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FISCAL IMPACT REPORT



SPONSOR: Adair DATE TYPED: 01/28/02 HB _____

SHORT TITLE: Sexual Predator Commitment Act SB 123

ANALYST: Trujillo

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY02	FY03	FY02	FY03		
		\$0.1 Significant		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 Attorney’s (AODA)
- Attorney General (AG)
- Children Youth and Families Department (CYFD)
- Corrections Department (CD)

SUMMARY

Synopsis of Bill

Senate Bill 123 creates the “Sexual Predator Commitment Act”. In short, the bill creates a separate involuntary civil commitment process for the potentially long-term control, care and treatment of sexually violent predators.

CD reports the bill defines a “sexually violent offense” to include (1) criminal sexual penetration; (2) sexual exploitation of children; (3) criminal sexual contact in the fourth degree; (4) criminal sexual contact of a minor; (5) incest; (6) aggravated indecent exposure; (7) child luring; (8) an attempt, conspiracy or criminal solicitation of an offense described above; (9) any conviction for a felony offense that is essentially the same for which the person was convicted for in another state;

and (10) any other crime, that either at the time of sentencing or during subsequent civil commitment proceedings that is determined beyond a reasonable doubt to have been sexually motivated.

The bill also defines “sexually violent predator” as a person who has been convicted of or charged with a sexual violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in repeat acts of sexual violence.

The bill provides that when CD or any other similar agency with jurisdiction anticipates the release of a sexually violent predator, that agency must notify the AG and the multi-disciplinary team.

The Secretary of Corrections is required to establish a multi-disciplinary team, which may include individuals from other state agencies. The team, within thirty (30) days of receiving notice, is required to assess whether the potential predator is a sexually violent predator. The team is then required to notify the AG of its assessment.

The bill authorizes the AG to file a petition with the district court for a finding that the person is a sexually violent predator. If the court finds probable cause to believe that the person is a potential sexually violent predatory, the court is to direct that the potential predator be transferred to a county jail or other appropriate secure facility (presumably including a department prison) for an evaluation as to whether the potential predator is a sexually violent predator.

The court is then required to conduct a trial, whereby the court or jury is to determine whether, beyond a reasonable doubt, the predator is a sexually violent predator. If the court or jury determines that the person is a sexually violent predator, the person is committed to the custody of the Secretary of Health for control, care and treatment until such time that the committed person’s mental abnormality or personality disorder has so changed that the person is safe to be at large.

Significant Issues

The AG reports a Potential Constitutional Challenge; indeterminate recurring fiscal impact.

According to the PD, the bill ignores diagnostic reality. There is no mental health treatment for persons with “personality disorders” and this designation may be an excuse to lock up people for life. “Mental abnormally” as defined is also not treatable as is the case with congenital defects or acquired behaviors. It may be problematic for a reputable psychologist to make this finding of diagnosis.

While most constitutional rights are preserved for trials, expert witnesses, and burdens of proof on the State, persons determined to be incompetent to stand trial are deprived of their right not to stand trial if they are incompetent. Right to counsel and the true costs of representation are not. The commitment provided by the legislation is indeterminate in its term and may extend up to and including the entirety of the person’s natural life. The legislation does not provide for treatment other than stating that “control, care and treatment shall be provided.” Section 8(A). The bill contains no appropriations, especially for representation predators and/or committed persons.

FISCAL IMPLICATIONS

The bill does not contain an appropriation.

The AG reports the Act may require additional personnel within the agency. The passage of the bill would require monies for prosecutions and appeals, the CD for providing multidisciplinary teams and perhaps housing, the district courts and judges to handle each stage of the proceedings which includes jury trials, the PD's office to provide counsel and experts for any indigent accused under the Act, the counties jails for holding the additional individuals, and the Department of Health for the long-term care and treatment of committed individuals. The Act anticipates a procedure for potential release of individuals, tracked by the State for a minimum of 5 years or the ultimate life-time commitment of others. New facilities may be required as the Act requires these individuals to be housed separately from others.

CD reports the bill will result in a minor increase in costs to the department, as a result of the requirement that the Secretary of Corrections establish a multi-disciplinary team. Also, there will probably also be a small to moderate increase in costs to CD as a result of the ability of the district court judges to order that potential sexual predators be placed in the custody of the CD after a probable cause determination has been made.

There could be a minimal decrease in costs to CD's Probation and Parole Division if the civil commitment of these sexual predators resulted in slightly smaller parole caseloads. There could also be a minimal decrease in revenue if the civil commitments result in fewer offenders being placed on probation or parole; which in time will result in slightly less probation and parole supervision fees being collected.

According to the PD, the number of persons who will be subjected to commitment under the legislation is critical. The legislation permits the classification of any person who has been convicted of a sexually violent crime as a sexually violent predator. It provides for commitment proceedings for nine specific crimes and a catch-all category of any crime that is determined to have been sexually motivated. The initial hearings alone on commitment require two probable cause hearings and a trial by jury with expert testimony for the State and for the person sought to be committed. At all stages of the proceedings, whether for commitment, release, or review of conditions of confinement, the person committed is entitled to representation by counsel, and generally, a trial by jury. The legal work involved in presenting such cases is highly specialized and requires a working knowledge of psychiatric diagnoses and treatment modes, in addition to the psychological and sociological history of the person committed. The necessary procedures under the legislation will require more trial work for a specialized unit of the PD, and more appeals for the Appellate division.

Because of the extremely high cost of housing and treating such persons, it is unclear how many persons will be identified as sexually violent persons under the legislation. Since procedures will be repeated annually, such as reviews, even ten such clients per year would likely require the addition of two PD IV attorneys a PD III an additional social worker, and investigator. Total costs would also include expert witness resources. PD projects a total cost of at least \$500,000 for the agency.

PD reports the legislation is not real clear on who is responsible for the cost of expert witnesses. It does provide that the district court assist in obtaining experts and approves payment of experts hired to do evaluations. If the person sought to be committed is responsible for these costs, the impact on

the PD's budget is potentially great as expert psychological evaluations and testimony run into thousands of dollars per case.

The AODA reports an increase in attorneys and support staff would be needed to meet the requirements of this new law. There is no increase in funding for the creation of additional duties for the District Attorney's office.

AOC reports there will be a minimal administrative cost for statewide update, distribution, and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this Act and commenced proceedings/hearings/trials related to the determination of probable cause and/or whether the potential predator is a sexually violent predator (Sections 5, 6, and 7 of the Act). Trials may include a jury. 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. Also refer to Section 4 of this bill analysis. Indigent persons will be entitled to counsel in this civil proceeding. This could impact the Court Appointed Attorney Fee Fund. Any impact would relate to the number of cases, hearing and reviews. There will also be costs to the state for any experts hired on behalf of indigent persons.

ADMINISTRATIVE IMPLICATIONS

CD reports the bill will result in additional administrative burdens upon the agency as it relates to the establishment and maintenance of a multi-disciplinary team and a decrease on the administrative burden within the Probation and Parole division as it relates to the civil commitment of the sexual predators.

According to the AODA, an increased workload will require more staff and administrative costs to district attorney offices.

According to the AOC, there will be an administrative impact on the courts as a result of:

- an increase in the number of petitions filed in the district courts (pursuant to Section 5);
- the requirement that the courts determine whether probable cause exists to believe that the potential predator is a sexually violent predator (pursuant to Section 6);
- where the court finds probable cause exists, the court shall also be responsible for ordering an evaluation and this evaluation must be conducted by a professionally qualified individual as determined by the court;
- the resulting hearing to contest the probable cause finding;
- any resulting trial (and jury) to determine whether the person is a sexually violent predator;
- providing assistance to the potential predator in obtaining an expert or professional person to perform an examination or participate in the trial on the potential predator's behalf (pursuant to Section 7);
- the court's requirement to conduct an annual review hearing of the status of the committed person;
- the court's requirement to hold a hearing for transitional release which may include a jury trial;
- any emergency ex parte orders;
- any hearings resulting from the return of a person to a commitment facility after being in a transitional release program;
- any hearings held to determine transfer to conditional release from transitional release;

- and any hearings held to determine transfer to final discharge from conditional release.

Any or all of these required events may increase the courts' caseload and/or the amount of time necessary to dispose of these and other cases.

CONFLICT/DUPLICATION/COMPANIONSHIP/RELATIONSHIP

AODA indicates this bill creates new procedural guidelines for the administration of its purposes which may conflict with the procedural guidelines of the Courts. Sections with potential conflict of current civil and criminal Court procedures include but are not limited to: Section 5 (B), Section 7 (B), and Section 8 (C).

TECHNICAL ISSUES

The AG suggests, to come into compliance with U.S. v. Crane, Section 3, D and J could be amended to include language that requires a finding that the person has serious difficulty in controlling the person's behavior.

For example:

“J. “sexually violent predator” means a person who has been convicted of or charged with a sexually violent offense, who suffers from a mental abnormality or personality disorder that makes the person likely to engage in repeat acts of sexual violence; and who has a serious difficulty in controlling the person's behavior;”.

AOC suggests Section 4(A), should the bill refer to subsection C in addition to subsection D? Subsection C establishes the multi-disciplinary team and subsection D establishes the prosecutor's review committee.

OTHER SUBSTANTIVE ISSUES

The AG reports, the State of Kansas has a Sexually Violent Predator Act. The U.S. Supreme Court has recently upheld the constitutionality of the Kansas Act. However, on Jan 22, 2002, in *Kansas v. Crane*, No. 00-957, the U. S. Supreme Court held that civil commitment of sexual offenders requires a determination by the trial court/jury that the sexual offender lacked control over his dangerous behavior. The proposed N.M. bill appears to closely follow the Kansas Act and is therefore also subject to the recent Supreme Court opinion.

Additionally in *Kansas v. Crane*, the Court indicated that it did not consider the constitutionality of one's confinement based on solely an “emotional” abnormality, as vs. volitional or cognitive impairments. The proposed act defines “mental abnormality” as “a congenital or acquired condition affecting the **emotional** or volitional capacity that predisposes a person to commit sexually violent offenses. . .” The potential for a constitutional challenge on this limited issue exists.

According to the PD, the legislation deprives incompetent persons the right not to be subjected to a trial at which they cannot assist. While similar legislation has been upheld in many states and by the United States Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346 (1997), this issue was not presented in that case and would be challenged in the New Mexico courts. Other constitutional challenges under Federal and New Mexico Constitutional Law would arise as cases move through the system. The entire process of this bill will be attacked in the trial and appellate courts.

LT/njw