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## FISCAL IMPACT REPORT



SPONSOR: Adair DATE TYPED: 01/28/02 HB \_\_\_\_\_

SHORT TITLE: Treatment For Certain Sexual Offenses SB 63

ANALYST: Trujillo

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY02	FY03	FY02	FY03		
	\$200.0			Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to Appropriation in The General Appropriation Act

### SOURCES OF INFORMATION

LFC Files

Responses Received From:

- Administrative Office of the Courts (AOC)
- Administrative Office of the District Attorney's (AODA)
- Department of Health (DOH)
- Corrections Department (CD)

### SUMMARY

Synopsis of Bill

Senate Bill 63 appropriates \$200.0 from the general fund to CD for the purpose of implementing a program of hormonal chemical treatment for sex offenders released on parole on the condition of participating in the program.

CD reports this bill requires that a person convicted of criminal sexual penetration in the first degree when the victim is a child less than thirteen (13) years of age shall, if paroled, undergo medroxyprogesterone acetate treatment or its chemical equivalent, in addition to any other punishment prescribed for that offense. (In other words, chemical castration).

The bill 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.

The bill also provides that the chemical treatment shall begin one week prior to the offender's release on parole from the physical custody of the CD. It requires the sex offender to remain on the treatment program until released from parole unless before that date the APB 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.

The bill provides that the federal Centers for Disease Control and Prevention shall administer and implement the protocols required by the bill.

### Significant Issues

DOH reports this is a highly controversial and complex issue with limited literature available related to this treatment. According to sexual treatment experts in New Mexico and national research studies, chemical treatment using medroxyprogesterone acetate has had limited success. This chemical castration intervention will not stop offenders who choose not to change their behavior. Chemical treatment, if used, should be coupled with group and/or individual therapy.

A permanent surgical alternative to hormonal treatment for sex offenders does not exist. It appears the language is referring to 'surgical castration' but it is not clear. If this is the intent, this is a problem as there is a limited amount of literature regarding the efficacy of surgical castration for the treatment of sex offenders. The mechanism of the effects on the brain of medroxyprogesterone acetate is not the same as the effects of surgical castration. The use of surgical castration is not reversible and may be medically unethical.

The parole board would be charged with lifelong monitoring of individuals not only for compliance with their conditions of parole, but also for the effectiveness of a treatment for which little research exists. The parole board would presumably work with medical doctors or others who could monitor effectiveness of the treatment. It would appear difficult to develop parameters of effectiveness for the treatment.

According to DOH, a final significant, and potentially erroneous issue of SB 63 is the assumption that all sex offenders are male. Medroxyprogesterone acetate (Depo-Provera) is unlikely to be effective for female sex offenders.

According to CD, an increase in costs will result from the administration of the chemical treatment program, and 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 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.

CD reports the bill mandates the federal Centers for Disease Control and Prevention (CDCP) to administer the protocols required by the bill. The supremacy clause of the United State 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 CDCP protocols.

### **FISCAL IMPLICATIONS**

The appropriation of \$200.0 contained in this bill is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of fiscal year 2003 shall revert to the general fund.

According to CD, 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. Since CD has no experience administering such a program, the department is unable to determine what the costs of such a program would be. It may be that the \$200,000 is sufficient to administer the program in fiscal year 2003, but such an amount may be insufficient in later years as the number of parolees participating in program multiplies in each year.

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.

CD reports the private prison annual cost of incarcerating an inmate based upon Fiscal Year 01 actual expenditures is \$22,787 per year for males. The cost per client to house a female inmate at the privately operated facility in Grants is \$24,480 per year. Any net increase in inmate population will be housed at a private facility.

The cost per client in Probation and Parole for a standard supervision program is \$1,381 per year. The cost per client in Intensive Supervision programs is \$4,785 per year. The cost per client in Department-Operated Community Corrections programs is \$5,558 per year. The cost per client in Privately-Operated Community Corrections programs is \$10,746 per year.

CD indicates the bill 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.

There could also be added costs of defending increased inmate and parolee litigation claims alleging cruel and unusual punishment under the 8<sup>th</sup> Amendment.

AODA reports an increase in trials due to the required punishment will require more assistant district attorneys and support staff over a varying period of time.

AOC reports there will be a minimal administrative cost for statewide update, distribution, and documentation of statutory changes. The fiscal implications on the judiciary will directly follow the amount of litigation that is generated or, alternatively, avoided by the Act.

### **ADMINISTRATIVE IMPLICATIONS**

According to CD the bill will result in a significant increase in the administrative burden upon CD personnel who will be required to administer the chemical treatment program. Ultimately, CD may need additional FTE to cover these additional administrative burdens.

AODA reports an increased workload will require more staff and administrative costs to District Attorney offices.

AOC indicates 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**

SB 63 assumes that all sex offenders are male. The noted chemical treatment is unlikely to have the desired effect on female offenders.

## **OTHER SUBSTANTIVE ISSUES**

According to AODA, this bill creates a question of cruel and unusual punishment pertaining to the Eighth Amendment of the United States Constitution and Section Thirteen of the New Mexico Constitution.

Castration can only be used against male offenders, there is no equivalent punishment for female offenders who are convicted of this crime.

The Supremacy Clause of the United States Constitution may prevent New Mexico's use of the Federal Centers for Disease Control in this manner.

Section D states that the Corrections Department or Parole Board can not force the doctors it employs to administer the castrating drugs or physical equivalent. This section makes it unclear who or what agency would be performing the required treatment.

DOH provides the following:

According to sexual treatment experts in New Mexico and national research studies, chemical treatment using medroxyprogesterone acetate has had limited success. This chemical castration intervention will not stop offenders who choose not to change their behavior. Use of medroxyprogesterone acetate for criminally deviant sexual behavior has only been studied in men (the bill does not specify sex of the criminal treated), is more effective in groups that can be identified by psychiatric evaluation, may be safer in groups that can be identified by medical history and examination and requires careful and frequent monitoring to avoid potentially deadly adverse drug events. Chemical treatment, if used, should be coupled with group and/or individual therapy.

Research regarding "sex offenders" suggests that taking medroxyprogesterone acetate or its equivalent is an effective treatment component for individuals whose sexual behavior is characterized as compulsive. It cannot be assumed that compulsivity is always characteristic of this particular subset of convicted offenders. SB 63 also assumes that characteristics of the legally defined population of "those convicted of first degree criminal sexual penetration of a child under 13 years of age" is the same as that of any group that has participated in clinical research.

For medroxyprogesterone acetate, which requires dosing every three months, medical monitoring for potential adverse drug effects should be done with every dose given. For medically equivalent chemical treatments, adverse drug effect monitoring will require monitoring at intervals consistent with the known adverse effects. For any chemical treatment used, medical

evaluation should be done to evaluate the sexual offender's risk of adverse effects. Those offenders with an increased risk of permanent adverse effects should not be given chemical treatment.

Medroxyprogesterone acetate can result in side effects. According to the 2001 Physician's Desk Reference, it is indicated only for pregnancy prevention. Contraindications include liver dysfunction or disease, active thrombophlebitis and/or cerebral vascular disease. Adverse reactions experienced by more than 5% of 3,900 subjects (all women) in clinical trials included headache, weight changes, backache and edema. In men, a potentially deadly adverse side effect is pulmonary embolus.

The rationale driving other states' use of medroxyprogesterone acetate for male criminal sex offenders is that the drug lowers blood serum testosterone levels, thereby also lowering sexual drive and aggression. It is, however, still possible for offenders taking this drug to engage in both criminal and non-criminal sexual behavior. Men on chemical treatment can still attain an erection, ejaculate and engage in sexual intercourse.

There are also legal issues involved in enactment of SB 63. If enacted, the statute could be challenged on constitutional grounds, including potentially cruel and unusual punishment and liberty interest challenges. The statute prescribes the use of a chemical treatment for a long term for which there are no widely accepted studies regarding its long-term effects. The statute provides no regular process for review of whether or not the treatment remains necessary. It only provides that the board may demonstrate to the sentencing court lack of further need for treatment. Additionally, there could be great liability in mandating treatment to individuals because such treatment is not a widely researched or accepted practice, and long-term effects are not yet known. Also, based upon prior court cases, parole in excess of five years probably cannot be imposed for crimes sentenced prior to the statute's enactment.

This statute also appears to mandate by its use of the term "shall" that a federal entity, the Centers for Disease Control and Prevention (CDC), develop and implement a protocol for a state statute. CDC has no personnel stationed in New Mexico whose duties could include those required by this Act. No state entity is mentioned, except the specific exclusion of the Department of Corrections.

DOH suggests developing further medical and other research data to identify a population that would most benefit from proposed treatment, keeping in mind that a legal definition or determination may not be the best manner by which to identify those they may benefit from any proposed chemical treatment. Fund more treatment for sexual offenders that are less intrusive and, hence attach less potential liability.

**LAT/njw**