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## FISCAL IMPACT REPORT

SPONSOR SHPAC ORIGINAL DATE 3/05/21  
LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_  
SHORT TITLE Hate Crime Sentencing Offenses SB 443/SHPACS  
ANALYST Glenn

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

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	See Fiscal Implications					

(Parenthesis ( ) Indicate Expenditure Decreases)

### **SOURCES OF INFORMATION**

LFC Files

#### Responses Received From

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

### **SUMMARY**

#### Synopsis of Bill

The Senate Health and Public Affairs Committee substitute for Senate Bill 443 amends Section 31-18B-3 of the Hate Crimes Act to add a list of specific noncapital felonies subject to sentence enhancements in the form of longer prison terms when the motivation for the crimes is hate. The bill makes mandatory the court's discretion under current law to include an alternative sentence of any combination of community service, treatment, or education; requires the alternative sentence relate to the "impact, intention or nature" of the hate crime; and makes mandatory the court's discretion under current law to suspend or defer the sentence or grant a conditional discharge.

The bill also amends Section 31-18B-3's provisions for misdemeanor offenses motivated by hate by making mandatory the court's discretion under current law to suspend or defer the sentence or grant a conditional discharge.

There is no effective date of this bill. It is assumed the effective date is 90 days following adjournment of the Legislature.

## FISCAL IMPLICATIONS

LOPD notes hate crime enhancements are rarely pursued, so it is unlikely the bill's proposed changes would have a fiscal impact on LOPD.

AOC states 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 law and commenced prosecutions and appeals from convictions. To the extent, however, the enumeration of crimes assists the court in identifying underlying crimes for which sentencing may be increased if the crime is proven to be a hate crime, fewer court resources and less court time may need to be expended. 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.

## SIGNIFICANT ISSUES

NMAG notes the title of the bill purports to "enumerate" the types of crimes that can be enhanced as hate crimes, while the text of the bill lists certain crimes included among the crimes that can be enhanced as hate crimes. This creates some uncertainty about whether the bill is intended to limit the crimes subject to enhancement as hate crimes. NMAG states, presumably, the crimes enumerated in the bill are not meant to be exhaustive, in which case NMAG suggests clarifying the bill's intent by changing "including" to "including *but not limited to*."

Alternatively, LOPD asks whether the list of crimes is necessary. LOPD notes Section 31-18B-3 currently applies the sentence enhancement to a "noncapital felony motivated by hate," which, by its terms, includes all noncapital felonies that exist under current law. Consequently, LOPD observes the addition of a list of specific noncapital felonies included in those subject to hate crime sentence enhancement does not change the meaning of the law or affect a court's current authority to enhance any and all noncapital felonies as hate crimes.

Like NMAG, LOPD notes the uncertainty created by the term "enumerate" in the bill's title and the list of specific hate crimes in the text. LOPD also acknowledges it is unlikely the bill is intended to limit hate crimes subject to sentence enhancement to the listed felonies and notes the list omits assault and battery, the most common potential hate crimes. Nevertheless, LOPD is concerned, because the list of felonies has no effect on the applicability of the current law, the addition of the list may invite a contrary interpretation. LOPD explains, under the rules of statutory interpretation applied by courts, a statute is interpreted to give effect to the entire text of a statute and no part is treated as superfluous. This opens up the possibility that, to avoid an interpretation that makes the list of felonies superfluous, a court might determine the list was added to limit the statute's applicability to the felonies specifically listed and to exclude those that do not appear on the list.

Regarding the bill's changes to the "alternative sentence" provisions, LOPD notes it is reasonable to require any community service, treatment, or education component to the sentence have a targeted goal of addressing the nature of the underlying hate crime. However, changing that component of sentencing from discretionary to mandatory may be problematic. It may be

challenging for courts to order such aspects of the sentence in parts of the state where such services are not available, and so it may be more practical to retain the judge's discretion in imposing such rehabilitative components to the sentence.

Finally, LOPD raises two issues in regard to the amendments to Section 31-18B-3's provisions for misdemeanor offenses motivated by hate. First, in contrast to its changes in subsections A and B, the bill does not require the "alternative sentencing" components in subsection (D) relate to the "impact, intention or nature" of the hate crime. Second, LOPD states mandating a suspended or deferred sentence or conditional discharge for misdemeanors and petty misdemeanors is extremely unusual.

AODA notes, by deleting the word "may" and adding the word "shall," the bill mandates a sentencing court to "suspend or defer any or all of the sentence or grant a conditional discharge, unless otherwise provided by law." Because of this change, it appears any sentencing enhancement for hate crimes will be subject to probation only and not incarceration. Additionally, AODA states it is not clear whether, should a defendant violate their probation imposed as a result of a sentencing enhancement for hate crimes, the defendant would ever be incarcerated for the hate crime sentence enhancement.

In connection with the bill's provisions making mandatory a judge's current discretionary sentencing authority, AOC quotes a publication by the National Judicial College, which states, "Judicious use [of judicial discretion] increases fairness and can help to promote an equitable legal process by allowing the judge to consider individual circumstances in instances when the law is insufficient or silent." (The National Judicial College, *Judicial Discretion: 10 Guidelines for Its Use*, [www.judges.org/news-and-info/judicial-news-judicial-discretion-guidelines/](http://www.judges.org/news-and-info/judicial-news-judicial-discretion-guidelines/).)

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