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FISCAL IMPACT REPORT

ORIGINAL DATE 02/20 /17

SPONSOR Maestas Barnes LAST UPDATED _____ HB 353

SHORT TITLE Sex Offense Permanent No Contact Orders SB _____

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		See Narrative	See Narrative		Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Department of Public Safety (DPS)
 Law Offices of the Public Defender (LOPD)
 New Mexico Sentencing Commission (NMSC)
 Office of the Attorney General (OAG)

SUMMARY

Synopsis of Bill

Section 1 of House Bill 353 requires a judge sentencing a defendant convicted of a sex offense to determine whether to issue a permanent no contact order. That order prohibits any contact by a defendant with the victim for the lifetime of the defendant. The victim has the right to be heard in such a proceeding, and a defendant who opposes such an order must show cause why the order should not be issued. Upon finding reasonable grounds exist, the judge shall issue a permanent no contact order. Section 1(D) provides a partial listing of the relief that may be granted in the order. Upon issuance of an order, information concerning it must be entered in the national crime information center (NCIC)'s order of protection file within 72 hours of receipt of the order by a law enforcement agency.

A person who violates a no contact order may be arrested without a warrant upon probable cause of violation. A first violation is a misdemeanor and upon a second or subsequent conviction, the defendant shall serve not less than 72 hours in jail, which sentence cannot be suspended, deferred or taken under advisement.

A no contact order may be rescinded at any time upon the motion of the state for the victim or the defendant if the court finds the grounds upon which it was based no longer exist. Within 72 hours of notice of rescission, that information must be entered in the NCIC system.

HB 353 also amends several sections of existing law to include a victim protected by a HB 353 no contact order: authorizing the issuance of a Brittany alert (a notification relating to an endangered person) in Section 2; exempting the victim from being charged costs in proceedings alleging a violation of such an order in Section 4; and providing for interstate enforcement of the order in Section 5.

In addition, Section 3 of HB 353 eliminates the statute of limitations (thereby allowing for prosecution at any time) for three crimes against children: alleged criminal sexual penetration alleged aggravated criminal sexual penetration and alleged criminal sexual contact of a minor.

The effective date of this bill is July 1, 2017.

FISCAL IMPLICATIONS

Proceedings during sentencing related to no contact orders will lead to increased costs for district attorneys, public defender and the courts, since issues relating to those orders will be litigated in those proceedings. Subsequent enforcement of those orders will also increase costs for those same agencies, as well as for law enforcement.

Removing the statute of limitations from certain sexual offense crimes against children may lead to increases in prosecutions for those crimes, increasing costs for district attorneys, public defender and the courts. LOPD advises that although cold case prosecutions are exceedingly rare, they may require expert testimony for both prosecutors and defenders if recovered memory is involved, leading to increased costs. Upon conviction, additional costs of incarceration would result.

SIGNIFICANT ISSUES

Permanent No Contact Orders

AODA first notes that the existing Family Violence Protection Act (FVPA) already provides for orders of protection in various forms for various threats, including extended orders of protection issued as part of the sentencing proceeding of a person convicted of criminal sexual penetration. In those cases, when the court's criminal jurisdiction over the convicted defendant ends, the victim may request that the order be extended for any period, including a period as long as the victim's lifetime. See Section 40-13-5.1 NMSA 1978. Further, as NMSC notes, in some instances probation and parole agreements for convicted sex offenders include no contact orders.

HB 353 provides another source for a protective order, which applies to a much broader class of sexual offenses than those under the FVPA. The sex offenses upon which such an order may be based under this bill include 14 crimes: aggravated criminal sexual penetration, criminal sexual penetration, criminal sexual contact, criminal sexual contact of a minor or solicitation to commit that crime, sexual exploitation of children, sexual exploitation of children by prostitution, kidnapping or false imprisonment when either is committed with intent to inflict a sexual offense, aggravated indecent exposure, enticement of a child, incest when the victim is younger

than 18, child solicitation by electronic communication device, and attempt to commit any of these crimes. A no contact order under this bill may be issued at the sentencing proceeding, and may last as long as the lifetime of the defendant. The orders issued under this bill, like orders issued under the Family Violence Protection Act, allow for warrantless arrests, and carry the same penalties for violations.

Under FYPA, only the victim may seek modification or rescission. See NMSA 1978, Section 40-13-6. HB 353, however, allows a defendant to move to rescind a no contact order at any time. As AOC points out, this could inadvertently create a mechanism by which the defendant files repeated motions as a way to continue to harass or see the victim. Requiring a substantial change in fact or circumstance as a basis for such a request, and, like in the FVPA, providing that the victim shall not be required to appear and allowing another person to appear on the victim's behalf may prevent or lessen the likelihood of such a situation.

Removing the Statute of Limitations

Section 3 removes the statute of limitations for certain crimes against children, allowing prosecution of those crimes at any time. AODA first explains the how the statute of limitations currently works:

The standard statutes of limitation apply to sexual offenses against children. Section 30-1-9.1 NMSA 1978. The time limit for bringing a prosecution is tied to the seriousness of the crime: there is a one year statute of limitations for a petty misdemeanor, a two year statute of limitations for a misdemeanor, a five year statute of limitations for a third or fourth degree felony, a six year statute of limitations for a second degree felony, and no statute of limitations for a capital felony or a first degree violent felony. However, the applicable time period does not begin to run until the victim is 18 or the violation is reported to a law enforcement agency, whichever occurs first. So, if the charge is a fourth degree felony criminal sexual contact of a minor, the five year statute of limitation will not begin to run until the victim turns 18 or the crime is reported, whichever is first. Such a crime committed against a 10 year-old-child and not reported would in effect have a 13-year statute of limitation, because the five year time limit would not begin until the child turned 18.

In Section 3, all statutes of limitation for the crimes of criminal sexual penetration when the victim is a child, and for criminal sexual contact of a minor are removed. AODA provides this analysis of that change, the effect of which:

is to greatly expand the time for prosecuting sexual crimes against children. For example, if parents report a misdemeanor crime of criminal sexual contact committed against their child, the statute of limitations under current law would be two years. Under HB353 there would be no statute of limitations- theoretically the crime could be prosecuted decades after the event. There are practical difficulties to prosecuting and defending such cases. Evidence and witnesses can disappear, and memories fade.

LOPD similarly notes difficulties that arise in delayed prosecutions:

The passage of time almost inevitably results in the loss of evidence available for both the prosecution and the defense of criminal charges. The loss of physical evidence and

the fading of memories can make it difficult to mount legitimate defenses to allegations which arise many years after an alleged event.

“Recovered memories” from children who were allegedly victimized are demonstrably problematic: In *Stogner v. California*, 539 U.S. 607, 631 (2003), the United States Supreme Court warned of problems that can “plague child abuse cases, where recollection after so many years may be uncertain, and ‘recovered’ memories faulty, but may nonetheless lead to prosecutions that destroy families.” *See also, e.g.*, Holdsworth, *Is It Repressed Memory with Delayed Recall or Is It False Memory Syndrome? The Controversy and Its Potential Legal Implications*, 22 *Law & Psychol. Rev.* 103, 103–104 (1998).

As a result, LOPD advises, statutes of limitations are designed to limit the ability of the state to reach back in time and charge suspects for past alleged deeds, and to provide a sense of certainty for all parties.

AOC reports that as to criminal sexual penetration charges, removing the deadline to commence prosecution for cases involving 13-17 year olds may create an issue since approximately one-third of all sexual assault (SANE) exams in the state involve adolescents or teenagers.

OTHER SUBSTANTIVE ISSUES

In its discussion of recovered memories, LOPD refers to the false memories that started the allegations in the McMartin preschool cases - which it advised ultimately led to not a single conviction. Clyde Haberman, *The Trial That Unleashed Hysteria Over Child Abuse*, N.Y. Times, Mar. 9, 2014, available at <https://www.nytimes.com/2014/03/10/us/the-trial-that-unleashed-hysteria-over-child-abuse.html>. It also advises that while statutes of limitation for most crimes have been a feature of American criminal law since the early days of the Republic, their application have been far from universal (England appears to have no general statute of limitation to criminal actions) and the time limits for prosecution of given crimes vary widely across the various states. *See* Listokin, *Efficient Time Bars: A New Rationale for the Existence of Statutes of Limitations in Criminal Law*, 31 *J. Legal Stud.* 99 (2002).

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