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FISCAL IMPACT REPORT

ORIGINAL DATE 02/20/13
LAST UPDATED 02/21/13 **HB** 446

SPONSOR Herrell

SHORT TITLE Sex Offender Registration Times & Definitions **SB** _____

ANALYST Daly

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY13	FY14	FY15		
	\$104.0*	\$104.0*	Recurring	Federal Funds

(Parenthesis () Indicate Revenue Decreases)

*See Fiscal Implications.

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	Minimal to Moderate	Minimal to Moderate	Minimal to Moderate	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with HB 48, HB 437, HB 451, HB 452 and HB 570

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Administrative Office of the Courts (AOC)
- Administrative Office of the District Attorneys (AODA)
- Attorney General's Office (AGO)
- New Mexico Sentencing Commission (NMSC)
- Public Defender Department (PDD)
- Adult Parole Board (PB)
- New Mexico Corrections Department (NMCD)
- Department of Public Safety (DPS)
- Reform Sex Offender Laws New Mexico (RSOL New Mexico)

SUMMARY

Synopsis of Bill

House Bill 446 (HB 446) makes comprehensive changes to the Sex Offender Registration and Notification Act, Sections 29-11A-1 through 10, NMSA 1978 (SORNA) as follows:

- expands the definition of “sex offender,” Section 29-11A-3(E), to mean a person who lives in New Mexico or has other, specific connections to New Mexico, (1) who is convicted of a sex offense or (2) who is required to (a) register as a sex offender in any jurisdiction or (b) register pursuant to the law of a foreign nation about which the U.S. State Department has concluded that the nation has an independent judiciary that generally or vigorously enforced the right to a fair trial in that nation during the year in which the conviction occurred (Section 1);
- limits the definition of two crimes that are classified as sex offenses in Section 29-11A-3(F)(6), to provide that kidnapping and false imprisonment must be committed “with intent to inflict a sexual offense,” while also expanding these crimes to include a parent of the victim (Section 1);
- expands the list of sex offenses in Section 29-11A-3(F) to include: patronizing prostitutes if the alleged prostitute is under 18; promoting prostitution if the victim is under 18; accepting earnings of a prostitute under 18; voyeurism; human trafficking for a sexual purpose when the victim is under 16; criminal sexual communication with a child; and conspiracy to commit any of the listed sex offenses (Section 1);
- defines “tier I sex offense” to include: false imprisonment with intent to inflict a sexual offense when the victim is under 18; aggravated indecent exposure; voyeurism; and attempt or conspiracy to commit any of these sex offenses (Section 1(H));
- defines “tier II sex offense” to include: enticement of a child; patronizing prostitutes under 18; promoting prostitution when the victim is under 18; accepting earnings of a prostitute under 18; sexual exploitation of children by prostitution; criminal sexual penetration in the fourth degree; incest when the victim is 16 or older but under 18; criminal sexual communication with a child; human trafficking for a sexual purpose when the victim is under 16; child solicitation by electronic communication device; solicitation to commit criminal sexual contact of a minor; and attempt or conspiracy to commit any of these sex offenses (Section 1(I));
- defines “tier III sex offense” to include: kidnapping with intent to inflict a sexual offense when the victim is under 18; sexual exploitation of children; aggravated criminal sexual penetration or criminal sexual penetration in the first, second or third degree; criminal sexual penetration in the fourth degree when the victim is under 16; criminal sexual contact in the fourth degree; criminal sexual contact of a minor; incest when the victim is under 16; attempt or conspiracy to commit any of these sex offenses (Section 1(J));
- requires sex offender to register with a county sheriff within three days (rather than the current 10 days) after release or relocation to the state, and provide not only a current address but the address of every place where the sex offender habitually lives; name and address of place of employment; every offense for which the offender was convicted; names, email addresses, monikers or other self-identifiers used in internet communications or postings or on social networking sites (as defined within the Act), to be used only for law enforcement purposes; the offender’s telephone numbers, professional licenses, and license plate or other identifier and description of any vehicle

owned or primarily operated by the offender, including aircraft and watercraft; name and address of any school or institution of higher education that the offender is attending; and copies of the offender's passport and immigration documents (Section 2(B) and (C));

- requires a county sheriff with whom a sex offender registers obtain a palm print in addition to a complete set of the sex offender's fingerprints on an annual basis (Section 2(D));
- requires a sex offender convicted of a tier III sex offense to renew registration with the county sheriff not less than once in each 90-day period following the date of initial registration for the remainder of the offender's life (Section 2(K)(1));
- requires a sex offender convicted of a tier II sex offense to renew registration with the county sheriff every 6 months for a period of 25 years (Section 2(K)(2));
- requires a sex offender convicted of a tier I sex offense to annually renew registration with the county sheriff for a period of 15 years (Section 2(K)(3));
- requires the Department of Public Safety (DPS) to retain registration record of a sex offender convicted of a tier III sex offense for the remainder of the offender's life; for a tier II sex offense, to retain for 25 years; and for a tier I sex offense, to retain for 15 years (Section 3(D)(E)(F));
- requires a county sheriff to forward registration information to the District Attorney or the chief law enforcement officer for a municipality when a sex offender is convicted of a tier II or III sex offense (Section 4(A));
- requires the DPS website to include the following registration information: legal name and any other names or aliases used; current address and address of every place the sex offender habitually lives (defined as "any place where the offender lives for at least 30 days in any 365-day period"); address of place of employment if employment requires direct contact with children; every sex offense for which the sex offender was convicted; professional licenses; license plate or other identifier and description of any vehicle owned or primarily operated by offender, including aircraft and watercraft; photograph; physical description; and date of birth (Section 4(E)); and
- requires the DPS to implement policies to ensure that sex offenders under its supervision are notified of changed registration and reporting requirements under the Act and sets out a tier-based schedule for notifying offenders of any new requirements when the Act is amended. (Section 5(E)).

HB 446 also provides that all sex offenders, regardless of date of conviction for a sex offense, are subject to the requirements of the SORNA.

The effective date of this bill is July 1, 2013.

FISCAL IMPLICATIONS

The DPS advises that passage of the proposed legislation carries a positive fiscal impact to the Department. This would be felt in increased funds from the Justice Assistance Grants. Currently, the state of New Mexico is not in compliance with the requirements of the Federal Adam Walsh Amendments to the Child Protection Act. The Public Safety Department, as the state administrating agency for New Mexico, currently loses ten percent (10%) of the Justice Assistance Grant funding for the state, the penalty applied to the DPS's allocation. Last year this penalty exceeded one hundred and four-thousand dollars (\$104,000). That number is shown in

the Revenue table above, reflecting the funding the State lost last year that would not be lost in the future if HB 446 is enacted. As the DPS notes, the program purposes for this funding are related to law enforcement and the impact from non-compliance is felt statewide. The DPS also reports that the changes to SORNA contained in this bill will not increase its workload.

The Public Defender Department (PDD) suggests that the expansion of the list of sex offenses requiring registration might cause an increase in prosecutions for registration-related offenses, which would require additional resources to ensure the provision of effective assistance of counsel.

Any such increase in prosecutions would similarly require more resources for the District Attorneys and the courts. No agency provided estimates as to costs related to such an increase.

SIGNIFICANT ISSUES

The Administrative Office of the District Attorneys (AODA) comments that the amendments to the SORNA made in HB 446 are generally consistent with its federal counterpart. See Sex Offender Registration and Notification Act, Pub. L 104-248, Tit. 1, 120 Stat. 590 (2006). The New Mexico Corrections Department (NMCD) notes that the bill appears to be designed to bring New Mexico into compliance or substantial compliance with the federal Adam Walsh act, which would help ensure state receipt of federal grant funding explicitly tied to compliance with that act. The New Mexico Sentencing Commission (NMSC) reports that 57 jurisdictions (including 16 states, three territories and 38 tribes) have substantially implemented federal requirements.

The AODA summarizes and comments on some of HB 446's significant changes to the existing SORNA:

HB 446 changes the offenses for which registration is required under the SORNA. It adds foreign offenses. It expands the list of offenses to include sexual offenses not currently covered by the SORNA, focusing on sexual offenses involving children. It also narrows the kidnapping and false imprisonment offenses to offenses committed against a minor with the intent to inflict a sexual offense. (As currently written, all kidnapping and false imprisonment convictions involving a minor victim are covered, unless the offender is a parent of the victim.) HB 466 removes the exception for parents when the offense includes intent to inflict a sexual offense.

The three-tier system set up under HB 466 adds a clear structure to applying different requirements to different classes of offenses, reserving the most stringent requirements for the most serious offenses. Previously, the statute recognized two groups of offenses: those listed under Section 29-11A-5(D) and those listed under Section 29-11A-5(E). The offenses previously under Paragraph D are now tier III offenses, and additional offenses have been added to that list. Some of the offenses previously under Paragraph E are now tier II offenses; others are tier I offenses. HB 446 increases the retention period for registration information on tier II offenses from ten to twenty-five years. HB 446 provides that tier I offenses have a fifteen year retention period. Violators with tier I offenses are required to register, but that information is not forwarded to the district attorney and is not posted on the web site.

The additional information regarding the offender required by HB 466 should allow for easier identification by law enforcement and by the public, as most of this information will also be posted on the SORNA website.

The PDD calls particular attention to issues surrounding the expansion of the SORNA to include as a sex offender any person who is required to register pursuant to the law of a foreign nation meeting the criteria spelled out in Section 1(E):

Historically, the reasons some nations have advanced for requiring persons to register have not squared with either the law, or the general spirit of the law, in New Mexico. The intent of the bill could be clarified by, for example, inserting “as a sex offender” before “pursuant to the law of a foreign nation.” However, unless the bill clarifies that a “sex offender” must have committed a “sex offense” as defined in the statute, then a problem arises: under which tier –if any--must a “sex offender” register when that sex offense is not illegal in New Mexico? For example, a person who after being afforded a fair hearing has been deemed by a foreign government to be a homosexual, and therefore required to register as a “sex offender” under that government’s laws, would be deemed a “sex offender” under this section. Because the person has not committed a “sex offense” as defined under the SORNA, the person would be required to register, but none of the tiers appear to apply. This problem could be avoided by limiting the definition of “sex offender” to persons who have actually committed what New Mexico considers to be a “sex offense.”

The Attorney General’s Office (AGO) addresses the provision in Section 2(C)(7) requiring a sex offender to provide email addresses and monikers:

There is an argument that the giving of email addresses and monikers used for the internet is a violation of the First Amendment. However, Wisconsin has a very similar law that was found to be constitutional because the passwords were not being asked of sex offenders nor was their access restricted. *See John Doe of Connecticut and John Doe of Florida v Rick Raemisch*, 2012 U.S. Dist. LEXIS 121794. Case law seems to suggest that as long as there is no restriction on internet access there is no First Amendment violation.

Additionally, the AGO comments on legal challenges to these types of registration requirements more generally:

The other argument that is commonly made is that all registration requirements violate due process. However, many courts have found that the registration requirements are a civil regulatory system rather than an additional punishment for the crime. This includes ex post facto claims when new crimes that were not originally listed as offenses requiring registration become subject to registration. *State of New Mexico v Druktenis*, 2004 NMCA 32. Registration has been recognized as a civil regulatory system designed to assist law enforcement and keep children safe. The court in *Raemisch* stated that the fact that the restrictions are difficult and cumbersome is not enough to make them unconstitutional.

Further, the AGO advises that New Mexico, like Wisconsin, is required by federal law to disclose information about the registered sex offender. The Wisconsin court found no violation in publishing the information on the website.

ADMINISTRATIVE IMPLICATIONS

The AODA notes that most of the administrative work will fall on the county sheriffs and the DPS.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

As reported in Fiscal Implications, the DPS advises that **each year New Mexico is not in substantial compliance with the federal Adam Walsh Act, the state's allocation of Byrne JAG funding from the federal government is decreased by ten percent (which last year was \$104 thousand)**, which impacts not only the DPS but every other task force and initiative funded by those monies.

OTHER COMMENTS

The Reform Sex Offender Laws New Mexico (RSOL New Mexico), a citizens' group composed of sex offenders, family members, and other citizens concerned about the SORNA, comments on the addition of new offenses requiring registration, the increased frequency of renewals for some registrants, and the retroactive application of the SORNA. It suggests, along with other alternatives, that the provision that makes the changes to registration requirements applicable to all sex offenders regardless of their conviction dates be removed, and that the duty to register arising from the expanded list of sex offenses be applied prospectively.

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