Sex Offender Legislation

One strike and you may be out.

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With hardly any publicity, with effectively no input or public hearings, and with blinding speed, the Washington State Legislature passed SB 6151 at 3:00 a.m. on June 21, 2001. The governor signed the bill on June 26, 2001. This bill, entitled "An Act Relating to the Management of Sex Offenders in the Civil Commitment and Criminal Justice System," profoundly changes the sentencing structure in sex crime prosecutions in Washington. It is not an exaggeration to say that it potentially creates a "one strike and you're out" law for class A sex felonies, while expanding the classification of crimes that are now class A.

The bill will soon be taking us all "Back to the Future," by recreating the indeterminate sentencing structure in place prior to the Sentencing Reform Act of 1981, whereby a judge would sentence an individual to a maximum term, and a board would decide when and if the person would be released. Under the former structure, the judge at least had discretion in setting a maximum term. Under the new bill, the judge must give the maximum (life for class A offenses, ten years for class B offenses, and five years for class C offenses) and the Indeterminate Sentence Review Board decides if and when your client is ever released.

Our members (and some of our clients) are all too familiar with the Wenatchee witch hunt prosecutions. There is no question but that scores of innocent people were forced into the unenviable position of pleading to "lesser" offenses in exchange for "lenience" in sentencing to avoid other more terrifying consequences. It is a sad fact that our system is less than perfect and innocent people are convicted of all sorts of crimes. However, we also know through experience that the probability of this unacceptable scenario is perhaps greatest in a sex case given the inherent nature of the allegations. There are typically no witnesses aside from the accuser and physical evidence is rare — but its absence does not rule out the abuse allegation. It should go without saying that children can be manipulated by innocent but assertive interviewers, or by malevolent spouses desperate to gain an advantage in a child custody battle. Worse, the advent of child hearsay has created an environment where conviction is easily obtained without the jury ever actually seeing or hearing the child accuser — rather, the jury might only hear the allegations through trained professionals who are experienced in smoothly relating the story.

Elected prosecutors are quick to assure us all that these concerns are ameliorated due to their careful review of each and every case prior to filing. The reality, as we have all experienced, is that most of these critical decisions are made by junior assistant prosecutors with virtually no real incentive to decline questionable cases. Now, even the shakiest of date rape prosecutions will subject the accused to an indeterminate sentencing scheme that will potentially shuffle the defendant through an ever-revolving door of conditions and petty violations resulting in continued imprisonment, potentially for life, on an attempted rape 2 charge. It should be emphasized that this result is imminent (September 1, 2001, is the effective date) rather than hypothetical in all sex cases, not just those involving children.

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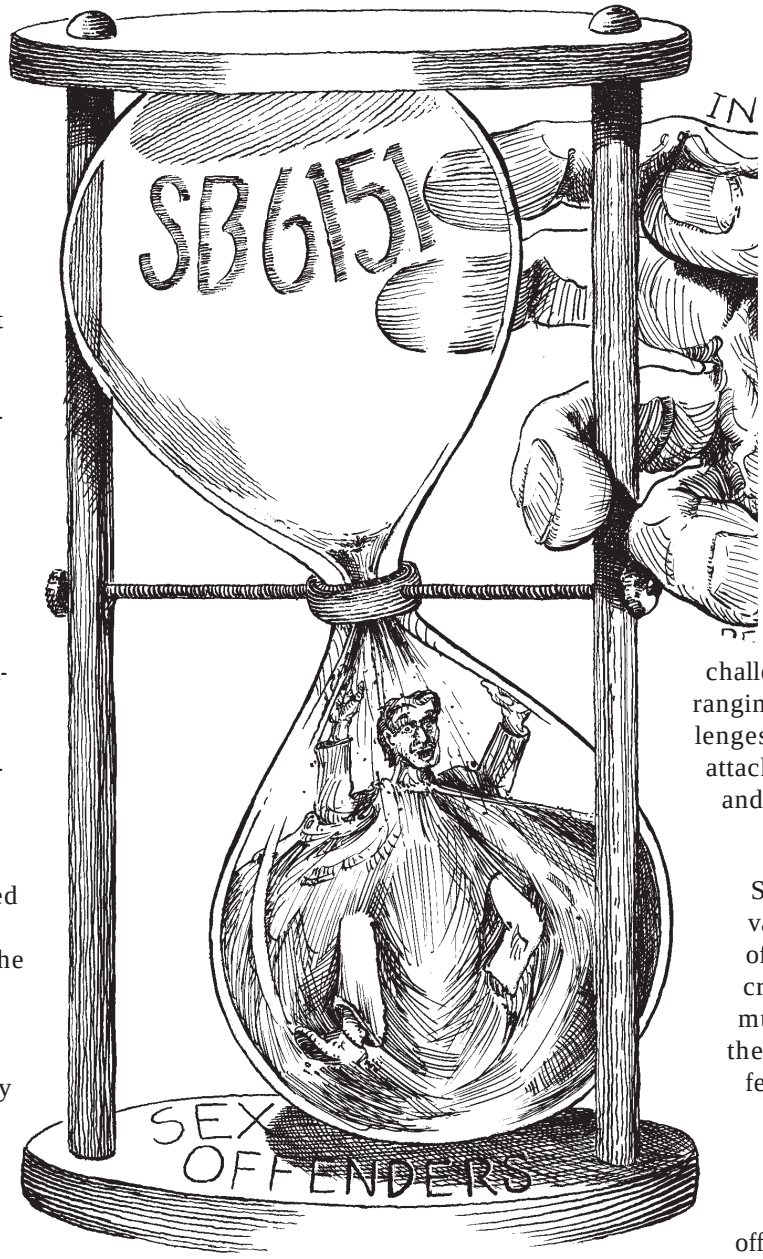
SB 6151 immeasurably increases the possibility that innocent persons convicted of class A sex offenses will spend the rest of their lives in prison, even for a first offense with no criminal history, especially if they continue to assert their innocence. The Indeterminate Sentence Review Board will consider the fact that such persons did not participate in sex offender treatment when deciding whether



to continue to hold them at the end of their minimum term. Unless one is ready to admit he or she committed the crime, the therapists will likely conclude they are "in denial." A convicted person, no matter how innocent, who is "in denial" will not likely fare well before the ISRB when it makes the determination of whether the person is more likely than not safe for release to the community.

Even those convicted of class A offenses who are lucky enough to be released from prison will still be in "community custody" for the rest of their lives. The statute permits arrest and reincarceration of these paroled individuals not only where there is a risk of reoffending, but also where the "safety" of the community is at issue in the review board's estimation. We have seen, in analogous circumstances, where a released sexual predator has been rearrested for being involved in a consensual extra-marital affair and consuming alcohol. It is not an exaggeration to suspect that paroled individuals will be rearrested if they violate any minor condition of release. They may also be required to participate in sexual deviance treatment and counseling for decades.

It is especially troubling that this bill was pushed through so quickly without any meaningful input from the public or from attorneys. For something as momentous as this bill, there should have been sufficient time for consideration, rather than a fast track with no input or debate. The soon-to-be-realized potential of this bill is to create many more Wenatchees, where very aggressive officers and prosecutors are able to charge and convict innocent people, many of whom will cave under the immense pressure created by the act and plead guilty to "lesser" offenses for supposed "leniency" in the face of the staggering possibility of life in prison for even a first offense.

It is with extreme anguish that we set forth the details of this bill. We encourage WACDL and WDA members to develop as numerous and varied challenges to this bill as possible, ranging from constitutional challenges on the one subject rule to attacks that it constitutes cruel and unusual punishment.

The Legislation

SB 6151 is wide-ranging and variously defines new means of committing old offenses, creates new mandatory minimum sentences, and increases the classifications of certain felonies, all while creating an entirely new sentencing structure. The avowed purpose of the act is to address "the management of sex offenders in the civil commitment and criminal justice system" in pertinent part by revising the sentencing structure for persons who have committed such offenses.[1] These provisions will take effect September 1, 2001, and shall apply only to offenses committed on or after that date.[2]

SB 6151's most drastic change in existing law is its reinstatement of indeterminate sentencing and delegation of vast discretion to the Department of Social and Health Services (DSHS) and Indeterminate Sentence Review Board (ISRB). Any

offender subject to sentencing under this statute will now be subject to both a minimum and maximum term of confinement.[3] The minimum term will be imposed according to the present sentencing scheme.[4] The minimum term will consist in the standard range sentence dictated by the SRA, unless an exceptional sentence were justified pursuant to RCW § 9.94A.120. The maximum term will be the statutory maximum sentence for the offense[5] — life for a class A felony, ten years for a class B, and five years for a class C.[6] During the term of confinement, the DSHS must provide "the opportunity for sex offender treatment."[7] The act does not alter the previously available 15% earned early release provisions for sex offenders.[8] Under the new scheme, the court may still impose an exceptional sentence; however, such an exceptional sentence may only increase the minimum (not the maximum) term of imprisonment.[9]

This sentencing structure will apply to two classes of clients. First, the statute prescribes penalties for any client regardless of criminal history if the offense of conviction is:

- rape in the first or second degree;
- rape of a child in the first or second degree;
- child molestation in the first degree;
- indecent liberties by forcible compulsion;
- any of the following if accompanied by sexual motivation:[10]
  - murder in the first or second degree;
  - homicide by abuse;
  - kidnapping in the first or second degree;
  - assault in the first or second degree;
  - assault of a child in the first degree;
  - burglary in the first degree;
- an attempt to commit any of the above; or
- any comparable federal or out-of-state conviction.[11]

The sentencing scheme also applies to repeat offenders who do not qualify as persistent offenders[12] but who have prior convictions for any of the above offenses and are subsequently convicted of any "sex offense."[13] The definition of "sex offense" is broad indeed and encompasses all of the above offenses plus: rape in the third degree;

- rape of a child in the third degree;
- sexual misconduct with a minor in the first and second degrees;
- sexually violating human remains;
- voyeurism;
- incest;
- sexual exploitation of a minor;
- dealing in, sending, or bringing into the state depictions of a minor engaged in sexually explicit conduct;[14]
- communicating with a minor for immoral purposes;
- patronizing a juvenile prostitute;
- allowing a minor at a live erotic performance;
- a criminal attempt, solicitation, or conspiracy to commit these crimes;
- any comparable felony pursuant to statute in effect prior to July 1, 1976;
- any felony with a finding of sexual motivation; and
- any comparable federal or out-of-state conviction.[15]

This framework *does not* govern convictions for failure to register as a sex offender or to an offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense.[16]

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Not only does this act wrestle away the court's discretion to set the maximum term of imprisonment, it also tenders nearly all remaining sentencing discretion over to the DSHS and the ISRB via a nebulous and onerous sentence of "community custody." A mandatory sentence of "community custody" must be imposed and will be supervised, not by the court, but by DSHS and the ISRB for any period of time your client is released from total confinement before the expiration of the maximum sentence.[17] The court is required to impose the standard conditions provided for in RCW § 9.94A.700(4).[18] In addition, the court may include additional conditions as provided in RCW § 9.94A.700(5).[19]

In addition to the these court-imposed conditions, an offender sentenced under this scheme will also be subject to additional restrictions imposed by the ISRB and/or DSHS.[20] After sentencing under this system, your client will be assessed by DSHS with regard to his or her risk of recidivism[21] and DSHS will thereafter recommend to the ISRB any additional or modified conditions based upon risk to community safety.[22] DSHS can also

immediately impose additional or modified conditions in the absence of such an assessment if it finds that an emergency exists.[23] Your client's only recourse from imposition of such a condition is to request administrative review where the condition will remain in effect unless DSHS's reviewing officer finds that it is not "reasonably related" to the crime of conviction, the risk of reoffense, OR community safety.[24] Note that the act provides your client only *one business day* after receiving notice of such a condition to request such review.[25]

Prior to the expiration of the minimum term, as defined above, DSHS must conduct an examination to predict your client's "sexual dangerousness," as well as the probability that he or she will engage in sex offenses if released at the end of the minimum term.[26] The act purports to order the offender to participate in such an examination.[27] In addition, the ISRB will then conduct a hearing to determine whether it is more likely than not that your client will engage in sex offenses if released on conditions.[28] This statute expressly provides that the ISRB, "may consider an offender's failure to participate in an evaluation in determining whether to release the offender."[29] At the termination of such a hearing, the ISRB shall order the offender released under whatever conditions deemed appropriate unless the ISRB determines "by a preponderance of the evidence that, despite such conditions, it is more likely than not that the offender will commit sex offenses if released."[30] If the offender is not ordered released, the ISRB will establish a new minimum term of confinement not exceeding an additional two years.[31]

During the period of "community custody," both the ISRB and your clients' community corrections officers will be able to arrest them based on no more than "reason to believe" the client has violated a condition of community custody or committed a new criminal law violation pending a determination by the ISRB whether sanctions should be imposed or whether community custody should be revoked.[32] Your client will not be eligible for pre-hearing release on bail or personal recognizance, except upon approval of the ISRB.[33] Ultimately, the ISRB must hold a violation hearing.[34] The hearing is characterized as an "offender disciplinary proceeding" and is purportedly not even subject to the Administrative Procedures Act.[35] SB 6151 leaves the task of developing hearing procedures as well as a structure of graduated sanctions to the ISRB.[36] However, the statute does give your client the rights to:

- Be present at the hearing;
- Have the assistance of a person qualified to assist the offender in a hearing, appointed by the hearing examiner if the offender has a language or communications barrier;
- Testify or remain silent;
- Call witnesses and present documentary evidence;
- Question witnesses who appear and testify; and
- Be represented by counsel if revocation of the release to community custody is a possible sanction for the violation.[37]

Following such a hearing, the ISRB may impose sanctions ranging from electronic home monitoring to educational or counseling sessions and may also suspend or revoke the release to community custody.[38] The only appeal of this decision, aside from a slow moving and costly personal restraint petition, is to a panel of three reviewing examiners.[39] However, the sanction will not be reversed or modified unless a majority of the panel finds that the sanction was not reasonably related to the crime of conviction, the violation committed, the offender's risk of reoffending, OR the safety of the community.[40]

Apart from this fundamental change in sentencing structure, SB 6151 also ratchets up the classification and therefore penalties for several offenses. For example, the statute makes attempts to commit child molestation in the first degree, indecent liberties by forcible compulsion, rape in the first and second degrees, and rape of a child in the first and second degrees class A felonies, thereby increasing the statutory maximum penalty to life.[41] Similarly, the statute elevates assault and kidnapping in the second degrees with findings of sexual motivation to class A status[42] along with indecent liberties by forcible compulsion,[43] and sexually violent predator escape.[44] Likewise, the act also imposes a new mandatory minimum term of 60 months confinement for sexually violent predator escape.[45]

Finally, the act lays down a new definition of sexual misconduct with a minor in the first degree in a move that basically creates a strict liability offense. The revised definition criminalizes the acts of a "school employee" who has or knowingly causes another under the age of 18 to have "sexual intercourse with a registered student of the school who is at least 16 years old and not married to the employee, if the employee is at least 60 months older than the student."[46] Sexual misconduct with a minor in the first degree is a class C felony.[47] Previously, there had to be evidence that a teacher or school employee was "in a significant relationship to the victim, and abuse[d] a supervisory position within that relationship" in order to engage in sex.[48]

Conclusion

This is perhaps the most substantial piece of criminal law legislation passed in Washington since the Sentencing Reform Act of 1981. It was basically a backroom bill, with no public hearings, discussion or debate. It will have a profound and unfortunately egregious effect on our clients. Attorneys should examine the bill carefully, educate themselves as much as possible on its effects, be prepared to explain it to clients in terms of making decisions as to whether to proceed to trial or settle the case in some other manner, to challenge it at every juncture and to try to inform the public as to the basic unfairness and draconian effect it will have on all citizens of the State of Washington.

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Notes

1. SB 6151 § 101.
2. SB 6151 §§ 503(2), 505.
3. SB 6151 §§ 301(41), 303(3).
4. SB 6151 § 303(3).
5. *Id.*
6. RCW § 9A.20.021(1).
7. SB 6151 § 305.
8. SB 6151 § 327; citing, RCW § 9.94A.150.
9. SB 6151 § 314 — As if a life term for a class A crime could be increased!
10. "'Sexual motivation' means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." SB 6151 § 301(39).
11. SB 6151 § 303(1)(a).
12. See SB 6151 § 301(32). Although SB 6151 will renumber and grammatically amend portions of the persistent offender statute, these amendments are not substantive and do not expand this category of offenders. *Id.*
13. SB 6151 § 303(1)(b); see also, SB 6151 § 301(32).
14. *Possession* of depictions of a minor engaged in sexual explicit conduct *does not* qualify. SB 6151 § 301(38)(a)(iii) (excluding convictions under RCW § 9.68A.070).
15. SB 6151 § 301(38); citing, RCW §§ 9.68A et seq.; 9A.28 et seq.
16. SB 6151 §§ 303(1), (2).
17. SB 6151 § 302(1); see also SB 6151 §§ 303(5), 317(2).
18. SB 6151 § 303(6)(a); citing, RCW § 9.94A.700(4) (the offender shall report and be available for contact with the assigned CCO, work at Department-approved education, employment, or community service; not possess or consume controlled substances except pursuant to lawfully issued prescriptions; pay supervision fees; and reside at a location and make living arrangements subject to the prior approval of the Department).
19. SB 6151 § 303(6)(a); citing, RCW § 9.94A.700(5) (the offender shall follow specified geographical boundaries, shall not have direct or indirect contact with the victim or a specified class of individuals, shall participate in crime-related treatment or counseling services, shall not consume alcohol, and/or shall comply with any crime-related provisions.
20. SB 6151 § 303(b).
21. "Risk assessment" is defined as "the application of an objective instrument supported by research and adopted by the department for the purpose of assessing an offender's risk of reoffense, taking into consideration the nature of the harm done by the offender, place and circumstances of the offender related to the risk, the offender's relationship to any victim, and any information provided to the department by the victims." SB 6151 § 301(35).
22. SB 6151 § 304(1), § 301(5), § 302(2)(b).
23. SB 6151 § 304(7) (such conditions will take effect immediately after notice to the offender by personal service but shall not remain in effect any longer than seven working days unless approved by the Board).
24. SB 6151 § 302(7).
25. SB 6151 § 301(35).
26. SB 6151 § 306(1)(a).
27. *Id.* ("the Department shall conduct, and the offender shall participate in, an examination").
28. SB 6151 § 306(3).
29. *Id.*
30. *Id.*
31. *Id.*
32. SB 6151 § 307(1).
33. SB 6151 § 308.
34. B 6151 § 309 (not less than 24 hours nor more than 15 working days later, if the client is not in custody; not less than 24 hours nor more than 5 working days later, if the client is in custody).
35. SB 6151 § 309(3).
36. *Id.*
37. SB 6151 § 309(4)(d).
38. SB 6151 §§ 309(2), 304(4).
39. SB 6151 § 309(4)(e).
40. *Id.*
41. SB 6151 § 354.
42. SB 6151 §§ 355, 356.
43. SB 6151 § 359(2).
44. SB 6151 § 360(2).
45. SB 6151 § 315(1)(d).
46. SB 6151 § 357(1).
47. SB 6151 § 357(2).
48. RCW § 9A.44.093.