standard sentence range that includes the possibility of imprisonment for 11 years or less.

### B. Deciding Whether to Grant a SSOSA

Prior to ordering a SSOSA, the court orders the offender to be examined. The examiner must submit a report of the examination and a proposed treatment plan to the court. After receipt of the report, the court must consider:

Whether the offender and the community would benefit from the use of SSOSA; and  
The opinion of the victim.

### C. Terms of a SSOSA Sentence

If a court decides to grant a SSOSA disposition, it enters a sentence and suspends its execution. The court must impose the following conditions of the suspended sentence:  
Treatment for any period up to three years; and  
A term of community custody.

Also, the court has the option to impose a variety of conditions of the suspended sentence, including up to six months of confinement (not to exceed the sentence range for the offense), crime-related prohibitions, and community restitution.

### D. Supervision of SSOSA Offenders

Offenders who receive SSOSA sentences are supervised in the community by the Department of Corrections (DOC). During the term of treatment, the treatment provider must provide quarterly reports to the court. If a violation of the terms of the suspended sentence happens during community custody, the DOC may handle the violation administratively or refer the violation to the court. The court may revoke the suspended sentence if the offender violates any of the conditions of suspension or does not make satisfactory progress in treatment.

#### E. Treatment Termination

When imposing a SSOSA sentence, the court must set a treatment termination hearing for three months prior to the end of treatment. Prior to the hearing, the treatment provider and the DOC report to the court and the parties regarding the offender's compliance with the conditions of his or her sentence and recommendations regarding treatment termination. Either party may request another evaluation, which the court has the option to grant. The offender must pay for the second evaluation unless the court finds him or her to be indigent, in which case the state pays. After the treatment termination hearing, the court may modify the conditions of community custody, terminate treatment, or extend treatment for up to the remaining term of community custody.

### **Summary of Bill:**

#### I. Rape of a Child

The seriousness level of rape of a child in the first degree is increased from XII to XIII. The seriousness level of rape of a child in the second degree is increased from XI to XIII. The increases do not apply to juveniles tried as adults.

#### II. The Special Sex Offender Sentencing Alternative

Changes are made to SSOSA that do not apply to juveniles tried as adults.

##### A. Eligibility for SSOSA

The eligibility criteria for SSOSA are expanded. The following persons are ineligible for SSOSA:

Persons with adult convictions for violent offenses committed within five years of the current offense; Persons who caused substantial bodily harm to the victim; and Persons who had no connection with the victim other than the offense itself.

In addition, for offenders convicted of rape of a child in the first and second degrees and child molestation in the first degree, the court may not impose a SSOSA sentence if the prosecutor recommends against it. When making his or her recommendation, the prosecutor must consider whether the victim's testimony is necessary to the case, whether the victim is willing to provide credible testimony, and whether there are other chargeable cases against the offender based on the existence of multiple victims.

##### B. Deciding Whether to Grant a SSOSA

The proposed treatment plan must identify behaviors or activities that are precursors to the offender's offense cycle.

The court must consider the following factors when deciding whether to grant a SSOSA sentence:

Whether the offender had multiple victims; Whether the offender is amenable to treatment. An admission to the offense, by itself, does not constitute amenability to treatment; The risk the offender poses to the community, the victim, or persons similarly situated to the victim; and Whether the alternative is too lenient in light of the extent and circumstances of the offense.

The court must give great weight to the victim's opinion. If the court orders a sentence that is contrary to the victim's opinion, the court must state its reasons in writing.

#### C. Terms of a SSOSA Sentence

As a condition of the suspended sentence, the court must impose a term of incarceration of 12 months or the maximum of the standard range, whichever is less. The court may increase this term of incarceration up to the statutory maximum sentence for the crime for aggravating circumstances. The term may not be reduced by earned release credits and may be served in partial confinement. The court must also order prohibitions against behaviors or activities that serve as precursors to the offender's offense cycle.

The maximum for the initial treatment term is increased from three years to five years. The treatment provider that provided the offender's initial examination may not be the same provider that provides treatment to the offender during the SSOSA sentence, unless the court has entered written findings that such treatment is in the best interests of the victim and that successful treatment of the offender would otherwise be impractical (this provision is the only SSOSA change that applies to juveniles tried as adults).

#### D. Supervision of SSOSA Offenders

The court must conduct a hearing on the offender's progress in treatment at least once a year. The court must provide notice and the opportunity to be heard at the hearing to the victim. The court may modify community custody terms or revoke the suspended sentence at the hearing.

Upon a second violation of a prohibition against precursor behaviors or activities, the DOC must refer the offender back to the court and recommend revocation of the suspended sentence.

#### E. Treatment Termination

The court must provide notice and the opportunity to be heard at the treatment termination hearing to the victim. The court must order another evaluation prior to the hearing, which must be performed by a treatment provider other than the one who provided treatment to the offender. The provision allowing the state to pay for the evaluation if the offender is indigent is removed. After the treatment termination hearing, the court may extend treatment in two year increments.

### III. Miscellaneous

The Washington Institute for Public Policy must perform a comprehensive analysis and evaluation of the impact and effectiveness of current sex offender sentencing policies, including SSOSA, DOC treatment programs for incarcerated offenders, and the validity of the risk assessment tool used by the End of Sentence Review Committee. The analysis must examine whether changes to sentencing policies and sex offender programming can increase public safety.

As part of the evaluation of SSOSA, the institute must examine the following issues: Eligibility for SSOSA; Minimum terms of incarceration; Appropriate conditions or restrictions that should be placed on SSOSA offenders; and Standards for SSOSA revocation. The institute must report its results and recommendations to the Legislature no later than December 31, 2004.

**Appropriation:** \$1,850,000 from the state general fund.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect July 1, 2004.

**Testimony For:** Children depend on us to keep them safe. There is no more essential duty for the Legislature than the protection of lives and the administration of justice. Persons guilty of victimizing our children must serve time. A message must be sent for the sake of children – if you do the crime, you do hard time. This bill will give families and victims justice. As for the costs of the bill, the safety of our children is priceless. Everything possible should be done to protect children. Use of SSOSA has led to sentences for these crimes dramatically below the standard range. People get much more severe punishment for less serious crimes. The persons evaluating an offender's fitness for SSOSA are often the same persons who are contracted to give the offender treatment services. These treatment providers therefore have financial incentive to recommend an offender to SSOSA. Offenders should get treatment in prison, not in the community.

(Concerns) There have been many changes to the sentencing laws over the last 20 years. We do not know what the effect of these changes has been. Before we change sentencing again, we should take a step back and look at the effect of these changes. We need to get more of these cases reported and into the courts. The problem with SSOSA is that it is all or nothing. However, there is an appropriate role for SSOSA. SSOSA helps to encourage victims to come forward and can help prosecutors get convictions in tough cases. The problem with SSOSA has existed for years. The program should be tightened, not eliminated.

**Testimony Against:** SSOSA can help to decrease the occurrence of sex offenses. However, this bill would effectively eliminate SSOSA, which would discourage the reporting and prosecution of sex offenses. Many sex offenses occur in the family context. Family members are often reluctant to report sex offenses if they feel the perpetrator will get a lengthy prison sentence. Treatment in prison is often less effective than treatment under SSOSA. SSOSA

offenders get treatment for a long time and have incentives to participate given the lengthy suspended sentence imposed by the program.

**Persons Testifying:** (In support) Representative McMahan, prime sponsor; Jim Hines and Theresa Gibbs, Friends and Neighbors of Theresa Gibbs; Shawna Peterson, victim and aunt of victim; Patricia Gibbs, grandmother; Michele Clute, Safe Haven; Lisa Lockwood, parent and spokesperson of Whatcom County; and Lane McNitt, grandfather of victim.

(Concerns) Suzanne Brown-McBride, Washington Coalition of Sexual Assault Programs.

(Opposed) David Marshall, Washington Association of Criminal Defense Lawyers and Washington Defenders Association.

(Comments) Tom McBride, Washington Association of Prosecuting Attorneys.

**Persons Signed In To Testify But Not Testifying:** (Concerns) Representative Eickmeyer, Sound Institute; and Kevin Glacken-Coley, Children's Alliance.

(Opposed) Richard Packard, Washington Association for the Treatment of Sexual Abusers; Linda Rutledge; and Ron Rogers.

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## HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 27 members: Representatives Sommers, Chair; Fromhold, Vice Chair; Sehlin, Ranking Minority Member; Pearson, Assistant Ranking Minority Member; Alexander, Anderson, Boldt, Buck, Chandler, Clements, Cody, Conway, Cox, Dunshee, Grant, Hunter, Kagi, Kenney, Kessler, Linville, McDonald, McIntire, Miloscia, Ruderman, Schual-Berke, Sump and Talcott.

**Staff:** Bernard Dean (786-7130).

### **Background:**

The Special Sex Offender Sentencing Alternative (SSOSA) provides for a suspended sentence that may include a jail term of up to six months and required outpatient or inpatient treatment. Offenders sentenced under this alternative are not eligible to accrue earned release time while serving the suspended sentence. In general, examinations and treatment under SSOSA may only be conducted by sex offender treatment providers certified by the Department of Health.

To be eligible for the SSOSA option, offenders must:

- not be convicted of a serious violent offense or rape in the second degree;
- be convicted of a violation of a sex offense;
- have had no prior convictions for sex offenses; and
- have a current offense and criminal history that permits the court to impose a sentence within the standard range of less than 11 years of confinement.

If those criteria are met, the court, on its own motion or on the motion of the state or the defendant, may order an examination to determine if the defendant is amenable to treatment.

The examiner must assess the defendant's amenability to treatment and relative risk to the community. A proposed treatment plan must be provided and must include, at a minimum:

- Frequency and type of contact between offender and therapist;
- Specific issues to be addressed in the treatment and description of planned treatment modalities;
- Monitoring plans, including any requirements regarding living conditions, lifestyle requirements and monitoring by family members and others;
- Anticipated length of treatment; and
- Recommended crime-related prohibitions.

Upon the motion of the state or the court, a second examination regarding the offender's amenability to treatment may be ordered. The defendant is to pay the cost of any second examination ordered unless the court finds that the defendant is indigent, in which case the state pays the cost. Once the examination report is received, the court must determine whether the defendant and the community will benefit from use of this special sentencing alternative. The court must also consider the victim's opinion regarding whether the offender should receive a treatment sentence.

As part of the SSOSA sentence, the court is required to place the offender on community custody for the length of the suspended sentence or three years, whichever is greater. The court may impose crime-related prohibitions and other supervision requirements on the offender.

Several options are available should the offender violate these sentence conditions. The court may revoke the suspension and order execution of the sentence or order up to 60 days in confinement. If a violation of conditions occurs during community custody, the Department of Corrections is authorized to return the offender to more restrictive confinement.

During the period of treatment, the sex offender therapist must submit quarterly reports on the offender's treatment progress to the court and to the parties of record. At a minimum, the reports must reference the treatment plan and include the dates of attendance, offender's compliance with requirements, treatment activities, the offender's relative progress in treatment and any other material specified by the court at sentencing.

At the sentencing hearing, the court sets a treatment termination hearing three months prior to the anticipated date of treatment completion. The sex offender therapist and community corrections officer submit written reports to the court and to parties of record prior to this hearing. The reports must address the offender's compliance with treatment and monitoring requirements and must contain recommendations regarding termination from treatment, including proposed community custody conditions. A second evaluation regarding the

advisability of treatment termination may be requested by either party and ordered by the court. The cost must be borne by the offender unless the court finds the person to be indigent, in which case the state pays the cost. As a result of the hearing, the court may modify the supervision conditions and must either terminate treatment or extend treatment for up to the remaining period of community custody.

### **Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Criminal Justice & Corrections:**

#### Sentencing for Certain Sex Offenses Against Children:

The sentencing enhancements for certain sex offenses against children are removed. Also removed is the mandatory minimum sentence for sexual misconduct with a minor in the second degree.

The substitute bill adopted by the Appropriations Committee increases the seriousness level of first degree rape of a child from level XII to level XIII and of second degree rape of a child from level XI to level XIII on the adult felony sentencing grid. These changes do not apply to juveniles sentenced as adults.

#### Special Sex Offender Sentencing Alternative:

The changes to the SSOSA in the substitute bill do not apply to juveniles charged as adults, except for the prohibition against the same treatment provider performing both the pre-SSOSA evaluation and treatment in the community. Additionally, persons who have an adult conviction for a violent offense within five years of the current offense are made ineligible for SSOSA.

The factors that a court must consider when deciding whether to grant a SSOSA are expanded to include whether the offender has multiple victims; whether the offender is amenable to treatment (an admission to the crime, by itself, does not constitute amenability to treatment); and the risk the offender poses to the community, the victim, or persons similarly situated to the victim.

The court must give great weight to the victim's opinion. If the court orders a sentence that is contrary to the victim's opinion, the court must state its reasons in writing.

The presumptive term of incarceration for SSOSA offenders is changed to 12 months or the maximum of the standard range, whichever is less. The term may not be reduced by earned release credits. The term may be served in partial confinement.

A number of changes regarding treatment providers are specified, including that the treatment provider that provided the initial evaluation may not be the same provider that provides treatment during the SSOSA sentence (this change also applies to juveniles charged as adults). In addition to receiving the quarterly reports, the court must conduct a hearing on the offender's progress in treatment at least once a year. The court must provide notice and an opportunity to be heard to the victim.



Additionally, the treatment termination hearing process is modified. The court must provide notice and the opportunity to be heard to the victim at the treatment termination hearing. The court must order another evaluation prior to the treatment termination hearing that must be performed by a treatment provider other than the one who provided treatment to the offender. The offender must pay for this evaluation. After the treatment termination hearing, the court may extend treatment in two year increments.

Washington State Institute for Public Policy Study:

The Washington State Institute for Public Policy (WSIPP) shall perform a study of sex offender sentencing policies. The study will evaluate the effectiveness of sex offender policies and programs. The research will examine whether any changes to sentencing policies and sex offender programming could cost-effectively increase public safety as well as how the risk assessment instruments and procedures could be improved. The WSIPP is directed to report its results to the appropriate standing committees of the Legislature no later than December 31, 2004.

The substitute bill includes a null and void clause.

**Appropriation:** None.

**Fiscal Note:** Requested on February 28, 2004. Available on original bill.

**Effective Date of Substitute Bill:** The bill takes effect July 1, 2004.

**Testimony For:** (Striking amendment) This legislation should focus on the child victims and not on the criminal. Children trust adults to keep them safe from harm. The government should fund justice for the victims and their families--this is the most essential duty of government. Victims should not have to live in daily fear of running into the predators who attacked them. We cannot put a price on a child's innocence. The striking amendment represents an appropriate compromise, under which class A felonies receive time in prison, and these most severe crimes should not be eligible for suspension with treatment. The proposed sentences in the striking amendment are light compared to the lifetime of suffering caused to the victims. The proposed substitute focuses on rehabilitation for the criminal, but the striking amendment focuses on justice for the victims.

(Substitute bill) This bill establishes harsher sentences for sex crimes against children by increasing the seriousness level of these crimes and increasing the minimum time served for persons going into the SSOSA program. We need to change these laws. However, if you eliminate SSOSA, defendants will go to trial and in many cases, be acquitted because of the inability of the young witness to testify against them.

The problem with the original bill is that the enhancements would make sex offenders ineligible for SSOSA. Rape of a child has to be the most terrible crime that someone can commit, but the original bill would have resulted in fewer convictions and would have resulted in these offenders walking the streets and continuing to victimize children.

SSOSA was originally designed for victims to try to get cases into court that would not be there, if not but for the sentencing alternative. SSOSA has been an important and narrowly used option for victims. The substitute puts great weight on victim input and narrows the pool of eligible persons.

The majority of sex crimes against children are committed by people who have a relationship with the child. For those kids and their parents, you have to have the SSOSA option available. If the treatment option is eliminated, people will go underground. There should not be a mandatory one year jail term for SSOSA and there are practical problems with having the treatment provider be separate from the provider giving the evaluation.

(With concerns) This bill would significantly impact the county jails, which already have capacity issues. Currently, about 27 out of 37 county jails are overcapacity on a daily basis. There would also be increased prosecution and defense costs for more offenders going to trial.

The issue isn't prison or SSOSA. We don't care about the costs. The issue is about getting the victim to cooperate. It's about getting victims out of an abusive relationship. It is rare for a case to go to trial without having the victim testify. It is difficult to keep these children together at trial. We're not in support of either bill. Neither bill is ready to go.

**Testimony Against:** If we get rid of the SSOSA program, there will be no flexibility for these cases. Without the treatment program, there will be many families that do not disclose the criminal behavior. It would result in having an unregistered sex offender in the community who is not receiving any treatment.

This bill shifts costs to the counties for jail confinement and for the court reporting and evaluation requirements. For instance, if an offender is indigent, the county must pay for the evaluation costs. There would also be litigation costs for hearings. Additionally, while the bill states that offenders may serve their sentence in partial confinement, Pierce County does not allow partial confinement for sex or violent offenders.

**Persons Testifying:** (In support of striking amendment) Representative McMahan, prime sponsor.

(In support of substitute bill) Representative O'Brien; Representative Lovick; Suzanne Brown McBride, Washington Coalition of Sexual Assault Programs; Rebecca Roe; and Kevin Glacken-Coley, Children's Alliance.

(With concerns) Sophia Byrd, Association of Counties; and Tom McBride, Washington Association of Prosecuting Attorneys.

(Opposed) Richard Peregrin; and John Hill, Department of Assigned Council.

**Persons Signed In To Testify But Not Testifying:** None.