

# SENATE BILL REPORT

## ESSB 5294

As Passed Senate, March 6, 2017

**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:** Law & Justice: 2/09/17, 2/16/17 [DPS-WM].

**Ways & Means:** 2/20/17, 2/23/17 [DPS(LAW)].

**Floor Activity:**

Passed Senate: 3/06/17, 49-0.

### Brief Summary of Engrossed First Substitute Bill

- Implements recommendations of the 2016 Senate Law & Justice Committee Majority Report of the Department of Corrections (DOC) Early-Release Scandal.
- Establishes an Office of Corrections Ombuds.
- Requires the Joint Legislative Audit Review Committee (JLARC) to conduct an audit of the Information Technology and Records departments at DOC.
- Establishes a joint legislative taskforce to review and make recommendations for the simplification of the Sentencing Reform Act.
- Updates the process for notifying participants to a whistleblower investigation as to the State Auditor's initiation and timeline for completion of an investigation.
- Requires OFM to include a review of the inability of DOC employees to utilize the whistleblower program to address mismanagement leading to the early release error in its next scheduled audit of the whistleblower program.
- Disallows the settlement of any cause of action brought by an employee for retaliation against a whistleblower from containing a provision prohibiting the employee from future work in state government.

*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.*

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## SENATE COMMITTEE ON LAW & JUSTICE

**Majority Report:** That Substitute Senate Bill No. 5294 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Padden, Chair; O'Ban, Vice Chair; Pedersen, Ranking Minority Member; Angel, Darneille, Frockt and Wilson.

**Staff:** Shani Bauer (786-7468)

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## SENATE COMMITTEE ON WAYS & MEANS

**Majority Report:** That Substitute Senate Bill No. 5294 as recommended by Committee on Law & Justice be substituted therefor, and the substitute bill do pass.

Signed by Senators Braun, Chair; Brown, Vice Chair; Rossi, Vice Chair; Honeyford, Vice Chair, Capital Budget; Ranker, Ranking Minority Member; Rolfes, Assistant Ranking Minority Member, Operating Budget; Frockt, Assistant Ranking Minority Member, Capital Budget; Bailey, Becker, Billig, Carlyle, Conway, Darneille, Fain, Hasegawa, Keiser, Miloscia, Padden, Pedersen, Rivers, Schoesler, Warnick and Zeiger.

**Staff:** Travis Sugarman (786-7446)

**Background:** DOC Early Release Error. In 2016, the Senate Law & Justice Committee conducted an investigation into the early release of some 3,000 prisoners by the Department of Corrections (DOC). The focus of the investigation was DOC's three-year delay in correcting a problem in calculating release dates for inmates. The committee issued a majority report in May of 2016 including the following recommendations:

- establish a Corrections ombuds independent of DOC or the Governor's office;
- investigate the Advance Corrections project with DOC;
- mandate the Governor put systems in place to directly monitor critical agency performance;
- clarify through policy how personal relationships with the executive branch should be managed to avoid a conflict of interest;
- simplify Washington's sentencing code in a manner that does not reduce punishment or compromise public safety;
- review the staffing of the Information Technology and Records departments at DOC;
- require a DOC-wide hand count in the vent of any future computer error that results in early prisoner releases;
- require an annual report to the Legislature and plan to address DOC's information technology maintenance backlog;
- enhance protections for DOC whistleblowers;
- review whether additional actions may be possible against former Secretary Warner;
- designate public safety as DOC's highest statutory duty; and
- restructure information technology governance at DOC.

State Ombuds Offices. In general, an ombuds is a state official appointed to provide a check on government activity in the interests of the citizens, and oversee the investigation of complaints of improper government activity against the citizens. If the ombuds finds a

complaint to be substantiated, the problem may get rectified, or an ombuds report is published making recommendations for change. The typical duties of an ombuds are to investigate complaints and attempt to resolve them, usually through recommendations. Ombuds sometimes also aim to identify systemic issues leading to poor service or breaches of peoples' rights.

Washington State has the following ombuds offices: the Long Term Care Ombudsman; the Office of the Family and Children's Ombudsman; the Office of the Educational Ombudsman; and the Health Care Authority Ombudsman.

State Employee Whistleblower Program (SEWP). SEWP was established to encourage state employees to report suspected improper governmental action and provide protection to employees who do so. The law makes retaliation against employees who make a report unlawful and authorizes remedies should retaliation occur. The State Auditor's Office (Auditor) is responsible for investigating and reporting assertions of improper governmental conduct.

When the Auditor receives an assertion of improper governmental conduct and completes a preliminary investigation, the Auditor must notify the whistleblower, any subject of the investigation, and the agency head and either conduct a further investigation or issue a report. If the preliminary investigation resulted from an anonymous assertion, a decision to conduct further investigation must be subject to review by a three person panel convened as necessary by the Auditor prior to commencement of any additional investigation. If further investigation will occur, the Auditor must provide written notification of the nature of the assertions to any subject of the investigation and the agency head, including relevant facts known at the time and the procedure to be used to respond to the assertions and information obtained during the investigation.

Within 60 working days after the preliminary investigation, the auditor must complete the investigation and report its findings to the whistleblower unless written justification for the delay is provided.

The Office of Financial Management (OFM) must periodically contract for a performance audit of SEWP 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 Engrossed First Substitute Bill:** Office of the Corrections Ombuds (Ombuds). Subject to appropriation, the Office of Corrections Ombuds is funded through the State Auditor's office for the purpose of providing information to inmates, family members, and DOC employees; providing assistance to support inmate self-advocacy; identifying and advocating for systemic reform; and monitoring and promoting compliance with statutes, rules, and policies pertaining to conditions of correctional facilities and the rights of inmates.

No later than August 1, 2017, the Governor must convene an Ombuds Advisory Council (Council) to support the Ombuds functions. The Council will assist the Ombuds in developing priorities and recommendations and review data and reports prepared by the

Ombuds. The Council must provide the Governor and the Legislature with recommendations regarding the Ombuds budget and changes in the law to enhance the Ombuds' effectiveness. The Council consists of four initial members of the Legislature charged with selecting six additional members from the community as prescribed. Membership also includes DOC staff serving as the internal ombuds and a bargaining unit representative. Council members must serve a term of three years.

The Auditor must conduct a competitive bidding process to designate a nonprofit organization to operate the Office of Corrections Ombuds. The selected organization will operate as an independent entity operating under contract with the state.

The Ombuds must:

- establish priorities within appropriated resources;
- provide information to inmates, inmate families and representatives, department employees, and others;
- provide technical assistance to support inmate participation in self-advocacy;
- monitor department compliance with applicable laws, regulations, and policies;
- monitor and participate in legislative and policy development;
- establish a statewide uniform reporting system related to complaints regarding the department;
- establish procedures to receive, investigate, and resolve complaints;
- submit an annual report to the council; and
- adopt and comply with rules, policies, and procedures necessary to comply with this chapter.

Further guidelines regarding Ombuds operations are outlined, including the conducting and reporting of Ombuds investigations, Ombuds access to correctional facilities, and confidentiality of information held by the Ombuds.

DOC Information Technology. To ensure public safety, if DOC has reason to believe a calculation error has caused an error in the calculation of the release date of any prisoner, DOC must manually calculate the release date of any affected prisoners. DOC must submit an annual report to the Governor and the Legislature detailing any information technology backlog at DOC along with the plans to address the backlog.

The JLARC is directed to conduct a performance audit of the information technology and records department at DOC and report its findings no later than December 1, 2018. The audit must include:

- the administrative structure of the departments;
- the sufficiency and quality of staffing of each of the departments; and
- an evaluation of the advance corrections project.

Governor. The Governor must supervise the conduct of all executive and ministerial offices, and ensure that all offices are performing their duties as prescribed by law, and ensure that all personal and professional conflicts of interest are avoided.

Sentencing Reform. A joint legislative taskforce (taskforce) is established to simplify criminal sentencing.

The taskforce must consist of four members of the Legislature and representatives from: the Washington Association of Sheriffs and Police Chiefs, Washington State Patrol, Caseload Forecast Council, Washington Association of Prosecuting Attorneys, Washington Association of Criminal Defense Attorneys/WA Defender Association, WA State Association of Counties, Office of the Attorney General, American Civil Liberties Union, Sentencing Guidelines Commission, Department of Corrections, Superior Court Judges Association, and Administrative Office of the Courts. The initial meeting must be convened by the legislative members no later than September 2018.

The taskforce must review and make recommendations for the simplification of the Sentencing Reform Act. The review and recommendations must be limited to technical, nonsubstantive changes that will not reduce punishment or risk public safety.

State Employee Whistleblower Program (SEWP). Provisions regarding a preliminary investigation are removed. The Auditor must instead notify the whistleblower, any subject of the investigation, and the agency head within 20 days of initiating an investigation pursuant to an assertion of improper governmental conduct. No later than 90 days after initiation of the investigation, the Auditor must notify the whistleblower, any subject of the investigation, and the agency head regarding the 120-day statutory deadline for conclusion of the investigation and provide notice that the investigation will be completed within 30 days. Within 120 working days after the investigation period, the Auditor must complete the investigation and report its finding to the whistleblower unless written justification for the delay is provided.

In the contract for the next regularly scheduled performance audit of the SEWP, OFM must require the audit to review the legislative report from the Senate Law & 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 SEWP to address concerns with mismanagement of that department. The audit must provide recommendations.

A settlement of any cause of action brought by an employee for retaliation against a whistleblower may not contain a provision prohibiting the employee from future work in state government.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** Yes.

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

**Staff Summary of Public Testimony on Original Bill (Law & Justice):** *The committee recommended a different version of the bill than what was heard.* PRO: The Committee investigation into the DOC error included eight work sessions in addition to the regular committee schedule with a number of witnesses testifying. This legislation implements recommendations from the report. DOC currently has an in-house person to address

grievances, but an independent body would have more credibility. It was clear that under the administration of Bernie Warner, DOC had gotten away from public safety as the highest duty of DOC. And there was a clear lack of oversight by the Governor's office. This bill clarifies that public safety is the highest duty of DOC. The miscalculation of sentences went on for over a decade and three years after actual notice. In contrast, Oregon vigorously tests its release dates with six manual checks prior to an offender's release.

The goal of unearthing these problems was to reform the agency and make it better. We should also recognize that there are many employees at DOC who do good work. This is an opportunity for all of us to assist DOC in the critical job they do in protecting the public. DOC should be recognized for the job that they do in protecting public safety. For the most part, they do a very good job of keeping the public and inmates secure and safe, managing between 16,000 and 17,000 inmates. This is a difficult task, particularly because DOC has become a go to place for the mentally ill.

It is extremely important to have an independent and impartial office to hear concerns, investigate, and find a resolution. People can accept negative outcomes if they are given full information and a fair and impartial decision.

A state whistleblower discovered that DOC was misreporting data on the success of a program with the goal of obtaining \$1.8 million in additional funding. After going through proper channels and reporting the misrepresentation, retaliation ensued from the agency including removal from committees, demotion, layoff notices, and near complete isolation in the agency. The retaliation was highly visible and the message was clear that management decisions were not to be questioned. She hired an attorney to address the retaliation and eventually the case settled. As part of the settlement, she was required to stipulate that she would never work for the state again. This was not expected and totally devastating. The cost of telling the truth was too great. There are no real protections in place for whistleblowers. The Legislature should consider passing a law that the state cannot ask for a stipulation that a person not work for the state again.

CON: The bill creates a taskforce to review the Sentencing Reform Act. The membership of the taskforce already reflects the membership of the Sentencing Guidelines Commission and this is the type of work that the Commission was established to address. The Commission would like to undertake this task. The Commission reviewed drug sentencing several years ago, which was very successful. Bits and pieces have been tacked onto what was originally a sound sentencing system. The Commission would like the opportunity to review the act as a whole. There is no question that the Commission works for the Legislature and any recommendations would be vetted by the legislature. Washington is rich in the kinds of expertise and the depth of knowledge needed to undertake this review.

OTHER: There should be a requirement that a person exhaust the internal grievance process with DOC prior to filing a complaint with a DOC Ombuds. DOC has an interest in resolving conflicts internally and the DOC Ombuds should not provide a mechanism for circumventing that process. The timelines for responding to requests from an external Ombuds are a little tight—1-3 days depending on the situation. These timeframes are too tight and would potentially impact DOC's ability to do other work.

**Persons Testifying (Law & Justice):** PRO: Senator Mike Padden, Prime Sponsor; Senator Steve O'Ban, Sponsor; Zachary Kinneman, citizen; Teri Herold-Prayer, citizen; Arthur West, citizen.

CON: Russ Hauge, Sentencing Guidelines Commission.

OTHER: Alex McBain, Department of Corrections; Rachel Seevers, Disability Rights Washington.

**Persons Signed In To Testify But Not Testifying (Law & Justice):** No one.

**Staff Summary of Public Testimony on First Substitute (Ways & Means):** PRO: Senate Law and Justice spent a considerable amount of time on investigations into Corrections last session. Fiscally, 29 felonies were committed by individuals that were let out early by the department, two of which allegedly resulted in deaths. There are considerable claims and possible costs to the state for these deaths and possibly for the other felonies. One claim in Spokane is for \$5 million. This is the body by action that can embed in code the necessary changes that ensure this doesn't happen again. The Ombuds is one of those things, more rigorous at conflict in interests. If we institute this bill, it will likely reduce liability and lawsuits. When I discovered that individuals were being released early, I was amazed that we got the software used from Florida and after \$55 million it never worked. Independent oversight is always a good thing for large institutions.

**Persons Testifying (Ways & Means):** PRO: Senator Mike Padden, Prime Sponsor; Zachary Kinneman, citizen.

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