

**Washington State Criminal Sentencing Task Force
Sentencing Effectiveness Working Group
DRAFT Meeting Summary: August 5, 2020
Zoom Digital Conferencing Technology**

Attendees:

- Russ Brown
- Senator Manka Dhingra
- Representative Roger Goodman
- Keri-Anne Jetzer
- Representative Brad Klippert
- Lauren Knoth
- Judge Stanley Rumbaugh
- Melody Simle
- Clela Steelhammer
- Nick Straley
- Councilmember Derek Young

Facilitation Team: Amanda Murphy, Chris Page, and Hannah Kennedy

INTRODUCTION & AGENDA REVIEW

Amanda welcomed Sentencing Effectiveness Working Group (SEWG or working group) members and briefly reviewed the agenda. The SEWG will present its second offer of findings and potential recommendations to the full Task Force on August 6th. The facilitation team asked members to identify which draft potential recommendations they would like to put before the Task Force and assign a SEWG member to present each. Chris and Amanda reminded members they will have a third opportunity to present potential recommendations in September. The SEWG may also present multiple versions of a potential recommendation, relying on the full Task Force to provide feedback and guidance. The facilitators emphasized the Task Force would have plenty of time to wordsmith and further refine recommendations before submitting their final report in December.

POTENTIAL RECOMMENDATIONS

The facilitation team walked the working group through 15 draft potential recommendations. SEWG questions/comments/responses and deliberations are summarized below:

Potential Recommendation #1: Establish mechanism for Post-Conviction Review, with Task Force continuing to monitor parallel efforts, noting the need to deal with retroactivity.

- **Q:** Why is this recommendation so broad? A lot of work has been done, particularly by the Sentencing Guidelines Commission (SGC), to address the need for post-conviction review. **R:** This recommendation is meant to be broad. With multiple parallel efforts looking to reform the post-conviction review process, the SEWG thought it best to ask the Task Force to offer their general support for the idea and emphasize the need to consider retroactivity.

Action Item: Greg Link will present this to the Task Force on 8/6.

Potential Recommendation #2: Provide incentives for counties to increase the use of alternatives to incarceration (potentially by establishing a statewide Justice Reinvestment Account via Treasury, for which funds saved can be allocated to counties for proven approaches), modelling such programs on proven offerings (see WSIPP [Inventory of Evidence-Based, Research-Based, and Promising Programs for Adult Corrections](#)) and considering “upstream” (pre-court) options such as education/assistance initiatives, probation, and other community-based responses.

Action Item: Representative Goodman will present this to the Task Force on 8/6.

Potential Recommendation #3: Assess and consider removing SRA barriers to alternatives to incarceration, such as barriers to therapeutic courts.

Action Item: Senator Dhingra will present this to the Task Force on 8/6.

Potential Recommendation #4: Consider requiring law enforcement agencies, prosecutors, courts, and detention facilities to maintain and report information detailing arrests, charges, convictions, and sentences. Data collection should include the underlying charge(s) and facts of the case, as well as demographics of all individuals involved.

- **C:** Although this might be difficult to institute, it is important to note. This Task Force and its various working groups have talked a lot about the lack of helpful/available information.
- **Q:** Isn't a lot of this information already collected? **R:** Yes. The Office of Financial Management (OFM) has been building a justice data warehouse. The Statistical Analysis Center (SAC) is considered the criminal justice data clearing house and they have a current federal grant to integrate Washington State Patrol (WSP) data. A simple statute change could make WSP data available for research.
- **C:** Practically, it would be difficult to accurately track what charges are the result of reductions made during plea negotiations.
- **C:** Washington State Institute for Public Policy (WSIPP) has a centralized database linking several criminal justice data systems. Linking and matching across the various state systems is complicated. While we should increase access to criminal justice data, the Task Force should know what databases and matching systems exist before recommending the state invest in another data integration project.
- **Q:** Are there datasets not being collected now that could help us better identify and understand disparities in the criminal justice system? **R:** The issue is a lack of uniformity and access across systems (i.e., between counties).

Action Item: The SEWG decided NOT to present this to the Task Force on 8/6.

Potential Recommendation #5: Require an analysis of the impacts of proposed changes to the criminal justice system that may exacerbate racial, socio-economic, or geographic disparities before such changes are adopted.

- **Q:** Are there any other examples of states/agencies/municipalities doing something like this? **R:** The Legislature sometimes requests health impact statements for certain bills. Among other things, these impact statements analyze the potential impacts on marginalized communities. **R:** A statewide office of equity was established during the last Legislative session. Although the department's funding was cut as part of the COVID-19 relief efforts, that new office is developing a Race and Equity Analysis toolkit that may be available by the 2021 session.
- **Q:** Should this be a broad, place-holding recommendation? **R:** It can be both. We could recommend the Task Force consider offering general support for equity analyses, but we could also recommend that all future criminal justice legislation require a race and equity impact analysis.
- **C:** While this recommendation is good in theory, there are practical timeliness and data issues (e.g., findings may differ depending on the race/ethnicity data source used).

Action Item: Senator Dhingra and/or Nick Straley will present this to the Task Force on 8/6.

Potential Recommendation #6: Request that the SGC develop a proposal to move all statutes concerning criminal penalties from Chapter 69.50 RCW to Chapter 9.94A RCW. At a minimum, this proposal should also include:

- a review of drug sentences and recommendations to reduce reliance on punitive sanctions and to prioritize a therapeutic model for associated drug offenses.
- a review of reforms to reduce or eliminate incarceration penalties for problematic drug use, particularly felony possession.
- Judge Rumbaugh, the interim SGC chair, indicated that the SGC would be happy to review the Controlled Substances Act (CSA) if directed by the Legislature based on recommendations made by this Task Force.
- **C:** This recommendation meets the Task Force goal to simplify the sentencing system. The CSA describes many criminal penalties; moving all criminal penalties to the SRA would reduce complexity.

- Several SEWG members suggested wording changes to refine and clarify the potential recommendation.
- **C:** Any efforts to reform the CSA and/or reduce criminal penalties for drug-related crimes should explicitly consider individuals on supervision.
- A member suggested establishing a new mitigating factor to address crimes motivated by drug-seeking behavior.
- **C:** Determining voluntary versus involuntary intoxication presents a practical implementation challenge.
- At least one SEWG member expressed reservation about this recommendation as it currently stands. They felt it would be difficult for courts to issue a lesser sentence down the line for an individual who has continually refused to accept treatment.

Action Item: Representative Goodman will present this to the Task Force on 8/6.

Potential Recommendation #7: Adopt a treatment-oriented public health approach to problematic drug use, including expansion of therapeutic interventions to respond to offenses associated with drug use.

Action Item: Representative Goodman will present this to the Task Force on 8/6.

Potential Recommendation #8: Decriminalize behaviors to which mental health, cognitive conditions, or brain injuries may contribute, and instead identify and implement public health approaches for addressing behaviors that endanger public safety. Two important steps among others toward realizing this goal are (1) establishing a mental health sentencing alternative and (2) creating a new mitigating factor in RCW 9.94A.535 that recognizes that mental health, cognitive conditions, or brain injuries can reduce culpability for criminal conduct.

- Several members felt the wording was too broad and were concerned that this recommendation, in its current draft, did not distinguish between mental health diagnoses that contributed to specific conduct and those that were merely coincidental.
- Another member noted the potential recommendation was written in such a way as to avoid stigmatizing mental illness. They also noted that the revised language for this potential recommendation reflects input from Disabilities Washington.
- Some SEWG members felt mental health courts should be expanded, while others thought the broad language of the recommendation was preferable as it highlights the need for the State, local jails, and communities to consider mental health.

Action Item: Nick Straley and Senator Dhingra will present this to the Task Force on 8/6.

Potential Recommendation #9: Encourage court systems that coordinate or are compatible to adopt a unified filing system.

- **C:** This recommendation is not politically likely to be enacted. Many different actors have tried to unify systems in the past and have always been met with opposition.
- **C:** It is important to note that a unified Judgement and Sentencing (J&S) form is different than a unified filing system.
- **C:** Despite a lack of progress in the past, this recommendation is critical if the Task Force wants to move forward with any recommendations that expand Pre-sentencing Investigations (PSIs) because PSIs require information from several places and a unified system would save time and resources in the long run.

Action Item: Greg Link will present this to the Task Force on 8/6.

Potential Recommendation #10: Increase the occasions when a PSI can be requested.

Action Item: Keri-Anne Jetzer will present this to the Task Force on 8/6.

Potential Recommendation #11: Make PSIs available earlier in the court process.

Decision: Keri-Anne Jetzer will present this to the Task Force on 8/6.

Potential Recommendation #12: Relocate the duty to complete PSIs requested by superior court judges to the superior court and have superior courts work with all parties (including DOC) to reduce differences across forms and make forms as applicable as possible to all who use them.

Action Item: Keri-Anne Jetzer will present this to the Task Force on 8/6.

Potential Recommendation #13: Increase cultural competency of those conducting PSIs to reduce disproportionality.

Action Item: Keri-Anne Jetzer will present this to the Task Force on 8/6.

Potential Recommendation #14: Exclude risk-assessment information and sentencing recommendation from PSIs.

Action Item: Greg Link will present this to the Task Force on 8/6.

Potential Recommendation #15 (Emerged during the meeting):

Review risk-assessment tools and approaches to recommend ways to address potential bias and/or disparities in sentencing recommendation from PSIs and to make the information available as uniform and accurate as possible and to make the risk assessments consistently predictive.

- **C:** While risk assessments have been rightly criticized as a proxy for racism, they are an integral part of PSIs. The potential for future public safety concerns should be considered when sentencing, especially in violent or sex cases.
- At least one SEWG member did not support the exclusion of risk-assessments from PSIs, so the recommendation would have to include more permissive language for them to support it. **R:** This recommendation seeks to address concerns about the variety of risk-assessments currently used, by making their inclusion in PSIs optional rather than automatic. It's not that practitioners don't want risk assessments; they just don't trust the way they are currently issued.
- **C:** WSIPP reviewed and assessed DOC risk assessments to find the most effective and least biased tool. The Task Force could consider recommending only verified risk assessments, which have been vetted via a racial equity analysis. **R:** Even verified risk assessment tools may vary in their efficacy, depending on the local community. Normed risk-assessments are more predictive, but some "off the shelf" tools can still be applied across jurisdictions.
- **C:** PSI staff sentencing recommendation may be biased and are not useful. They are rarely, if ever, considered. Furthermore, their inclusion may jeopardize the validity of a sentence when all parties have reached an agreement that does not match the PSI staff-recommended sentence.

Action Item: Lauren Knoth will present this to the Task Force on 8/6.

NEXT STEPS & ACTION ITEMS

- SEWG members to present second offer of findings and potential recommendations to the full Task Force on 8/6.

**Washington State Criminal Sentencing Task Force
Sentencing Effectiveness Working Group
Meeting Summary: August 19, 2020
Zoom Digital Conferencing Technology**

Attendees:

- Lydia Flora Barlow
- Russ Brown
- Senator Manka Dhingra
- Judge Veronica Galván
- Representative Roger Goodman
- Kim Gordon (alternate for Greg Link)
- Omeara Harrington
- Keri-Anne Jetzer
- Lauren Knoth
- Kelly Leonard
- Judge Roger Rogoff
- Melody Simle
- Clela Steelhammer
- Nick Straley
- David Triewweiler

Facilitation Team: Amanda Murphy, Molly Stenovec, and Hannah Kennedy

INTRODUCTION & REVIEW AGENDA

Amanda welcomed Sentencing Effectiveness Working Group (SEWG or working group) members, noted the facilitation team’s annual leave schedule, and briefly reviewed the agenda. She also reviewed the Task Force’s 2020 working plan and meeting schedule for September. Amanda reminded SEWG members to submit, to the Facilitation Team, any additional potential recommendations by August 31st to be considered for the December 2020 final report.

DRAFT RESEARCH PROPOSAL

Lauren Knoth (Washington State Institute for Public Policy, aka WSIPP) shared the Grid Subgroup’s draft research proposal (*see supporting materials section below for complete proposal*). SEWG comments/questions/responses are summarized below:

- **Q:** Given that this research relies on averages and we do not have the resources to examine county-level differences, does this proposal require us to assume a certain level of homogeneity across the state? **R:** This proposal looks at averages across the state; any changes the Task Force proposes that the Legislature and Governor enact would also be statewide. We would assume that individual judges would still “anchor themselves” the way they do now (e.g., those that usually sentence at the top end of the range will continue to do so, even if the absolute length of a top end sentence changes). A formal report would allow us to document all assumptions made throughout the research process.
- **Q:** Is there any way to make reasoned decisions about how long a certain crime should be sentenced? **R:** Since the 1980s, sentencing has contained some sense of retribution in addition to concerns about reducing recidivism and rehabilitating individuals. The US Sentencing Commission has released reports analyzing impacts of sentencing statute changes on recidivism rates, but given the number of factors that can influence recidivism, there is no practical way to draw such conclusions about an entire sentencing grid at once.
- **C:** Multiple working group members noted the importance of prison culture and reentry opportunities in determining recidivism rates.
- **C:** If sentences are adjusted or reduced without addressing our state’s past and current practices when it comes to incarceration and reentry support services, the results are not going to be what we hope for.
- **C:** The Department of Corrections (DOC) is unlikely to receive additional program funding any time soon. Without additional programming resources, people will continue to lack rehabilitation programming while in prison. **C:** It does not make sense to keep people in prison longer if DOC does not offer enough programming

options to support their successful reentry. It would be more appropriate to provide programming in the community and avoid incarceration as much as possible.

- **Q:** Will the protected zone enhancement be considered in this research agenda? **R:** It will be included to the extent that the enhancement affects racial disparities.

Amanda reminded SEWG members they will likely present this research proposal to the full Task Force at the September 10th meeting.

Action Item: All members in attendance will share this proposal with their constituents and will provide any input or suggested edits to Lauren by close of business (COB) on Friday (8/21/20).

FIREARM & DEADLY WEAPON ENHANCEMENT POLICY OPTIONS

Representative Goodman presented three draft policy options aimed at reforming the firearm and deadly weapon enhancements (see supporting materials section for a summary of options A-C). SEWG comments/questions/responses are summarized below:

- **Q:** When we discuss judicial discretion to make them concurrent, does that refer to multiple enhancements or the underlying offenses? **R:** Multiple enhancements.
- **Q:** Retroactivity is very important. What are the reasons why not to resentence? **R:** There are several concerns. Full retroactivity could be very expensive, could burden local courts, and could result in people waiting years to be resentenced. There are also appellate rights concerns: for example, an individual with stacked enhancements could be resentenced to serve less time compared to another individual charged with the same or similar crime(s) whose charge did not include stacked enhancements. Retroactive resentencing also brings up the potential for revictimization. Finally, retroactive resentencing could create uncertainty, which could negatively affect the plea negotiation process and potentially trigger further revictimization.
- Several working group members emphasized the importance of addressing retroactivity in some manner.
- **Q:** Are these policy options intended to eliminate mandatory stacking but then leave judges the discretion to make enhancements concurrent? **R:** Currently, there is no discretion to make these enhancements concurrent; the stacking is mandatory.
- **C/Q:** This would likely have a large fiscal note and very unlikely to pass in this legislative session. Do we know how many people would be affected under policy options B and C? **R:** The cost would likely be borne by the courts.

Action Item: Clela agreed to contact the Department of Corrections to determine how many individuals would be impacted by policy options B and C; the number would be 631.

- **C:** The working group may want to look at whether any potential DOC cost savings could be shifted to local jurisdictions.
- **Q:** Is it correct that DOC cost-savings only occur when a unit gets shut down? **R:** It depends on the numbers, but in general the big reductions (i.e., closing a unit) allow staffing reductions, which bring larger cost-savings.
- **C:** Currently, many young men hope to be resentenced under [SB 6164](#). If we do not make enhancement policy changes retroactive, there is no other way for individuals to get relief. However, if full retroactivity is too politically untenable, a hybrid approach could be to eliminate mandatory stacking and allow individuals to petition for relief/resentencing.
- **Q:** What about allowing the prosecutor and individuals to be able to seek resentencing? **R:** While some working group members expressed support for this, others had reservations.

Q: Are there opportunities to save resources and streamline the process when all parties agree on reducing a sentence?

- **C:** We should consider the possibility these policy changes could unintentionally increase county jail populations, impacting local efforts to reduce incarceration rates. If/when we have lower sentences, counties will need resources to provide programming that can support reentry and reduce recidivism.
- **Q:** If we want to give more discretion to the courts, why have a mandatory amount of time for firearm and deadly weapon enhancements? Why not make it discretionary, i.e., instead of a mandatory five years, make it *up to five years*? **R:** Changing an enhancement from mandatory to discretionary may not practically give more discretion to judges, because courts do not often deviate from sentencing recommendations when all parties agree.
- **Q:** How does this compare to judicial discretion in aggravated sentences? **R:** Enhancements differ from aggravating factors because before a judge can impose an exceptional sentence, they need to make certain findings. With an enhancement, judges have complete discretion without the need for specific findings.
- **C:** The Sentencing Reform Act (SRA) shifted discretion to prosecutors. It is not about removing discretion from the system, but where in the system that discretion exists. For some, judicial discretion is more transparent because a Judge's decision-making process is part of the public record.

Amanda briefly summarized the firearm and deadly weapon enhancement conversation, noting members seemed most interested in policy options B and C. She asked members to confirm with their constituents whether they could support a recommendation based on policy options B and/or C rather than A. She also asked members that if their constituents could not support anything related to B and C, to bring to the next SEWG meeting proposed changes that their constituents *would* support.

NEXT STEPS & ACTION ITEMS

- **All SEWG members** should review the draft research proposal. Any feedback/suggestions should go to **Lauren** at lauren.knoth@wsipp.wa.gov by Friday (8/21). If she receives no edits/changes, the research proposal will go in front of the Task Force for potential consensus at the September 10th meeting.
- **All SEWG members** should review the firearm/deadly weapon enhancement policy options A-C with their constituents and let the facilitation team know if this review process raises any red flags by COB 8/24. **The Grid Subgroup** will refine the options based on SEWG input and any notes sent to the facilitation team.
- **Clela** will contact DOC to see if the Department can provide any data on the number of individuals who could be impacted by resentencing because of legislative changes to firearm/deadly weapon enhancements.
- **The SEWG** is tentatively scheduled to present its third and final offer of potential recommendations and findings to receive input from the full Task Force on 9/17.
- **Members to send the facilitation team any additional potential recommendations for SEWG consideration by COB 8/28.**