

HOUSE BILL REPORT

ESSB 5294

As Reported by House Committee On: Public Safety

Title: An act relating to addressing the department of corrections early release error.

Brief Description: Concerning the department of corrections.

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

Brief History:

Committee Activity:

Public Safety: 3/28/17, 3/29/17 [DPA].

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

- Requires sentencing courts to use a sentencing elements worksheet developed by the Department of Corrections (DOC) when sentencing felony offenders.
- Requires the DOC to conduct manual calculations of offender release dates in certain circumstances.
- Requires a performance audit of the DOC information technology and records units.
- Creates the Joint Legislative Task Force on Criminal Sentencing.
- Creates the Office of the Corrections Ombuds.
- Requires the next audit of the Whistleblower Protection Act Program (Program) to include a review of the ability of DOC employees to use the Program.

HOUSE COMMITTEE ON PUBLIC SAFETY

Majority Report: Do pass as amended. Signed by 11 members: Representatives Goodman, Chair; Pellicciotti, Vice Chair; Klippert, Ranking Minority Member; Hayes, Assistant Ranking Minority Member; Appleton, Chapman, Griffey, Holy, Orwall, Pettigrew and Van Werven.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

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

Background:

Sentencing and Release of Offenders.

Sentencing. The Sentencing Reform Act of 1981 (SRA) 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 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.

Judgment and Sentence. A Judgment and Sentence (also referred to as a sentencing order) is a written document created and signed by the court to record the conviction or acquittal of a criminal defendant. The Judgment and Sentence specifies the terms of the offender's sentence, including the legal basis for imposing it. A court only possesses the power to impose sentences authorized by the SRA.

Incarceration and Release of Offenders. A person convicted of a felony with a sentence of longer than one year is committed to the Department of Corrections (DOC). The DOC calculates the term of confinement and release date for each offender, 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.

If the DOC discovers an error in the Judgment and Sentence, the DOC may petition the Court of Appeals for a review. The review is limited to errors of the law. The petition must be filed within 90 days after the DOC has actual knowledge of the terms of the sentence. The petition must include a certification that all reasonable efforts to resolve the dispute with the trial court have been exhausted. If the DOC does not file the petition within 90 days, the DOC must enforce the Judgment and Sentence imposed by the trial court.

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.

The Department of Corrections Ombuds and Grievance Programs.

Ombuds Program. In 2016 the 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 the DOC's 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 the 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.

Whistleblower Protection Act.

The State Employee Whistleblower Protection Act (WPA) encourages state employees to report improper governmental action by providing protections for whistleblowers against retaliation. The Washington State Auditor (SAO) is responsible for investigating and reporting assertions of improper governmental action. 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 Office of Financial Management (OFM) is required to periodically contract for a performance audit of the WPA Program (Program) to determine whether the program is using its resources economically and efficiently, whether the program has complied with laws and rules on matters of economy and efficiency, and whether the desired results and benefits of the program are being achieved.

Summary of Amended Bill:

Sentencing and Release of Offenders.

Sentencing Elements Worksheet. The DOC must develop a mandatory sentencing elements worksheet to be used by the courts to identify and record the elements of a sentencing order. The Administrative Office of the Courts (AOC) must include the worksheet in a specific section within its felony Judgment and Sentence forms. The DOC will use the worksheet to calculate an offender's confinement term and community custody term.

For all felony sentences imposed on or after January 1, 2018, a Judgment and Sentence must contain the mandatory sentencing elements worksheet in a section of the document. The DOC may petition the Court of Appeals for a review of a sentence according to the processes in current law in order to address a missing, incomplete, or illegible worksheet.

Review of Sentencing Laws. Subject to an appropriation, the Sentencing Guidelines Commission (SGC) must contract with one or more external consultants to evaluate the state's sentencing laws and practices. The evaluation must include recommendations for changing and improving sentencing laws and practices in accordance with certain priorities specified in the bill. The evaluation must also include recommendations for phased prospective and retroactive implementation of sentencing changes, as well as for establishing

an ongoing review of sentencing laws and practices. The consultant must work cooperatively with the SGC and include recommendations from the SGC in the final report. The final report is due to the Legislature and the Governor by September 1, 2018.

The Joint Legislative Task Force on Criminal Sentencing (Task Force) is created. The Task Force's membership includes four legislators and 12 representatives of specified organizations and interests. The Task Force must review sentencing laws after consideration of the study and recommendations from the consultants hired through the SGC. The Task Force is required to develop recommendations to reduce sentencing implementation complexities and errors, improve the effectiveness and fairness of the sentencing system, and promote public safety. The first meeting must be convened no later than September, 2018, and the final report of the Task Force is due December 1, 2019.

Release of Offenders. 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 the Department of Corrections Information Technology Units. The Joint Legislative Audit and Review Committee (JLARC) must conduct an immediate performance audit of the IT and records units at the DOC, including:

- the administrative structure of the units, including whether the units should be restructured to respond efficiently to changes in sentencing laws and other emergent issues;
- the sufficiency of staffing levels and expertise at each of the units; and
- an evaluation of the Advance Corrections Project's impact on workload and staff resources at each of the units.

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

Office of the Corrections Ombuds.

An independent Office of the Corrections Ombuds (Ombuds) is created. Subject to appropriated funds, the Department of Commerce (COM) must designate a nonprofit organization to contract to operate the Ombuds. The organization must meet specific criteria, and must be selected through a competitive bidding process. The contract lasts for a period of two years, and may be renewed. The contracted organization is subject to financial and other audits by the SAO and its employees are subject to state ethics laws.

Responsibilities of the Ombuds. The Ombuds is responsible for:

- establishing priorities for the use of limited resources;
- developing policies for responding to records requests from the public;
- 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 regarding the rights of inmates;
- providing technical assistance to support inmate participation in self-advocacy;
- monitoring DOC compliance with applicable federal, state, and local laws, rules, regulations, and policies with a view toward the appropriate health, safety, welfare, and rehabilitation of inmates;
- monitoring and participating in legislative and policy developments affecting correctional facilities;
- 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, the Office of the Governor and the Legislature, 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. Subject to appropriated funds, by August 1, 2017, the Governor must convene an Ombuds Advisory Council (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 two-year terms:

- two former inmates who have 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;
- a bargaining unit representative; and
- a representative of the Office of the Governor.

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; DOC decisions, administrative 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, a person must reasonably pursue

resolution of the complaint through the internal DOC grievance process and other internal procedures. 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 that there has been or continues to be a significant inmate health, safety, welfare, or rehabilitation issue, the Ombuds must report to the Governor and the Legislature.

Access to Prisons and Records. The DOC must permit the Ombuds to enter and inspect DOC facilities at any reasonable time, and to have reasonable access to inmates. The Ombuds may inspect, view, photograph, and video record all areas of the facilities that are accessible to inmates. Upon request, the DOC must grant the Ombuds access to all relevant information, records, or documents in the DOC's control that the Ombuds considers necessary in an investigation of a complaint. The DOC must respond to written demands for agency records from the Ombuds within five business days by making requested documents available or providing a reasonable time estimate for when the records can be made available. Other governmental entities that have relevant records must also provide those records to the Ombuds. The DOC may not hinder the Ombuds' lawful actions, and the Ombuds must work with the DOC to minimize disruption.

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.

Whistleblower Protection Act.

In the contract for the next regularly scheduled performance audit of the WPA Program, the OFM must require the audit to review the ability of DOC employees to use the WPA Program.

Amended Bill Compared to Engrossed Substitute Bill:

Intent Section. The intent section is removed from the underlying bill.

Sentencing. The striking amendment requires the DOC to develop a mandatory sentencing elements worksheet to be used by courts to identify and record the elements of a sentencing order. The DOC may petition the Court of Appeals for a review of a sentence according to the processes in current law in order to address a missing, incomplete, or illegible worksheet.

The striking amendment requires the SGC to contract with one or more external consultants to evaluate the state's sentencing laws and practices, including assessments of certain specified items. The recommendations must include a phased implementation plan for possible retroactive and prospective changes and a process for an ongoing review of sentencing laws and practices.

The Joint Legislative Task Force (Task Force) is modified and expanded. The Task Force is on criminal sentencing, rather than simplifying sentencing. The striking amendment removes language specifying that the Task Force make recommendations on simplifying the SRA, which are limited to technical, nonsubstantive changes. Instead, the Task Force is required, after consideration of the recommendations completed by the external consultant, to develop recommendations to reduce sentencing implementation complexities and errors, improve the effectiveness and fairness of the sentencing system, and promote public safety. The striking amendment adds a requirement for the legislative members to select co-chairs from among the legislative members. All meetings of the Task force must be scheduled and conducted in accordance with the requirements of both the Senate and House of Representatives.

The requirement for the JLARC to conduct a performance audit of the IT and records departments at the DOC is modified. References to "information technology and records departments" are changed to "information technology and records-related units." The striking amendment: requires the JLARC to audit whether units should be restructured to respond efficiently to changes in sentencing laws and other emergent issues (rather than more quickly respond to legislative directives and emergent issues); requires JLARC to audit the sufficiency of staffing levels and expertise at each of the units (rather than the sufficiency and quality of staffing at each of the units); and specifies that the JLARC audit of the advance corrections project is limited to the project's impact on workload and staff resources at each of the units.

Office of the Corrections Ombuds. Numerous changes are made to the provisions creating the Ombuds.

The definition of "inmate" is narrowed to include only those in physical custody of the DOC, and the purposes of the Ombuds are amended to remove references to providing assistance with alternative dispute resolution, individual representation, and systemic reform advocacy. The COM, rather than the SAO, is responsible for contracting with a nonprofit organization to operate the Ombuds office. The Ombuds contract is limited to two years, changes are made to the qualifications of the contracted organization, and the requirement for stakeholder participation in the selection process is removed. The contracted organization is made subject to financial and other audits by the SAO, and its employees must abide by the provisions of the Ethics in Public Service Act.

Changes are made to the Council to: make the Council subject to appropriated funds; require the Governor to make Council appointments; make modifications to Council membership; and shorten terms to two years, rather than three years.

Amendments are made to the Ombuds' duties, to: require that the Ombuds establish policies for responding to records requests by the public; remove references to assistance with the kite, grievance, and appeal procedures, and advocacy for systemic reform; and require the

Ombuds to report annually to the Office of the Governor and the Legislature, in addition to the Council.

The grounds under which a complaint may be filed are made more specific. The exhaustion requirement is made applicable to all complainants, and exhaustion of internal DOC procedures must be pursued for 90 business days, rather than 90 calendar days. The Ombuds, when it does not investigate a complaint, must notify the complainant. Language allowing the Ombuds to report a finding of abuse, neglect, or other rights violation to the Legislature or take additional action is removed. Instead, if the Ombuds believes there has been or continues to be a significant prisoner health, safety, welfare, or rehabilitation issue, it must report to the Legislature and the Governor.

All underlying provisions related to facility and records access are removed. Instead: (i) the DOC must permit the Ombuds to enter and inspect facilities at any reasonable time, and to view, photograph, and record inmate accessible areas; (ii) the DOC must allow the Ombuds reasonable access to inmates, including opportunities to communicate privately and confidentially; (iii) the DOC must provide the Ombuds with record and document access and must respond to a records request within five days; (iv) other governmental entities that have relevant records must provide those records to the Ombuds; and (v) the DOC must not hinder the lawful actions of the Ombuds, and the Ombuds must work with the DOC to minimize disruption.

Conflicts of Interest. The striking amendment removes the requirement that the Governor ensure all offices in the executive branch perform their duties as prescribed by law, and ensure that all personal and professional conflicts of interest are avoided.

Whistleblower Protection Act. All changes to the WPA are removed, including those relating to the investigation process and the prohibition against certain clauses in whistleblower retaliation lawsuit settlements.

The expanded performance audit of the WPA is modified. The audit must review the ability of DOC employees to use the Program (rather than the legislative report from the Senate Law and Justice Committee and any other pertinent documentation of the DOC sentencing error, with a particular focus on the inability of DOC employees to use the Program to address concerns with mismanagement).

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on March 29, 2017.

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

Staff Summary of Public Testimony:

(In support) It was discovered in 2015 that there had been a tragic release of 3,000 violent and dangerous inmates that had occurred over the course of many years. Some of those inmates committed violent crimes while they should have been incarcerated. In response, the Senate Law and Justice Committee held eight independent hearings, in which the DOC admitted they had departed away from what should have been the agency's primary focus of public safety. This bill calls for the JLARC to look at the DOC's IT department. The whistleblower changes in the bill are also important, as a DOC whistleblower was retaliated against during the course of these events. The Task Force in the bill can work cooperatively with the SGC, which is planning its own examination of sentencing structure.

There is a technical issue with the December 1, 2017, date by which the SGC must contract for consultant services. A prime contractor can be obtained by then, but it may take longer to find a subcontractor. There is consensus that issues with the SRA should be addressed, and the bill's two-step process is worthwhile. The list of participants involved in the Task Force might be a good guide for changes to the SGC membership. It might make sense to add some additional participants.

With respect to the Ombuds provisions, having independent prison oversight is important, and this legislation has been in process for years. There has to be an opportunity for families to have someone look into issues they deem unfair or emergent. When prisons run well it serves the public safety. Also, most incarcerated people will be released, so it is important for them to be able to access services while incarcerated.

Further amendments could increase accountability and effectiveness of the Ombuds. Clarity around objectivity and neutrality could be enhanced through internal bylaws. Contract renewal must be every two years, but there is no information as to how redesignation happens. In a previous version, the organization would continue unless its designation was removed. Confidentiality protections are very important, and this version essentially subjects the Ombuds to the Public Records Act. The bill requires the Ombuds to release a public decision, and it could be easy to ascertain who an investigation was regarding. Additionally, the Ombuds is essentially limited to reporting, and is unable to continue advocacy unless health, safety, or rehabilitation is at issue. The standard for continued advocacy should be whether or not a complaint has been resolved. With respect to response time for document requests, there should be an outside time limit. The current bill requires a response within five days, but that only requires that the DOC acknowledge that they received the request. Concerns remain that this is a place for families to take individual problems. The Ombuds should be able to bring litigation when necessary. Just because this function is excluded, it does not mean that lawsuits will not be brought. Lawsuits have cost the state millions of dollars and demonstrate that the internal grievance system does not work.

(Opposed) None.

(Other) The new draft legislation has alleviated concerns with the Ombuds proposal, including those having to do with neutrality, grievance timelines, and response to records requests. Some minor issues remain. An exception should be made for the internal DOC ombuds to the time and term limits that apply to the Council's membership. Language should be added to the section allowing photo and video recording in facilities to state that

before releasing any photos or videos, the Ombuds must consult with the DOC to ensure that there are no safety and security issues.

Institutions should be held accountable. The DOC has done a terrible job of guarding dangerous people. It is important to have an Ombuds office that is an independent resource for families of inmates and for DOC employees to address internal needs without the influence of bias. This will save the state money by avoiding lawsuits. Clarity is needed with respect to the language that states that the Ombuds must consult with, rather than notify, someone they are going to criticize. Additionally, there is a question as to why restricting access to cameras in facilities would have any positive impact on public safety.

The Long Term Care Ombuds (LTC Ombuds) is structured similarly to the Ombuds in the bill in that it is housed in a nonprofit contracted by the COM and has an advisory council. The COM audits the LTC Ombuds every three years, and a request for proposals process occurs every 10 years. The LTC Ombuds is an advocate for residents and believes that residents determine what is in their best interest. The LTC Ombuds gathers information in a neutral way and works collaboratively with providers, resulting in a 92 percent rate of resolution to complaints.

The provisions regarding the judgment and sentence worksheet are very important. The DOC has been working with the AOC, prosecutors, and clerks to develop a sentencing worksheet.

Persons Testifying: (In support) Senator Padden, prime sponsor; Russ Hauge, Sentencing Guidelines Commission; Melody Simle, Department of Corrections-Family Council; Rachael Seevers, Disability Rights Washington; and Ari Kohn, Post-Prison Education Program.

(Other) Alex MacBain, Department of Corrections; Zachary Kinneman; Patricia Hunter Washington State Long Term Care Ombudsman; and Noah Martin, Quaker Voice on Washington Public Policy.

Persons Signed In To Testify But Not Testifying: Brenda Wiest.