

SENATE BILL REPORT

E2SSB 5163

As Passed Senate, March 8, 2021

Title: An act relating to the placement and treatment of conditionally released sexually violent predators.

Brief Description: Concerning the placement and treatment of conditionally released sexually violent predators.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senators Rolfes, Dhingra, Saldaña and Wilson, C.).

Brief History:

Committee Activity: Human Services, Reentry & Rehabilitation: 1/22/21, 2/05/21 [DPS-WM, w/oRec].

Ways & Means: 2/17/21, 2/19/21 [DP2S, DNP, w/oRec].

Floor Activity: Passed Senate: 3/8/21, 27-22.

Brief Summary of Engrossed Second Substitute Bill

- Shifts the primary responsibility for identifying less restrictive alternative (LRA) placements for civilly committed sexually violent predators (SVPs) to the Department of Social and Health Services (DSHS) in certain circumstances, and requires LRA placements to be aligned with fair share principles of release when possible.
- Requires DSHS to use a request for proposal process to contract with LRA housing and treatment providers, subject to appropriations, and use a housing matrix to plan and develop LRA placements.
- Specifies an SVP has the right to an ongoing, clinically appropriate discharge plan as part of the treatment process.
- Allows the state to site secure community transition facilities and other conditional release and transitional facilities in any county of the state.

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

- Requires DSHS, the Sex Offender Policy Board, and the Department of Health to convene a workgroup to develop recommendations for increasing the availability and quality of sex offender treatment providers, subject to appropriations.

SENATE COMMITTEE ON HUMAN SERVICES, REENTRY & REHABILITATION

Majority Report: That Substitute Senate Bill No. 5163 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Darneille, Chair; Nguyen, Vice Chair; Gildon, Ranking Member; Saldaña and Wilson, C.

Minority Report: That it be referred without recommendation.

Signed by Senators Dozier and McCune.

Staff: Kelsey-anne Fung (786-7479)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Second Substitute Senate Bill No. 5163 be substituted therefor, and the second substitute bill do pass.

Signed by Senators Rolfes, Chair; Frockt, Vice Chair, Capital; Robinson, Vice Chair, Operating & Revenue; Carlyle, Conway, Darneille, Dhingra, Hasegawa, Hunt, Keiser, Lias, Mullet, Pedersen and Wellman.

Minority Report: Do not pass.

Signed by Senators Wilson, L., Ranking Member; Brown, Assistant Ranking Member, Operating; Honeyford, Assistant Ranking Member, Capital; Schoesler, Assistant Ranking Member, Capital; Braun, Muzzall, Van De Wege, Wagoner and Warnick.

Minority Report: That it be referred without recommendation.

Signed by Senator Gildon.

Staff: Kayla Hammer (786-7305)

Background: Sexually Violent Predators. A sexually violent predator (SVP) is a person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

A prosecutor may petition for indefinite civil commitment of a person as an SVP when the person is about to be released from a state correctional facility, among other circumstances.

The filing of the petition triggers a probable cause determination followed by a full evidentiary trial. The burden is on the state to prove beyond a reasonable doubt that the person should be civilly committed as an SVP. If the person is found to be an SVP, the person must be placed in the custody of the Department of Social and Health Services (DSHS) for control, care, and treatment at the Special Commitment Center (SCC) on McNeil Island. Civilly committed SVPs have the right to adequate care and individualized treatment.

Petitions for Release. DSHS must annually examine an SVP's mental condition to determine whether the person's condition has changed. If the SVP's condition has changed so that the person no longer meets the definition of an SVP, or if conditional release to a less restrictive alternative (LRA) is in the best interest of the person and conditions can be imposed that adequately protect the community, then DSHS must authorize the person to petition the court for unconditional or conditional release. An SVP may also petition the court for unconditional or conditional release without the approval of DSHS, in which case the court must hold a show-cause hearing before proceeding to a full unconditional release or conditional release trial. If the petition is for conditional release to an LRA, the person must propose a placement plan to the court, which must include a proposed residence, treatment plan, and other conditions.

When an SVP petitions the court for release, the state bears the burden to prove the person continues to meet the definition of an SVP and that conditional release to an LRA would be inappropriate. However, a trial may not be ordered unless there is current evidence from a licensed professional that the committed person has undergone a permanent physiological change, such as paralysis, stroke, or dementia, which renders them unable to commit a sexually violent act; or treatment has brought about a positive change in mental condition.

Criteria for Conditional Release to a Less Restrictive Alternative. Before authorizing conditional release to an LRA, the court must find that all of the following are met:

- the person will be treated by a qualified sex offender treatment provider (SOTP) who has presented a specific course of treatment and has agreed to report violations to the court and other specified entities;
- housing exists that is sufficiently secure to protect the community, and the housing provider agrees to accept the person, provide security, and immediately report to the court and other specified entities if the person leaves without authorization;
- the person is willing to comply with requirements imposed by the SOTP and the court; and
- the person will be supervised by the Department of Corrections (DOC).

County of Commitment. When authorizing conditional release to an LRA, the court must consider release to the person's county of commitment, which is the county of the court that ordered the person's commitment. It is appropriate to release a person to the person's county of commitment unless the court determines that return to the county of commitment would be inappropriate, considering any court-issued protection orders; victim safety

concerns; the availability of appropriate treatment or facilities that would adequately protect the community; negative influences on the person and the location of family or other persons or organizations offering support. When DSHS or the court assists in developing an LRA placement, effort must be made to avoid disproportionate effects on a single county. If the person is not released to their county of commitment, DSHS must provide written notice and an explanation to the law and justice council of the county of placement.

Modification of the Less Restrictive Alternative Order. Each person conditionally released to an LRA must have their case reviewed by the court within one year of release, and annually thereafter, until the person is unconditionally released. Conditional release to an LRA may be revoked or modified by a court if it is determined the SVP violated the terms and conditions of the conditional release order or needs additional care, monitoring, supervision, or treatment.

Secure Community Transition Facilities. Persons found to be SVPs are committed to the SCC on McNeil Island. A conditional release of an SVP may be to a community-based LRA placement or a secure community transition facility (SCTF). Community-based LRA placements may include private residences, adult family homes, and group homes. DSHS operates an SCTF on McNeil Island with a maximum capacity of 24 beds. A second SCTF in King County can house up to six individuals. When siting new SCTF facilities, DSHS must work with local governments to achieve equitable distribution within counties to avoid a disproportionate grouping of similar facilities in any one jurisdiction or community.

Community Notification. When an SVP is conditionally released, is unconditionally released, or escapes, DSHS must provide notice to the local law enforcement agency where the person will be placed, or, if residence is unknown, the county sheriff where the SVP was last convicted of a sexually violent offense. DSHS must also notify the Washington State Patrol, which must facilitate dissemination of release information to all law enforcement. Victims, witnesses, and other persons identified by the prosecuting agency are also entitled to notice of release or escape. Notice of conditional or unconditional release must be provided at least 30 days before release.

Supervision of Sex Offenders. DOC is required to have a policy governing the department's evaluation and approval of release plans for sex offenders. The policy must include, at a minimum, a formal process by which victims, witnesses, and other interested persons may provide information and comments to DOC on potential safety risks a sex offender may pose to specific individuals or classes of individuals. For persons convicted of a felony sex offense against a minor after June 6, 1996, DOC is prohibited from approving a residence location if the proposed residence: (1) includes a minor victim or child of similar age or circumstance as a previous victim who may be put at substantial risk of harm; or (2) is within close proximity of the current residence of a minor victim, unless certain circumstances apply. DOC may also reject a residence location if the proposed residence is within close proximity to schools, child care centers, playgrounds, or other grounds or facilities where children of similar age or circumstance as a previous victim are present who

may be put at substantial risk of harm by the sex offender's residence at that location.

State Identification Cards. The Department of Licensing (DOL) requires applicants for driver's licenses or identification cards to provide DOL with certain valid identifying documentation. DOL has determined that a written identification document completed by DOC is sufficient to clearly establish identity. DOC and DOL have an interagency agreement and memorandum of understanding to assist incarcerated individuals at state correctional facilities with obtaining a state driver's license or identification card at the time of release. Prior to the day of release, or when it has been determined that the incarcerated individual needs a state driver's license or identification card, DOC staff will complete a verification letter and send it to DOL.

State-Operated Living Alternatives Program. According to the Developmental Disabilities Administration at DSHS, the State-Operated Living Alternatives (SOLA) program is a state-operated supported living program that offers up to 24 hours support and habilitation services so individuals can live in their own homes with up to three others. Individuals pay for their own rent, food, and other personal expenses with assistance from staff to manage their finances as needed.

Sex Offender Policy Board. In 2008, the Legislature created the Sex Offender Policy Board (SOPB) to promote a coordinated and integrated response to sex offender management. SOPB is organized as an independent entity, staffed and maintained by the Sentencing Guidelines Commission, which is located within the Office of Financial Management. SOPB may be convened by the Governor or legislative committee of jurisdiction to undertake projects to assist policymakers in making informed judgments about issues relating to sex offender policy; and to conduct case reviews of sex offense incidents to understand performance of the state's sex offender prevention and response systems. SOPB consists of 13 voting members with representatives from various agencies and stakeholder groups as specified in law.

In March 2020, the Senate Ways and Means Committee convened the SOPB to review policies and practices related to civilly committed SVPs and their release from the SCC. SOPB submitted a final report to the committee on December 1, 2020. The final report, *Recommendations and Current Practices for Special Commitment Center Releases*, includes 35 recommendations.

Summary of Engrossed Second Substitute Bill: Discharge Planning. In addition to adequate care and individualized treatment, a civilly committed SVP has the right to the development of an ongoing, clinically appropriate discharge plan as part of the treatment process. The right to the development of a discharge plan does not guarantee that any particular person will be determined appropriate for discharge at any particular time. Based on information known to DSHS, and in accordance with policies adopted by DSHS, the following must be addressed in the person's ongoing discharge plan:

- the resident's physical health, functioning, and any need for health aid devices;

- the resident's intellectual or cognitive level of functioning and need for specialized programming;
- the resident's history of substance use and abuse;
- the resident's known history of risky or impulsive behaviors, criminogenic needs, and treatment interventions to address them;
- the resident's ability to perform life skills and activities of daily living independently, and any need for disability accommodations;
- a summary of the community services and supports the resident needs for a safe life in the community and the type of providers of such services and support; and
- a plan to mitigate identified needs that also addresses ways to develop or increase social supports, recreation opportunities, gainful employment, and if applicable, spiritual opportunities.

When ordered by the court, DSHS must provide LRA treatment that includes at a minimum:

- services identified in the person's discharge plan;
- assignment of a community care coordinator;
- regular contacts with providers of court-ordered treatment services;
- community escorts if needed;
- a transition plan that addresses the person's access to continued services upon unconditional discharge;
- financial support for necessary housing;
- life skills training and disability accommodations if needed; and
- assistance in pursuing benefits, education, and employment.

Subject to appropriations, at the time when DOC is ordered to investigate a proposed LRA placement, DSHS must assign a social worker to assist the person with discharge planning, pursuing benefits, and coordination of care prior to release from the SCC. The social worker must assist the person with completing benefits applications, initiating a clinical transition of care between the SCC clinician and the person's community SOTP up to 15 days before a person's release from the SCC; and locating any needed disability accommodations in the community and resources to help address any life skills needs.

Petitions for Conditional Release to a Less Restrictive Alternative. The processes for petitioning for conditional release to an LRA are modified. Following a determination by DSHS that the person's condition has changed such that an LRA is appropriate, if the person files a petition for conditional release, the court must order DSHS to identify an LRA placement within 90 days, including identification of a SOTP and housing. If DSHS cannot identify a placement, it must provide a written certification to the court and the parties detailing its efforts to find a placement. Upon receiving DSHS' certification, the person may propose an LRA. When the court receives a proposed LRA placement plan from either DSHS or the person, it must order a conditional release hearing within 45 days.

If the person files a petition for conditional release without authorization from DSHS, the process depends on the outcome of the show cause hearing. If the state fails to present

prima facie evidence that no LRA is in the best interest of the person and conditions cannot be imposed to adequately protect the community, the process outlined above is followed and the court must order DSHS to propose a LRA within 90 days. If the court finds probable cause to believe, based on evidence presented by the person, that release to an LRA is in the person's best interest and conditions can be imposed to adequately protect the community, the court must set a hearing on the issue of conditional release once the person presents a qualifying LRA placement.

Conditional Release to a Less Restrictive Alternative. The criteria a court must consider before authorizing conditional release to an LRA are expanded to include a documented effort was made by DSHS to ensure the LRA placement is consistent with fair share principles of release if DSHS has proposed housing that is outside the county of commitment.

In imposing conditions upon an SVP, the court must impose a restriction on the proximity of the person's residence to public or private schools. Courts must require a minimum distance restriction of 500 feet on the proximity of the person's residence to child care facilities and public or private schools providing instruction to kindergarten or any grades 1 through 12. DOC's investigation of the placement and conditions recommendations must be submitted to the court within 60 days of the order to investigate. Recommended conditions must be individualized to address the person's specific risk factors and criminogenic needs, and the non-exhaustive list of potential conditions a court may impose is expanded to include restrictions on residences and specification of contact with a reasonable number of individuals that are verified by DOC to be appropriate social contacts.

To the greatest extent possible, the prosecutor, the person's counsel, SOTP, supervising community corrections officer, and appropriate SCC clinical staff must meet and collaborate to craft individualized, narrowly tailored, and empirically based conditions to present to the court to help facilitate the person's successful transition to the community.

When DSHS develops a LRA placement, it must attempt to identify a placement which is aligned with fair share principles, and document its rationale for the recommended placement. "Fair share principles" means each county should have adequate options for conditional release housing placements in a number generally equivalent to the number of residents from that county who are subject to total confinement as an SVP. If the court authorizes conditional release to a county other than the county of commitment, the court must enter specific findings concerning the decision, and identify whether the release remains in line with fair share principles. If the person is not conditionally released to their county of commitment, DSHS must provide the law and justice council of the county of release with notice and a written explanation, including whether DSHS remains in compliance with fair share principles. If DSHS does not support or recommend conditional release to an LRA due to a clinical determination, DSHS must document its objection and certify it is developing the LRA pursuant to a court order and not because of a clinical determination.

When DSHS develops or proposes a LRA placement, it shall be considered a predisposition recommendation. In developing, modifying, and enforcing LRAs, DSHS is deemed to be performing a quasi-judicial function.

Contracts with Housing and Treatment Providers. DSHS has primary responsibility for developing LRA placements and must use a specified housing matrix as a guide for planning and developing LRA placements. Considerations in the housing matrix may not be used as a reason to deny an LRA placement. Considerations for evaluating a proposed vendor's application for LRA housing services must include applicable state and local zoning and building codes, among other things, and DSHS must require the housing provider to provide proof the facility is in compliance with all local zoning and building codes. DSHS must use a request for proposal process, subject to appropriations, to contract with housing and treatment providers across the state and facilitate fair share among counties. DSHS has oversight over vendors and providers who contract with the state, and must maintain a statewide accounting of the contracted community housing and treatment providers in each county. DSHS must provide a biannual report to the Governor and Legislature on the availability and adequacy of LRA placements and DSHS compliance with fair share principles.

Conditional Release and Transition Facilities. Subject to appropriations, DSHS must explore the development of conditional release and transition facilities, which may include community-based state-operated living alternatives similar to the SOLA program operated by the Development Disabilities Administration. DSHS may identify facilities or placements through a request for proposal process or direct state acquisition. Any contracts must require DSHS oversight over placements to ensure the programs are operating appropriately.

Modification to the Less Restrictive Alternative Order. For a court reviewing an LRA order, the question for the court is expanded to include whether modification to the person's LRA order is appropriate to ensure the conditional release remains in the best interest of the person and adequate to protect the community.

Siting of Secure Community Transition Facilities and Other Conditional Release and Transitional Facilities. The state may site and operate SCTFs and other conditional release and transitional facilities in any county in the state in accordance with state law governing public hearing, review, and comment for siting secure community transition facilities once DSHS has demonstrated need to the appropriate committees of the Legislature and appropriate funding has been provided. When DSHS identifies potential counties and sites within a county to site a SCTF or other conditional release and transitional facility, DSHS must work with local governments to provide equitable distribution of such facilities.

Community Notification. Change of address for an SVP on conditional release is added to the circumstances for when DSHS must provide 30-days' notice to local law enforcement,

and victims and witnesses who requested notice. Change of address does not include a return to the SCC or a SCTF pending revocation or modification proceedings, and an additional community notification process is not required, unless conditional release is revoked or the return lasts longer than 90 days.

Disappearance of a Sexually Violent Predator on Conditional Release. If an SVP disappears while on conditional release, DOC may enter a warrant for the person's arrest for up to 72 hours pending entry of a bench warrant by the court. DOC, its officers, agency, and employees are not liable for the acts of individuals on conditional release unless DOC, its officers, agency, and employees acted with gross negligence.

Sex Offender Treatment Providers. Subject to appropriations, DSHS, SOPB, and the Department of Health (DOH) must convene a workgroup to develop recommendations to increase the availability and quality of SOTPs to meet the growing number of persons qualifying for conditional release to an LRA. The workgroup must gather data on best practices in other states and make certain recommendations in a report due to the Legislature by December 1, 2021.

State Identification Cards. DSHS must enter into a memorandum of understanding with DOL to allow residents at the SCC to obtain a state identification card using a written identification verification letter provided from the SCC to DOL. The process must occur upon the person's initial detention at the SCC and must reoccur when the person's state identification card expires.

Sex Offender Policy Board. The SOPB is directed to meet quarterly during the 2021-23 biennium to continue its review of SVP and LRA policies and best practices, collaborate with stakeholders and DSHS, provide outreach to providers and stakeholders, and monitor implementation of this act. SOPB must also explore and make recommendations whether to continue or remove the prohibition on an LRA from including a placement in the community protection program. During the 2021-23 biennium, SOPB must provide semiannual updates to the appropriate legislative committees.

Appropriation: The bill contains a section or sections to limit implementation to the availability of amounts appropriated for that specific purpose.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

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

Staff Summary of Public Testimony on Original Bill (Human Services, Reentry & Rehabilitation): *The committee recommended a different version of the bill than what was heard.* PRO: The Sex Offender Policy Board 2020 report recommendations reflect wide

consensus among a diverse group of stakeholders who work with this population. Serious efforts were made by the group to think practically about how their recommendations would be implemented in the real world and affect communities. This bill will shift the burden of finding and developing placements from defense counsel, who have an ethical obligation to their clients and cannot ensure equitable distribution of placements among the counties, to DSHS. DSHS is best suited to identify and contract with housing and treatment providers for when residents are ready for conditional release because DSHS can fully vet placements, take a birds-eye view of resources across the counties to ensure there are no disproportionate effects on any one county, use economies of scale, engage and involve community partners early on in the process, and ensure the placement is the best fit for the individual.

The bill will bring consistency, community safety, transparency, accountability and structure to the LRA process. It will give individuals the right tools as they transition from the SCC to the community, ensuring they have adequate treatment, adequate housing, chaperones, available funds, and someone to assist with their successful transition into the community; this by definition makes communities safer. The bill has guardrails that will not only keep communities safe but protect the constitutionality of the civil commitment statute. It will also increase community confidence, infrastructure and coordination, and improve outcomes for transitioning individuals. It will also improve the court process and reduce court time and attorney expenditures.

The county of commitment approach is a failed model. There are many reasons why a person transitioning from the SCC cannot return to the county of origin, such as victim safety concerns or lack of specialized resources that the person needs. The focus instead should be on fair share and equitable distribution of placements among the counties.

OTHER: DSHS will be facing new political and public pressures and liabilities that the current system has shielded them from. DSHS should have the same immunity that courts have in doing this work. This bill will require substantial new work at DSHS, and to successfully implement this legislation, significant fiscal resources will be necessary. There are many counties that currently do not have housing resources, a certified sex offender treatment provider, or persons willing to establish an environment where a placement would be appropriate. DSHS should cooperate with counties early on in the process to create resources and placements to facilitate fair share and balance the person's civil rights with community safety.

Persons Testifying (Human Services, Reentry & Rehabilitation): PRO: Senator Christine Rolfes, Prime Sponsor; Brad Meryhew, Washington Sex Offender Policy Board; Michael O'Connell, Washington Association for Treatment of Sexual Abusers; Sonja Hardenbrook, Washington Association of Criminal Defense Lawyers, Washington Defender Association, Snohomish County Public Defender Association; Shoshana Kehoe-Ehlers, Washington State Office of Public Defense; Devon Gibbs; Linda Farmer, Councilmember, City of Lakewood; Jennifer Ritchie, King County Prosecuting Attorney; Rachael Seevers,

Disability Rights Washington; Daniel Davis, Pierce County Prosecutors.

OTHER: Joshua Choate, Washington State Office of the Attorney General; Sjan Talbot, Behavioral Health Administration, Department of Social and Health Services; David Flynn, Behavioral Health Administration, Department of Social and Health Services.

Persons Signed In To Testify But Not Testifying (Human Services, Reentry & Rehabilitation): No one.

Staff Summary of Public Testimony on First Substitute (Ways & Means): *The committee recommended a different version of the bill than what was heard.* PRO: The fair-share provision of the bill is very important to prevent a disproportionate amount of these individuals from going to one county. Prior legislation was proposed to address this issue that did not go far enough.

OTHER: The current language in the bill related to local zoning may allow for loopholes in the counties that would prevent the "fair-share" provision from working in the intended way. I would propose that the language be removed. The fiscal note seems very high as this work has previously been done by the Defense Board with four social workers and 22 individuals were placed in LRAs last year.

Persons Testifying (Ways & Means): PRO: Linda Farmer, City of Lakewood, Councilmember.

OTHER: Rachael Seevers, Disability Rights Washington.

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.