

# HOUSE BILL REPORT

## 2SHB 1470

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**As Passed House:**

February 28, 2023

**Title:** An act relating to private detention facilities.

**Brief Description:** Concerning private detention facilities.

**Sponsors:** House Committee on Appropriations (originally sponsored by Representatives Ortiz-Self, Chopp, Simmons, Santos, Ryu, Orwall, Chapman, Gregerson, Doglio, Peterson, Ramel, Macri, Ormsby, Berg, Leavitt, Bateman, Morgan and Fey).

**Brief History:**

**Committee Activity:**

Community Safety, Justice, & Reentry: 2/7/23, 2/14/23 [DPS];

Appropriations: 2/22/23, 2/24/23 [DP2S(w/o sub CSJR)].

**Floor Activity:**

Passed House: 2/28/23, 58-39.

**Brief Summary of Second Substitute Bill**

- Creates a private right of action and civil penalties for violations of laws related to private detention facilities.
- Specifies conditions for the operations of private detention facilities.
- Requires the Department of Health to adopt rules regarding inspections, cleaning and sanitizing, laundry, personal hygiene, food and diet, room temperature, infection control, and water and air quality; and permits the Office of the Attorney General to enforce violations.
- Subjects private detention facilities to the Public Records Act.

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**HOUSE COMMITTEE ON COMMUNITY SAFETY, JUSTICE, & REENTRY**

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass.

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*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.*

Signed by 6 members: Representatives Goodman, Chair; Simmons, Vice Chair; Davis, Farivar, Fosse and Ramos.

**Minority Report:** Without recommendation. Signed by 3 members: Representatives Mosbrucker, Ranking Minority Member; Griffey, Assistant Ranking Minority Member; Graham.

**Staff:** Martha Wehling (786-7067).

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## HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Community Safety, Justice, & Reentry. Signed by 18 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Berg, Chopp, Davis, Fitzgibbon, Lekanoff, Pollet, Riccelli, Ryu, Senn, Simmons, Slatter, Springer, Stonier and Tharinger.

**Minority Report:** Do not pass. Signed by 6 members: Representatives Stokesbary, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Chandler, Rude, Schmick and Steele.

**Minority Report:** Without recommendation. Signed by 6 members: Representatives Corry, Assistant Ranking Minority Member; Connors, Couture, Dye, Harris and Sandlin.

**Staff:** Yvonne Walker (786-7841).

### **Background:**

#### Correctional and Detention Facilities.

Correctional and detention facilities are used to detain persons for a variety of purposes, including pretrial detention and sentencing. Pretrial detention and sentences of up to one year are carried out by locally and publicly operated jail facilities. Sentences of over one year are served in state prison facilities operated and managed by the Department of Corrections (DOC). Juvenile sentences of 30 days or less are served in locally operated juvenile detention facilities, and longer sentences are served in Juvenile Rehabilitation facilities operated and managed by the Department of Children, Youth, and Families.

"Detention facility" means any facility in which persons are incarcerated or otherwise involuntarily confined for purposes including prior to trial or sentencing, fulfilling the terms of a sentence imposed by a court, or for other judicial or administrative processes or proceedings. "Private detention facility" means a detention facility that is operated by a private, nongovernmental, for-profit entity and operating pursuant to a contract or agreement with a federal, state, or local governmental entity.

### Prohibition on Private Detention Facilities.

Until 2021 private businesses had the ability to contract with federal, state, and local governments to provide detention services or ancillary services inside detention facilities. In 2021 the state enacted legislation prohibiting any person, business, state, or local government entity from operating a private detention facility, or utilizing a contract with a private detention facility. A private detention facility operating pursuant to a valid contract with a governmental entity that was in effect prior to January 1, 2021, may remain in operation for the duration of that contract. The facility may not extend or modify an existing contract. No new private detention facilities are permitted within the state, and no state or local governmental entity may enter into a contract with a private detention facility outside the state.

The DOC may transfer prisoners to an out-of-state private correctional entity meeting certain requirements. The federal government may enter into contracts for detention services, which may include detaining persons pursuant to immigration-related proceedings.

The restriction on contracting does not apply to certain types of facilities authorized under state law and any similarly applicable federal law, including:

- a facility providing rehabilitative, counseling, treatment, mental health, educational, or medical services to juveniles;
- a facility providing services to a person who has been detained or civilly committed for involuntary mental health treatment or forensic evaluation;
- a facility used for the quarantine or isolation of persons for public health reasons;
- a facility used for work release;
- a facility used for extraordinary medical placement;
- a facility used for residential substance use disorder treatment;
- a facility used for the housing, care, and security of persons held in the custody of United States Marshals; and
- a facility owned and operated by a federally recognized tribe and contracting with the government.

In *Geo Group v. Newsom*, decided in 2022, the Ninth Circuit Court (Ninth Circuit) held that a state law that gave the state a power of review over the federal Immigration and Customs Enforcement's (ICE) operations regarding detention violated the supremacy clause. The supremacy clause prohibits states from interfering with or controlling the operations of the federal government. In its review of denial of a preliminary injunction, the Ninth Circuit held that the California law violated the supremacy clause under two separate doctrines because it controlled federal contractors' operations. First, intergovernmental immunity prohibits state laws that either regulate the United States directly or discriminate against the federal government or its contractors. Second, a state law is preempted if it stands as an obstacle to the accomplishment of the purposes and objectives of Congress. Three judges dissented, reasoning that because the California law has the same effect as directly regulating the federal government, but does not directly regulate the federal government, the

intergovernmental immunity doctrine does not apply. The dissent also reasoned that a state law that regulates health and safety triggers a rebuttable presumption against preemption, which was not overcome by the United States Congress's intent for the ICE facilities.

#### Public Records Act.

The Public Records Act (PRA) applies to all state and local agencies, including the DOC. A person may request a "public record" from an agency. A "public record" is a writing containing information relating to the conduct of government or the performance of any governmental or proprietary function that is prepared, owned, used, or retained by any state or local agency. Certain information and records are exempt from disclosure under the PRA, including body scanner images from x-ray or similar systems, records related to the Federal Prison Rape Elimination Act, and an incarcerated individual's health information. When a private business provides a governmental function, it is treated as the functional equivalent of an agency for purposes of the PRA.

#### **Summary of Second Substitute Bill:**

##### Conditions for Private Detention Facility Operations.

The Department of Health (DOH) is required to adopt rules governing private detention facilities' operations related to sanitary, hygienic, and safe conditions. The rules must address use of personal belongings; cleaning and sanitizing of living areas; laundry facilities; provision of personal hygiene items; provision of a nutritious, balanced, or special diet; food handling and hygiene practices; number and timing of meals; indoor air quality; room temperature; and an infection control program. The Office of the Attorney General (AGO) has the option to enforce violations of these rules.

Private detention facilities with contracts with effective dates on or after January 1, 2023, must comply with certain conditions. These conditions address issuance of clothing and footwear, price of food items in the commissary, provision of free telecommunications services for 60 minutes daily, in-person visitation allowing children and personal contact, prohibition on solitary confinement, provision of telephones and handheld radios at no cost, invitations to outside speakers and presenters, provision of computer and internet, availability of a law library, communication in each detained individual's primary language, reporting of sexual violence and harassment grievances, provision of mental health evaluations and free culturally competent mental health therapy, prompt medical care, natural light and windows in sleeping rooms, and emergency response. The AGO has the option to enforce violations of these conditions.

Definitions providing specifications for the conditions are added. These include definitions for basic personal hygiene items, culturally competent, detained person, fresh fruits and vegetables, personal protective equipment, solitary confinement, and telecommunications services.

##### Inspection by State and Local Agencies.

Two state agencies are directed to inspect private detention facilities. The DOH is required to adopt rules related to the inspection of food services and handling, sanitation and hygiene, nutrition, complaints, food provided, and testing of water and air. The DOH must post inspection results on its website and at the private detention facilities in conspicuous places. Results must be posted in multiple languages. The DOH may delegate food safety inspections to local health jurisdictions.

The Department of Labor and Industries is required to conduct inspections for workplace conditions and work undertaken by detained persons. The AGO has the option to enforce violations found in the agencies' inspections.

Private Right of Action and Civil Penalties.

A private right of action is created, allowing a detained person to recover a monetary award for violations. A negligent violation permits recovery of \$1,000 or actual damages, while an intentional or reckless violation permits recovery of \$10,000 or actual damage. If the detained person prevails, the person is entitled to reasonable attorney's fees and costs. The court may grant injunctive relief without a bond. The private right of action has a three-year statute of limitations, and is only available against the owner, operator, contractor, subcontractor, or employee of a private detention facility, not the state or agencies.

The DOH may create penalties for failure to comply with the act, including a penalty of \$1,000 per violation per day. If the DOH collects the penalty, it must be deposited into the State General Fund. If the civil penalty is not paid, the AGO may pursue recovery of the penalty in superior court. Any recovery by the AGO must be deposited into the Washington State Attorney General Humane Detention Account, which must be used to enforce this act. Penalties may only be imposed against the private detention facility owner, operator, contractor, or employees, not the state or agencies.

Public Records Act Application to Private Detention Facilities.

Private detention facilities operating pursuant to a contract with a state or local agency are subject to the Public Records Act. The exemptions available for individuals incarcerated in DOC facilities are also available to individuals detained in private facilities, protecting confidential health information from disclosure.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill contains an emergency clause and takes effect immediately. However, the bill is null and void unless funded in the budget.

**Staff Summary of Public Testimony (Community Safety, Justice, & Reentry):**

(In support) The standards Washington applies to public facilities should also apply to any

private facility in the state. Courts allow the state to regulate health and safety within a private detention facility, even if it has a contract with the federal government. When people are held in custody in private facilities, the facilities must meet people's basic needs and treat them as human beings. For years, clients have been held in poor conditions at a private facility, which makes it challenging to prepare their cases because they are focused on food. The food at the facility is not fully cooked, lacks nutrients, has maggots and mold, and is served at irregular times. The food available at the commissary is often junk food and expensive. No one should have to face the choice of buying food at the commissary or going hungry. The people housed within one facility have held hunger strikes out of desperation. The facility does not provide adequate blankets, appropriate medical services, or provide clean clothes. One individual had COVID-19 three times and requested solitary confinement to avoid getting sick again. Another individual asked to be deported to Russia, rather than continue to be housed in the facility. The detainees are placed in solitary confinement as punishment, and a tactical unit was sent in with tear gas and pepper spray. Even knowing that the state is watching it, the facility continues to abuse the people housed within it. The state does not have the authority to stop this facility from harming the detainees. There is little transparency about the facilities' operations, and there are few tools for families to hold the facilities accountable. State agencies and local health departments should have the right to conduct unannounced inspections and ensure basic food and safety standards are met. When an abuse occurs and is documented, the state should step in and take swift action. Incarcerated juveniles have high rates of substance abuse and need professional mental health access to avoid injury and self-harm. The state has a duty to ensure people in Washington housed in private detention facilities have a safe and healthy environment, clean clothes, and warm meals.

(Opposed) Nine eastern Washington counties have operated Martin Hall since 1999 through a private detention company. The regional facility is to avoid separate facilities in nine counties. The bill creates a lot of new operational conditions which should not apply to juvenile detention facilities. Martin Hall should be exempt from the bill because it will go out of business if the conditions apply to it.

(Other) The bill closes an important gap in authority to improve safety and healthy environments for Washington's most vulnerable residents. A few areas need clarity and more appropriate delegation of authority. The Department of Health (DOH) is the appropriate entity to regulate and inspect private facilities, because it already has similar authority for long-term care and behavioral health, as well as working with other agencies. Some of the tasks currently assigned to the Department of Ecology and the Department of Social and Health Services should be consolidated in the DOH. Broad language in the bill resulted in a large fiscal note, but amendments would reduce the fiscal impact. Like other public health work, the development of standards, inspection, and follow-up require investments. Since that is not currently in the Governor's budget, the testifier signed in as "other."

#### **Staff Summary of Public Testimony (Appropriations):**

(In Support) The first substitute bill made several key changes including consolidating oversight under the Department of Health to arrive at a more streamlined system on inspection and enforcement. This is a smaller bill that covers few facilities. The substitute bill is more efficient in terms of enforcement and in terms of a funding impact.

(Opposed) None.

**Persons Testifying (Community Safety, Justice, & Reentry):** (In support) Representative Lillian Ortiz-Self, prime sponsor; Manuel Abrego, Maria Leonides Perez, and Maru Mora Villalpando, La Resistencia; Sandra Rodarte, Latino Civic Alliance; Hannah Woerner, Columbia Legal Services; Maria Jose Cordero, North West Immigrant Rights Project; Bernal C. Baca, Mi Centro; Molly Matter, Mi Centro and Amend Law; and Paul Benz, Washington Partners for Social Change.

(Opposed) Juliana Roe, Washington State Association of Counties.

(Other) Jaime Boddien, Washington State Association of Local Public Health Officials; and Lauren Jenks, Department of Health.

**Persons Testifying (Appropriations):** Hannah Woerner, Columbia Legal Services.

**Persons Signed In To Testify But Not Testifying (Community Safety, Justice, & Reentry):** None.

**Persons Signed In To Testify But Not Testifying (Appropriations):** None.