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## Public Safety Committee

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### ESSB 5294

**Brief Description:** Concerning the department of corrections.

**Sponsors:** Senate Committee on Law & Justice (originally sponsored by Senators Padden and O'Ban).

#### Brief Summary of Engrossed Substitute Bill

- Requires the Department of Corrections (DOC) to conduct manual calculations of offender release dates in certain circumstances.
- Requires a performance audit of the DOC information technology and records departments.
- Creates the Joint Legislative Task Force to Simplify Sentencing.
- Creates the Office of the Corrections Ombuds.
- Requires the Governor to ensure conflicts of interest are avoided.
- Modifies the State Auditor's investigation process under the Whistleblower Protection Act (WPA), and requires the next audit of the WPA program to include a review of the documentation of the DOC early release error and use of the WPA program by DOC employees.

**Hearing Date:** 3/28/17

**Staff:** Kelly Leonard (786-7147) and Omeara Harrington (786-7136).

#### **Background:**

##### Sentencing and Release of Offenders.

*Sentencing.* The Sentencing Reform Act of 1981 is the legal framework for the sentencing of felony offenders. Judges select an offender's sentence within a sentence range provided in statute, which is calculated using both a statutory severity designation for the offense and the

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offender's criminal history. In addition to the standard range, other factors affect a sentence, including, for example: enhancements; exceptional sentences; consecutive and concurrent sentences; "Three Strikes" and "Two Strikes" laws; and alternative sentences. Some offenders are also eligible for earned early release, which reduces a sentence based on good behavior while incarcerated up to a certain allowed percentage.

*Release of Offenders.* The Department of Corrections (DOC) determines the dates for offenders to be released from state correctional facilities, taking into account the Judgment and Sentence signed by the court, sentencing laws, and earned early release eligibility. An individual offender's release date may also be affected by credit for time served, different concurrent and consecutive directives, and tolling of earned early release eligibility on portions of his or her sentence. The DOC currently uses the Offender Management Network Information (OMNI) System, an information technology system, to assist with calculating release dates.

In 2016 it was announced that the DOC had released approximately 3,000 offenders earlier than their sentences allowed as a result of incorrect programming in the OMNI system. The early release error was ongoing from 2002 to 2015. The legislative and executive branches have conducted formal inquiries into the early release error, including by the Senate Law and Justice Committee and by external investigators, acting on contract by the Office of the Governor. Both inquiries resulted in published findings and recommendations.

#### Department of Corrections Ombuds and Grievance Programs.

*Ombuds Program.* In 2016 the Department of Corrections (DOC) created an internal ombuds position within the DOC's Executive Policy Office. The ombuds is intended to act as a resource for families and inmates by providing impartial assistance and investigating and attempting to resolve allegations of noncompliance of DOC policies and state law. In addition, the DOC ombuds may recommend changes in DOC policies, procedures, and statutes if systemic problems are identified.

*Grievance Program.* The DOC has a formal grievance process overseen at the facility level by grievance coordinators. Only incidents, policies, or practices within DOC jurisdiction that affect an offender personally and that do not have an established appeals process are grievable. Examples of grievance topics include: conduct of employees or other offenders, health services, policies, prison operations, and food services. The grievance program contains an appeals system that allows an offender to request review at a higher level if he or she is not satisfied with a response.

#### Conflicts of Interest in State Government.

State law prohibits any state officer or employee from having an interest, financial or otherwise, direct or indirect, or engaging in a business or transaction or professional activity that is in conflict with the proper discharge of the state officer's or employee's official duties.

#### Whistleblower Protection Act.

*Improper Governmental Action.* The State Employee Whistleblower Protection Act (WPA) encourages state employees to report improper governmental action by providing protections for

whistleblowers against retaliation. Any whistleblower who has been subject to workplace reprisal or retaliation for the disclosure of improper actions has a cause of action for relief as an unfair practice, pursuant to the law against discrimination.

The Washington State Auditor (SAO) is responsible for investigating and reporting assertions of improper governmental action. An improper governmental action includes any of the following actions taken within the performance of an employee's official duties: gross mismanagement or waste of public funds or resources; a violation of a state or federal law or rule; substantially and specifically endangering public health or safety; or preventing the dissemination of scientific opinion or altering technical findings without scientifically valid justification, unless disclosure is prohibited by state or common law privilege.

*Investigations.* The SAO has the sole authority to determine whether to investigate any reports under the WPA. In determining whether to conduct either a preliminary or further investigation, the auditor is required to consider certain factors. Upon receiving a report of improper governmental action, the SAO has 15 working days to mail a notice to the whistleblower stating whether a preliminary investigation will be conducted, and 60 working days to conduct a preliminary investigation, if appropriate.

If a preliminary investigation reveals that a report is unsubstantiated and warrants no further investigation, then the SAO must notify the whistleblower summarizing where the allegations are deficient and provide a reasonable opportunity to reply. Alternatively, if the preliminary investigation reveals that further investigation is warranted, the SAO must notify the whistleblower, the subject of the investigation, and the agency head, and subsequently conduct a full investigation. If a report is made anonymously, the decision to conduct a full investigation is reviewed by a three-person panel, including the SAO, a citizen volunteer, and the Office of the Attorney General.

After a preliminary investigation is completed and the SAO determines a full investigation is warranted, the SAO has 60 days to complete the full investigation and report its findings to the whistleblower, unless written justification for the delay is provided. In any case, the investigatory findings must be sent to the whistleblower within one year of the initial report.

*Performance Audit.* The Office of Financial Management (OFM) must periodically contract for a performance audit of WPA to determine whether the program is using its resources economically and efficiently, the cause of any uneconomic or inefficient practice, and whether the program has complied with laws and rules on matters of economy and efficiency. The audit must also analyze whether the desired results and benefits of the program are being achieved.

### **Summary of Bill:**

#### Department of Corrections.

*Release Date Calculations.* If the DOC has actual knowledge or reason to believe that a computer calculation error is or has caused an error in the calculation of the release date for any prisoner, the DOC must immediately manually calculate the release date of that prisoner as well as the release dates of any similarly sentenced prisoners.

*Information Technology Backlog.* The DOC must submit an annual report to the Governor and the Legislature detailing any information technology (IT) backlog at the DOC along with specific requirements and plans to address it.

*Performance Audit of Department of Corrections IT Departments.* The Joint Legislative Audit and Review Committee must conduct an immediate performance audit of the IT and records departments at the DOC, including:

- the administrative structure of the departments, including whether the departments should be restructured to more quickly respond to legislative directives and emergent issues;
- the sufficiency and quality of staffing at each of the departments; and
- an evaluation of the Advance Corrections Project.

A report on the audit is due to the Governor and the Legislature by December 1, 2018.

#### Joint Legislative Task Force to Simplify Sentencing.

The Joint Legislative Task Force to Simplify Criminal Sentencing (Task Force) is created. The Task Force is required to review and make recommendations on how the Sentencing Reform Act of 1981 can be simplified. However, the Task Force must limit its review and recommendations to technical, non-substantive changes that will not reduce punishment or risk public safety. The Task Force membership includes certain representatives of organizations and interests.

The first meeting must be convened no later than September, 2018. The final report is due to the Legislature by December 1, 2019.

#### Office of the Corrections Ombuds.

An independent Office of the Corrections Ombuds (Ombuds) is created. Subject to appropriated funds, the SAO must designate a nonprofit organization to contract to operate the Ombuds office. The organization must meet specific criteria, and must be selected through a competitive bidding process involving stakeholder participation. The designation of the organization contracted to provide the Ombuds services cannot be revoked except upon a showing of neglect of duty, misconduct, or inability to perform duties.

*Responsibilities of the Ombuds.* The Ombuds is responsible for:

- establishing priorities for the use of limited resources;
- maintaining a statewide toll-free telephone number, a collect telephone number, a website, and a mailing address for the receipt of complaints and inquiries;
- providing information to inmates, inmates' families, employees, and others on the rights of inmates;
- providing technical assistance to support inmate participation in self-advocacy, utilizing existing kite, grievance, and appeal procedures;
- monitoring DOC compliance with applicable federal, state, and local laws, rules, regulations, and policies with a view toward protecting the rights of inmates;
- monitoring and participating in legislative and policy developments affecting correctional facilities and advocating for systemic reform aimed toward protecting the rights of inmates;

- establishing a statewide uniform reporting system to collect and analyze complaints of the DOC and establishing procedures for investigating and resolving those complaints;
- submitting an annual report to the Ombuds Advisory Council (Council) analyzing the work of the Ombuds; and
- adopting and complying with rules, policies, and procedures necessary to implement the responsibilities of the Ombuds.

*Ombuds Advisory Council.* By August 1, 2017, the Governor must convene a Council. The Council must participate in a priority setting process to develop priority recommendations to the Ombuds, review data collected by the Ombuds, review reports issued by the Ombuds prior to their release, and make recommendations to the Ombuds regarding the accomplishment of its purposes. The Council has authority to issue its own reports and recommendations and must biannually review the Ombuds' performance, make recommendations regarding the Ombuds budget, make recommendations for changes in the law that would enhance the Ombuds' effectiveness, and report its findings and recommendations to the Governor and the Legislature.

The Council is composed of the following members, serving three-year terms:

- one democrat and one republican member of the Legislature;
- one former inmate who has successfully reintegrated;
- two family members of current inmates;
- an expert with significant criminal justice or correctional experience who is not a state employee or contractor;
- two community members with extensive knowledge and experience in specified areas: one with knowledge of the accommodation needs of individuals with disabilities; and the other with knowledge of issues related to racial, ethnic, or religious diversity within the correctional system;
- a community member with dispute resolution training with experience working in corrections or criminal justice;
- the DOC staff serving as the internal Ombuds, if any; and
- a bargaining unit representative.

*Ombuds Investigations.* The Ombuds may initiate and attempt to resolve an investigation upon its own initiative, or upon receiving a complaint from an inmate, family member or other representative of an inmate, an employee, or others, regarding: abuse or neglect; the DOC decisions, actions, inactions, or omissions; policies, procedures, and rules; or alleged violations of the law. Except in cases involving a complaint related to threats of bodily harm, prior to filing a complaint with the Ombuds, an inmate must reasonably pursue resolution of the complaint through the internal DOC grievance process. The Ombuds may decline to investigate any complaint.

At the conclusion of an investigation of a complaint, the Ombuds must render a public decision on the merits of the complaint, including any recommendations regarding further action, and communicate the decision to the inmate, if any, and to the DOC. If the Ombuds believes additional action is warranted following an investigation, the Ombuds may choose to report a finding of abuse, neglect, or other rights violation to the Legislature or take other action as necessary.

*Access to Prisons and Records.* The Ombuds must have reasonable access to correctional facilities and involved persons at all times necessary to conduct a full investigation of an incident of abuse or neglect. The Ombuds must also have reasonable access to all DOC facilities and to inmate programs, at minimum during normal working and visiting hours, for the purposes of providing information about inmate rights and Ombuds services, and inspecting and monitoring compliance. The Ombuds has the right to access, inspect, and obtain copies of information, records, or documents in the possession or control of the DOC that the Ombuds considers necessary in an investigation of a complaint. Records must be provided within 10 business days if the investigation involves potential abuse or neglect, and within 72 hours if there is reasonable suspicion that an inmate's health or safety is in serious immediate jeopardy, or if an inmate dies while in custody.

*Confidentiality.* Correspondence with the Ombuds is confidential, and may not be disclosed except with informed consent, or when disclosure is impliedly authorized in order for the Ombuds to carry out its duties. However, to the extent the Ombuds reasonably believes necessary, it must reveal information to prevent reasonably certain death or substantial bodily harm, and may reveal information to prevent the commission of a crime.

*Protection Against Retaliation.* No civil action may be brought against any Ombuds employee for good faith performance of his or her responsibilities. No discriminatory, disciplinary, or retaliatory action may be taken against a DOC employee, an inmate, a family member, or other person for any communication or information exchanged to aid the Ombuds in carrying out its responsibilities, unless the communication or information is made, given, disclosed maliciously, or without good faith.

#### Conflicts of Interest.

The Governor is required to ensure that all offices are performing their duties as prescribed by law and all personal and professional conflicts of interest are avoided.

#### Whistleblower Protection Act.

*Settlements.* A settlement of a retaliation claim brought by an employee under the WPA may not contain a provision prohibiting the employee from future work in state government.

*Investigations.* Most procedures for and references to SAO preliminary investigations under the WPA are eliminated. This includes, among other changes, the elimination of the review panel process for anonymous claims as well as the process for notifying certain persons of relevant facts revealed through a preliminary investigation.

The SAO is required to notify a whistleblower, the subject of investigation, and the relevant agency head of an investigation within 20 days of initiating it. The SAO must complete a full investigation within 120 days, unless written justification for the delay is provided. The SAO must also notify the whistleblower, the subject of the investigation, and the relevant agency head within 90 days of initiating an investigation regarding the 120-day deadline for concluding it, and providing notice that the investigation will be completed within 30 days.

*Performance Audit.* In the contract for the next regularly scheduled performance audit of the WPA program, the Office of Financial Management must require the audit to review the legislative report from the Senate Law and Justice Committee and any other pertinent documentation regarding the DOC early release error, with particular focus on the inability of DOC employees to use the state employee whistleblower program to address concerns with DOC mismanagement.

**Appropriation:** None.

**Fiscal Note:** Available on substitute bill.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.