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FISCAL IMPACT REPORT

ORIGINAL DATE 02/03/19

SPONSOR Fajardo **LAST UPDATED** _____ **HB** 190

SHORT TITLE Permanent Sex Offender 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)
 Department of Public Safety (DPS)
 Law Offices of the Public Defender (LOPD)
 New Mexico Attorney General (NMAG)
 New Mexico Corrections Department (NMCD)
 New Mexico Sentencing Commission (NMSC)

SUMMARY

Synopsis of Bill

Section 1 of House Bill 190 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 protection order 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A no contact order may be rescinded at any time upon the motion of the state for the victim or the defendant if the court finds the grounds upon which it was based no longer exist.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 190 also amends several sections of existing law to include a victim protected by this form of 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 190 creates a ten year statute of limitations for prosecution of two crimes against children: alleged criminal sexual penetration and alleged criminal sexual contact, which period begins to run once the victim attains the age of 18.

The effective date of this bill is July 1, 2019.

FISCAL IMPLICATIONS

Proceedings during sentencing related to no contact orders will lead to increased costs for district attorneys, public defenders 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.

Setting a ten year statute of limitations for prosecution of certain sexual offense crimes against children, which period does not begin to run until the victim reaches the age of 18, may lead to increases in prosecutions for those crimes, also resulting increasing costs for district attorneys, public defender and the courts. LOPD advised in its analysis of a similar bill in the 2017 session (HB 353) 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

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 probation and parole agreements for convicted sex offenders include no contact orders.

HB 190 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 FVPA, only the victim may seek modification or rescission. See NMSA 1978, Section 40-13-6. HB 190, 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.

As to the provision in Section 19(E) of the bill allowing for warrantless arrest for violation of a permanent no contact order, LOPD advises it risks constitutional challenge under *Campos v State*, 1994-NMSC-012 and *State v Paananen*, 2015 -NMSC- 031. LOPD warns it is possible that the provision could be challenged as legislating away a Fourth Amendment and Article II, Section 10 right (requiring an arrest warrant absent exigent circumstances where it is practicable to obtain one), which may be argued to be more properly the domain of the courts.

Ten Year Statute of Limitations

Section 3 sets a 10-years statute of limitations to commence prosecution for certain crimes against children, which period would begin to run upon the victim reaching the age of 18. NMSC calls attention to the impact of this bill on the existing limitations period for first degree criminal sexual penetration which under current law is that perpetrated on a child under 13 by the use of force or coercion that results in great bodily harm or great mental anguish to the victim. See Section 30-9-11(D). To the extent this crime constitutes a first degree violent felony, under current law there is no statute of limitations. See Section 3(J) of HB 190. Additionally, this provision in HB 190 may create confusion with the provisions of existing law allowing tolling of the statute of limitations for prosecuting when DNA evidence is available until it is matched with a suspect. See Section 30-1-9.2, NMSA 1978. Similarly, NMAG notes a potential conflict with existing law governing statute of limitations as to certain sexual offenses involving children until the victim turns 18 or until report is made to law enforcement.

OTHER SUBSTANTIVE ISSUES

AOC recognizes that, while HB 190 streamlines the process for a victim of a sex offense to be able to obtain a permanent no contact order against the defendant, the process it outlines likely will have a significant impact on the criminal judges. In order to reduce that impact, removing the requirement that a judge “shall enter written findings of fact and the grounds on which the order is issued” may be warranted. AOC suggests, for example, a standardized permanent no contact order form approved by the Supreme Court--similar to protection orders issued under the FVPA--may be more efficient by having a judge fill out a standard form, rather than requiring separate written findings. In addition, the standard forms would ensure that all permanent no

contact orders issued by a district court would be consistent in form and content, making enforcement of violations more likely.

AMENDMENTS

AOC suggests these amendments:

- Subsection D(1): add the terms “contact, and “threaten” to the list of prohibited activities, and “school” as another location to be more comprehensive; and
- Subsection D(2): add “contacting the victim through a third party” since this a common tactic often used to circumvent contact prohibitions in domestic violence orders of protection.

MD/gb