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FISCAL IMPACT REPORT

SPONSOR: Adair DATE TYPED: 02/16/01 HB _____
 SHORT TITLE: Sex Offender Sentencing SB 512
 ANALYST: Trujillo

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY01	FY02	FY01	FY02		
	\$ 200.0	\$ 400.0	Significant	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB511 and HB463

SOURCES OF INFORMATION

- LFC Files
- Administrative Office of the Courts (AOC)
- Administrative Office of the District Attorney's (AODA)
- Attorney General (AG)
- New Mexico Public Defender (NMPD)
- Children Youth and Families Department (CYFD)
- Corrections Department (CD)

SUMMARY

Synopsis of Bill

SB512 requires that a person convicted of criminal sexual penetration in the first degree when the victim is a child less than thirteen years of age shall, if paroled, undergo medroxyprogesterone acetate treatment or its chemical equivalent (chemical castration), in addition to any other punishment prescribed for that offense.

SB512 provides that the person shall be exempt from treatment if he has undergone or does undergo a permanent surgical alternative to hormonal chemical treatment for sex offenders.

SB512 also provides that the chemical treatment shall begin one week prior to the offender's release on parole from the physical custody of CD. It requires the sex offender to remain on the treatment program until released from parole unless before that date the Parole Board demonstrates to the satisfaction of the sentencing court that the treatment is no longer necessary. The bill also provides that the parole period for these offenders is extended for the natural life of the person paroled. SB512 provides that the federal Centers for Disease Control and Prevention shall administer and

implement the protocols required by the bill.

SB512 also appropriates \$200,000 from the general fund to the Corrections Department for expenditure in fiscal year 2002 for the purpose of implementing a hormonal chemical treatment program for sex offenders released on parole.

Significant Issues

CD reports the most salient issue for the department is the increase in costs that will result from the bill. This increase in costs will result not only from the administration of the chemical treatment program, but from lengthening the parole term of these offenders for the period of their natural life.

Also, CD does not currently provide medical services to any parolees or probationers. CD only provides medical services through a contracted medical services provider for those offenders housed in its prisons. Therefore, this will be the first time that CD will be required to provide medical services to parolees. CD will presumably be required to contract with various physicians or medical service providers in various communities around the state and is not currently funded for this expense. It may also be somewhat difficult to monitor an offender's compliance with this program.

According to CD, another issue is that the bill mandates the federal Centers for Disease Control and Prevention to administer the protocols required by the bill. The supremacy clause of the United States Constitution prohibits a state from mandating a federal agency to administer a state program. This problem could be addressed by suggesting the State will follow CDC protocols.

PERFORMANCE IMPLICATIONS

CD reports SB512 could have significant performance implications upon department prison, parole and probation programs. There would be generally a significant performance burden upon department prison personnel who would be required to administer the chemical treatment program. There could also be an increased burden upon the department's prisons, since, because these offenders would be paroled for life, violations to the conditions of parole would result in these offenders returning to department prison facilities.

SB512 will have substantial performance impacts upon the probation and parole program because of the contemplated lengthy parole terms; in addition to monitoring these offenders for long periods of time, parole officers would be charged with monitoring compliance with the chemical treatment program. Increased caseloads could result in a need to hire more parole officers to cover the additional performance burden.

FISCAL IMPLICATIONS

SB512 appropriates \$200.0 to CD in FY02 for the purposes of administering the program. The cost of the program will be recurring. Since the bill also increases the parole term for these offenders to the period of their natural life, these recurring costs will continue to grow with each year as to both the chemical treatment program as well as the ordinary costs of administering parole supervision. Since the CD has no experience administering such a program, CD is unable to determine what the costs of such a program would be. It may be that \$200,000 is sufficient to administer the program in fiscal year 2002, but such an amount may be insufficient in later years as the number of parolees participating in this program multiplies in each year.

CD reports the bill will ultimately result in a substantial increase in the number of persons being supervised on parole since the parole term for these offenders is increased to the period of their

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natural life. CD would require additional appropriations for this purpose in later years.

According to CD, by increasing the length of the parole term to the natural life of the offender, the bill also increases the likelihood that these offenders will sometime have their parole violated and be returned to prison. This will result in increased costs to house these additional offenders.

Also, the cost per client in probation and parole for a standard supervision program is \$1,536 per year. The cost per client in Intensive Supervision programs is \$3,922 per year. The cost per client in department-operated community corrections programs is \$5,519 per year. The cost per client in privately-operated community corrections programs is \$10,724 per year.

SB512 may result in a minimal increase in revenues from parole supervision fees assessed against those offenders who would now be serving a longer period of parole.

According to NMPD, this legislation is likely to have significant impact upon NMPD by the numerous constitutional issues raised. As with most new “additional penalty” legislation, the harsher or more enduring the punishment, the less likely a plea will result. The accused simply has no reason to plea to any result that results in lifetime punishment. NMPD estimates that passage of this legislation will require at least one PD III trial attorney in each of its larger Districts (three).

Further, many inmates will undoubtedly raise the issue of cruel and unusual punishment, right to bear children, right to privacy and other due process issues after conviction. The punitive measures contemplated by the Bill appear to be a condition precedent to release after the convicted has served his time. ***“A person convicted of criminal sexual penetration in the first degree when the victim is a child less than thirteen years of age shall, if paroled, undergo medroxyprogesterone acetate treatment or its chemical equivalent, in addition to any other treatment or punishment prescribed for that offense by the sentencing court.”*** It appears that unless the potential parolee accepts this ongoing punishment, he may never be released, or, if released, may be returned to prison if non-compliant. In addition to post-conviction appeal issues, ‘life parole’ will probably also raise a significant number of Habeas petitions, particularly if the parolee had already served a significant period of time in prison and declined chemical castration. As such this office also estimates that passage will result in needing two PD III appellate/Habeas attorneys. Total cost may approach \$312,000 a year.

The AG reports an additional FTE may be required to manage additional appeals. This would entail an expenditure between \$50,000 and \$70,000 depending upon the level of experience of the attorney selected.

AOC reports it will cost the judicial information system \$400 for statewide update, distribution, and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws, and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

RELATIONSHIP

NMPD reports the parole section of the bill is related to HB 463 that contemplates life parole for the sex offender. The castration section is related to SB 511 that provides for physical castration as an

alternative to chemical castration. SB 511 further states that non-compliance with chemical castration is, of itself, a Second Degree Felony. Finally, the Bill is related to HB 437 in that in the latter bill conviction of two violent sex offenses results in life imprisonment without possibility of parole.

AOC reports there may be an administrative impact on the courts commensurate with the increase in caseload and/or in the amount of time necessary to dispose of cases.

TECHNICAL ISSUES

CYFD suggests the following amendment: Section 1(C) should be amended by deleting the first and second sentences. It is not possible to suggest substituted language without first ascertaining whether such a protocol, issued by the Federal Centers for Disease Control and Prevention in Atlanta, Georgia, already exists, whether it is adequate, and/or whether some other protocol will have to be used:

~~The federal centers for disease control and prevention shall administer and implement the protocols required by this section. These protocols shall include a requirement that the person subject to treatment pursuant to this section shall be informed in writing about the effect of hormonal chemical treatment and any side effects that may result from it. The person shall provide a receipt in writing indicating that he has received this information ~~has been provided to the person.~~~~

OTHER SUBSTANTIVE ISSUES

There could also be added administrative burden of increased inmate and parolee litigation claims alleging cruel and unusual punishment under the 8th Amendment.

According to the AG SB512 mandates drug therapy for paroled sex offenders who perpetrated their crimes against victims who were under the age of thirteen. The bill specifies a particular drug for the treatment, medroxyprogesterone acetate (also known as Depo Provera), and extends the parole period to encompass the natural life of the offender. The bill delegates protocol for treatment to the Center for Disease Control and Prevention (CDC). The bill is aimed at the reduction of recidivism by a class of offenders known for their high propensity to re-offend. In research studies with voluntary participants, the drug therapy mandated has shown some promise in reduction of inappropriate physical arousal and in the inhibition of inappropriate sexual fantasy.

A number of states have implemented legislation such as the proposed bill. Typical of the challenges to its provisions are violations of equal protection, substantive and procedural due process and cruel and unusual punishment, all under state and federal constitutions. The majority of states do not mandate drug therapy until the second offense of sexual assault on a child. Only one reported case rejects drug treatment as a part of a sentence and it does so on statutory grounds inapplicable here. People v. Gauntlett, 134 Mich. App. 737, 352 N.W. 2d 310.

A number of practical problems exist in the implementation of the bill, however. For example:

The compulsory language relating to the CDC roles in the treating of parolees is unenforceable. Federal agencies cannot be given duties relating to state prisoners under state law.

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SB 512 specifies a drug to be used that is no longer the favored drug of choice for the stated purpose and which is of no benefit to most categories of sex offenders. The lack of demonstrated benefit would mitigate against involuntary treatment.

SB 512 utilizes masculine pronouns, but the question of its applicability to women is not specifically delineated. A penalty directed at only male offenders would raise constitutional questions, but the drug treatment mandated by the bill acts as a fertility inhibitor only for women.

The extended length of parole proposed would permit long-term treatment of offenders but would be unique in New Mexico law. Even where there has been a capital felony conviction the term of parole is a maximum of five years with the possibility of less at the discretion of the Adult Parole Board.

The AG reports current law provides for coercive psychological treatment of offenders as part of sentencing. The addition of "medical management" authority would permit the treating professional to make a medical determination of appropriateness of drug therapy, and the drug suited to the particular offender, without the blanket imposition of a therapy which may not be effective and would be required for the lifetime of the offender.

LAT/njw:ar