

HOUSE BILL REPORT

HB 2573

As Reported By House Committee On:

Criminal Justice & Corrections

Title: An act relating to custodial sexual misconduct.

Brief Description: Defining the crime of custodial sexual misconduct.

Sponsors: Representatives Lambert, Carrell, Costa and Thompson.

Brief History:

Committee Activity:

Criminal Justice & Corrections: 1/27/98, 2/4/98 [DPS].

HOUSE COMMITTEE ON CRIMINAL JUSTICE & CORRECTIONS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 10 members: Representatives Ballasiotes, Chairman; Benson, Vice Chairman; Koster, Vice Chairman; O'Brien, Assistant Ranking Minority Member; Cairnes; Dickerson; Hickel; McCune; Mitchell and Sullivan.

Staff: Mark Hamilton (786-7310).

Background: Currently, there is no specific crime which makes unlawful sexual intercourse or sexual contact between a correctional employee and a correctional inmate, or between a law enforcement officer and a person under arrest. Moreover, while the law currently allows for indemnification in cases of joint and several liability, there is no specific statutory provision which would ensure indemnification of correctional employer expenses related to the criminal sexual misconduct of correctional employees against inmates.

Summary of Substitute Bill:

Section 1. *Custodial Sexual Misconduct in the First Degree.* Custodial sexual misconduct in the first degree occurs when an employee or contract personnel of a correctional agency engages in sexual intercourse with a resident of a facility used for the incarceration, imprisonment, detention, or housing of adult or juvenile inmates or criminal defendants, or someone who is otherwise under correctional supervision. The employee must be known or believed by the victim to be a person who has actual, implied, or apparent authority over the victim, or who has the actual, implied, or

apparent ability to influence the terms, conditions, duration, or fact of incarceration or correctional supervision. In addition, a law enforcement officer who has sexual intercourse with a person who is being detained, under arrest, or in the custody of a law enforcement officer is also guilty of the crime. Consent is not a defense to prosecution. Custodial sexual misconduct in the first degree is a class C felony.

Section 2. *Custodial Sexual Misconduct in the Second Degree.* Custodial sexual misconduct in the second degree is virtually the same as in the first degree. The difference is the degree of the sexual encounter with the victim. Second degree requires only "sexual contact" rather than "sexual intercourse." Custodial sexual misconduct in the second degree is a gross misdemeanor.

Section 3. *Custodial Sexual Misconduct in the First Degree a Level V Offense.* Sets custodial sexual misconduct in the first degree as at seriousness level V under the sentencing guidelines, punishable by between six and 96 months imprisonment.

Section 4. *Definition of "Crime Against Children or Other Persons."* Adds custodial sexual misconduct to list of crimes which are considered "crimes against children or other persons." This classification is used for those background checks of those applying for jobs which allow unsupervised access to children under 16 years old.

Section 5. *Definition of "Sexual Assault."* Adds custodial sexual misconduct to list of crimes which are considered "sexual assault." This section relates to programs for victims of sexual assault. Thus, those who were victims of custodial sexual misconduct would be eligible for sexual assault victims programs.

Section 6. *Employment Termination and Disciplinary Action.* When an employee subject to the custodial sexual misconduct law is convicted of custodial sexual misconduct (or for violation of another sexual offense on allegations which led to charging with custodial sexual misconduct), the employee is required to be terminated. This provision is notwithstanding any other provisions of law. In addition, the employer may take appropriate disciplinary action, up to and including dismissal, prior to conviction, pursuant to other constitutional, statutory, regulatory, or contractual authority.

Section 7. *Liability of Employee and Indemnification of Employer.* An employer who sustains or incurs expenses, including third party civil judgments, as a result of an employee's criminal conduct, when the employee has been convicted of custodial sexual misconduct, has a cause of action against the employee for those expenses. However, the lack of a conviction shall not be construed as limiting any other statutory or common law rights of indemnification which may be available to the employer.

Substitute Bill Compared to Original Bill:

Two Degrees of Custodial Sexual Misconduct. Creates two degrees of custodial sexual misconduct, with first degree based on a "sexual intercourse" standard and second degree based on a "sexual contact" standard. In addition, first degree is a class C felony, while second degree is a gross misdemeanor. Retains seriousness level V for first degree custodial sexual misconduct.

Definitional Additions Retained. Retains addition of custodial sexual misconduct to related definitions for purposes of background checks and participation in victim assistance programs. Sections 4 and 5 of the substitute bill correspond to sections 3 and 4 of the original bill, respectively.

Employment Termination and Disciplinary Action. Adds mandatory employment termination provision for employees convicted of custodial sexual misconduct, as well as option for disciplinary action against employee for sexual misconduct.

Liability of Employee and Indemnification of Employer. Adds right of employer to indemnification (through a cause of action) of expenses incurred by the employer for the criminal actions of an employee of custodial sexual misconduct, as well as interpretive note preserving other indemnification rights for employers.

Appropriation: None.

Fiscal Note: Available.

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

Testimony For: This bill addresses the problem of state employees not being fired after committing sexual offenses. In addition, it is designed to protect the state against civil claims against it due to the crimes of employees. The main concern expressed was that bill did not appear to cover detainment situations (short of actual custody) in which there might be an exchange of sexual favors initiated by law enforcement. While there is only a small number of employees for which this behavior is a problem, the bill sends "the right message, a strong message."

Testimony Against: While misuse of authority for sex should not be sanctioned, the issue of who is the perpetrator is not always clear. Sometimes the perpetrator is an inmate. Would the bill punish sex with a non-inmate resident? Concern was expressed with regard to employer immunity from liability to the employee for discharge under the statute when a conviction is later overturned or amended. In addition, possibility was raised that the language might also make the employer immune from liability to the victim. Finally, the lien provisions of the bill were criticized as potentially taking away assets and benefits that are community property, and thereby punishing both the convicted employee and the spouse or family of the employee. This provision would go

beyond punishing the felony, by taking away benefits that were already earned, and thus depriving the convict employee of a vested property right.

Testified: Representative Kathy Lambert, prime sponsor; Russ Hauge, Chief Prosecutor, Kitsap County, representing Washington Association of Prosecuting Attorneys; Larry Erickson, Executive Director, Washington Association of Sheriffs and Police Chiefs; Annette Sandberg, Chief, Washington State Patrol; Belinda Stewart, Superintendent, McNeil Island Corrections Center; and Alice Payne, Superintendent, Washington Correctional Center for Women (Purdy) (All pro). Mike Ryherd, Teamsters, representing correctional officers (con).