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## FISCAL IMPACT REPORT

**SPONSOR** Stewart **ORIGINAL DATE** 02/09/15  
**LAST UPDATED** 03/03/15 **HB** \_\_\_\_\_

**SHORT TITLE** Sex Offender Parole Conditions **SB** 151/aSPAC/aSJC

**ANALYST** Cerny

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
NMCD		(Indeterminate)	(Indeterminate)			General Fund
AGO/PDD		\$ 30.0	\$ 30.0			General Fund
<b>Total</b>		(Indeterminate)	(Indeterminate)			General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Synopsis of SJC Amendment

Senate Judiciary Committee amendment to Senate Bill 151a/SPAC effects two changes to the once amended bill:

1. It provides on page 3, line 15 that the licensed mental health clinician who administers the evaluation of sex offenders must have a contract with the “State of New Mexico” rather than the HSD. This is a correction of a technical error, as such clinicians contract with the state’s current Statewide Entity (SE), Optum Health.
2. It clarifies on page 5, line 25 that no sex offender may remain incarcerated for a period of more than five years without a full review hearing “represented by counsel” [new language] pursuant to subsection D of the bill.

#### Synopsis of SPAC Amendment

Senate Public Affairs Committee amendment to Senate Bill 151 would amend the Probation and Parole act in the following new ways:

1. Child solicitation by electronic communication device would be removed from the list of offenses eligible for a minimum of 5 years supervised parole, as proposed in Subsection

(A)(1).

2. Proposed Subsection (D) would be amended, prohibiting the continuation of probation on the sole basis of the circumstances of the underlying sex offense. Additional considerations would include “the sex offender's lack of progress in treatment or rehabilitation, failure to comply with conditions of release and the results of a risk and needs assessment conducted within the six months prior to the review hearing.”
3. Disallow the parole board from ordering a sex offender released on parole to be subject to drug and alcohol testing, even though a parole agreement may have as one of its conditions the prohibition of alcohol and drug use.

Clarifies that when a sex offender is being reviewed for parole that the parole board will take into consideration victim notification procedures already in statute.

AGO analysis advises that:

These amendments further diminish community safeguards built into the codified statute. By striking child solicitation by communication device from the list of offenses triggering this statute, SB 151 would serve only as an impediment to instituting supervised probation for sex offenders. The seriousness of the crimes committed by sex offenders should bear significant weight in determining the duration of supervised probation.

AODA states that “Concerns remain about too-early parole for these most recidivist and difficult offenders and its effect upon victim security, especially the younger victims.”

#### Responses Received From

Administrative Office of the Courts (AOC)  
Administrative Office of the District Attorney (AODA)  
Office of the Attorney General (AGO)  
New Mexico Sentencing Commission (NMSC)  
Public Defender Department (PDD)  
New Mexico Corrections Department (NMCD)  
Human Services Department (HSD)

#### **SUMMARY**

##### Synopsis of Original Bill

Senate Bill would amend Section 31-21-10.1 NMSA 1978, within the Probation and Parole Act, to revise the terms and conditions of parole for sex offenders. The bill would include child solicitation by electronic communication device within the Probation and Parole Act, as a sex offense requiring a five to 20 year indeterminate term of supervised parole. This would make this section congruent with the definition of sex offenses pursuant to the Sex Offender Registration and Notification Act (Section 29-11A-3(I) NMSA 1978).

SB 151 also requires a risk and needs assessment will be performed by a licensed mental health clinician who has a contract with the Human Services Department. The clinician must

administer a dynamic evaluation instrument that has specific relevance to evaluating sex offenders and that have been validated. The sex offender and the attorney general may also submit a separate, independent assessment at the party's own expense. The assessment would be used as evidence at any review hearing held by the parole board.

While the bill does not change the language that the AGO has the burden of proving by clear and convincing evidence at any such review hearing that the offender should remain on parole, it clarifies that the AGO must meet this burden by showing the offender has not progressed with treatment or rehabilitation or has otherwise failed to comply with conditions of release.

The bill also clarifies that when polygraph examinations are required by the parole board as a condition of parole, that any such examination that would implicate potential criminal liability and that are required for parole compliance, must be accompanied by a use immunity agreement, thus protecting the offender from self-incrimination.

The bill also requires a review hearing in front of the parole board after any sex offender has been five years on parole and removes the requirement that the five year period only applies to *supervised* parole. Finally, the bill also clarifies that if a sex offender has his or her parole revoked and is returned to prison, the parole board must review the offender's eligibility to be released at one-year intervals thereafter. It also indicates that at no point shall a sex offender remains incarcerated for more than five years without a full review hearing.

## **FISCAL IMPLICATIONS**

AGO analysis states:

SB 151 allocates no appropriation for the funding of the licensed mental health clinician required for every risk assessment in subsection C. There are also no appropriations allocated to the AGO to conduct independent risk assessments. Requiring a formal risk assessment in all cases has significant cost implications for the AGO based on the volume of yearly parole hearings and would require the AGO to obtain a risk assessment in every case because of the inherent danger of sex offenders and need to protect the community.

Reliance on a contract clinician alone would be insufficient because the report or findings will almost always be contested by the sex offender if the clinician recommended continued supervision, thus requiring the AGO, under the structure of this legislation, to provide a second expert opinion swaying the board. Alternatively, if the HSD clinician found minimal risk, and the sex offender did not contest the finding, the AGO would essentially serve as the provider of a second opinion regarding possible risk to the community.

Based on a modest estimation of twenty-one hearings a year, and minimal expert fee of \$250 an hour and at least three hours of expert time which would include conducting a risk assessment, drafting a report, and providing testimony at subsequent hearing, the cost to the AGO would be at least \$15,750 and could be higher than \$25 thousand depending on the specifics of each case, an expert's hourly rate, and amount of materials subject to review by the expert.

NMCD states that:

..if the sex offender is ultimately released from parole supervision based on the risk and needs assessment at the legally mandated review hearings held after five years of supervised parole (and at two and one half year intervals thereafter if needed), then NMCD probation and parole (PPD) staff will not have to supervise that offender on parole (or in the case of in-house parolees, NMCD prison staff would no longer have to incarcerate the offender in prison). NMCD's PPD or prison caseload would be reduced by one offender, and the following costs would be saved for each offender released from parole supervision or prison because of the assessment.

The classification of an inmate determines his or her custody level, and the incarceration cost varies based on the custody level and particular facility. The average cost to incarcerate a male inmate is \$43,603 per year in a state-owned and operated prison, and the average annual cost in a privately operated prison is \$29,489 (where primarily only level III or medium custody inmates are housed).

The cost per client in Probation and Parole for a standard supervision program is \$2,783 per year. The cost per client in Intensive Supervision programs is \$2,563 per year. The cost per client in Community Corrections is \$3,664 per year. The cost per client per year for female residential Community Corrections programs is \$27,412 and for males is \$18,100. Offenders placed on probation for the crimes covered by this bill seem likely to be immediately or eventually placed on standard supervision.

However, since the number of parolees who would be affected by SB 151 is unknown, the cost savings are indeterminate.

PDD states that adding one offense to the list of enumerated offenses may have some fiscal impact on the PDD. This impact, however, may be reduced by the authorization of private counsel representation. The PDD would only pay for the sex offender risk-needs assessment if submitting an independent assessment, but could incur some additional expenses.

HSD analysis stated that their agency “had no programs targeted at the evaluation or treatment of sex offenders on parole...while the Department of Health-Behavioral Health Institute operates specialized programs for sex offenders and the Corrections Department routinely assesses parolees.”

## **SIGNIFICANT ISSUES**

The bill modifies language in Subsection A to clarify a presumption that sex offenders serve the minimum five years on parole and that the state now carries the burden of proof if a sex offender is to remain on parole supervision beyond that point.

AGO analysis states:

The bill creates a low standard for a sex offender to achieve release from parole. Subsection (D) requires the attorney general to demonstrate that a sex offender has made *no* progress with treatment or rehabilitation to remain on supervised parole. Therefore, if a sex offender makes *any* perceivable progress, the sex offender will be removed from supervised parole. With such a high burden placed upon the attorney general, it may become very rare for a sex offender to remain on parole more than 5 years. This

heightened standard undermines the legislative intent behind enactment of the indeterminate period of parole, as codified in Section 31-21-10.1(A).

The legislature enacted this statute because it deemed offenders of certain crimes to be inherently dangerous. These crimes include criminal sexual penetration of a minor (Section 30-9-11), kidnapping (Section 30-4-1) with the intent to inflict a sexual offense, criminal sexual contact of a minor (Section 30-9-13), and sexual exploitation of children (Sections 30-6A-3; 30-6A-4).

Due to the threat posed to our community, the legislature determined that these sex offenders required indeterminate supervision. SB 151 undercuts this community safeguard.

AODA analysis concurs suggesting that in effect this bill immediately reduces an offender's parole obligation to only five years at the outset (with a possibility of expanding it later), rather than allowing a court to impose up to the maximum at the outset, with review periodically after the first five years. The analysis states:

This is a subtle yet serious change downward in offender accountability, which undercuts the reasons behind the longer parole for sex offenders. This reduces the prosecution's credibility in assuring victims that offenders will be held fully accountable and supervised, especially through the minority of the youngest victims, and leaves the case vulnerable to dismissal at an earlier time frame to decisions by persons removed from the initial case.

NMCD generally gives a positive analysis to this bill:

When a sex offender who has his parole revoked and is returned to prison requests a hearing after a year, it seems reasonable to require the Parole Board to hold a review hearing at one year intervals thereafter.

Finally, regarding those sex offenders who are eligible for parole but are generally unable to secure an approved parole plan and thus remain in prison, this bill creates a more intelligent approach to decision making as the performed expert assessments would form a more defensible basis for parole plans couched in relevant social science relating to risk for these offender types.

The bill also reasonably requires a review hearing after five years, regardless of whether the offender is on supervised parole in the community or still in prison on parole (due to a lack of an approved parole plan). Under existing law, a sex offender could serve their entire 20 year parole term in prison without a review hearing, and at great fiscal (incarceration) expense to the NMCD.

Additionally, NMCD provide sex offenders serving parole in prison with sex offender treatment based on a cognitive behavioral model, but under the current law these offenders never get a review hearing in front of the parole board. The assessment required by this bill would be used at the now requisite hearing (after five years and two and one-half year intervals thereafter), and the assessment could demonstrate in some cases that the in-prison treatment has made it appropriately safe for the offender to leave

prison and enter the community.

## TECHNICAL ISSUES

NMSC analysis points out that licensed mental health clinicians who may possess the credentials and experience to administer a dynamic evaluation instrument do not contract with HSD. Clinicians contract with OptumHealth New Mexico.

## OTHER SUBSTANTIVE ISSUES

Sex offender assessment clinicians may not be uniformly available throughout the state.

PDD analysis states that without the clarification SB 151 provides:

...there is ambiguity as to whether the minimum 5 years is actually presumed, or whether the parole board can lawfully extend the term indefinitely without any reason, or based solely on the nature of the underlying offense. This could arise in litigation claiming the indeterminate sentence is void for vagueness. “A statute is void for vagueness if...it fails to create minimum guidelines for the reasonable police officer, prosecutor, judge, or jury charged with enforcement of the statute, and thereby encourages subjective and ad hoc application.” *State v. Jacquez*, 2009-NMCA-124, ¶ 6.

By not specifying the procedures upon revocation or what elements the state must prove to keep sex offenders on indeterminate parole, the statute currently fails to create minimum guidelines. Many sex offenders who should be released from prison or parole supervision will remain in prison or on parole supervision, resulting in a significant fiscal impact on all agencies involved. The parole board currently cannot consider a risk and needs assessment, a relevant factor.

Currently, without any provision for use immunity, incriminating statements during a polygraph exam may be coerced by threat of a parole violation, contrary to the Fifth Amendment.

CAC/bb/aml/je