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**FISCAL IMPACT REPORT**

SPONSOR: Adair DATE TYPED: 02/21/03 HB \_\_\_\_\_

SHORT TITLE: Sexual Predator Civil Commitment Act SB 88

ANALYST: Fox-Young

**APPROPRIATION**

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY03	FY04	FY03	FY04		
			Significant \$0.1	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to/Partially Duplicates HB 165, SB 21; Relates to HB 42

**SOURCES OF INFORMATION**

- Responses Received From  
 Department of Health (DOH)  
 Corrections Department (CD)  
 Public Defender Department (PDD)  
 Children Youth and Families Department (CYFD)  
 Administrative Office of the Courts (AOC)  
 Administrative Office of the District Attorneys (AODA)  
 Attorney General (AG)

**SUMMARY**

Synopsis of Bill

- Senate Bill 88 enacts the “Sexual Predator Civil Commitment Act,” creating a separate involuntary civil commitment process for the potentially long-term control, care and treatment of sexually violent predators.
- The bill defines “sexually violent predator” as “ a person who has been convicted of or charged with a sexually 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 and who has a serious difficulty in controlling his behavior.”

- A “sexually violent offense” means (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.

### Significant Issues

The bill establishes an involuntary commitment process, independent of the New Mexico Mental Health and Developmental Disabilities Code, for certain “sexually violent predators,” regardless of age, including those who have already served a sentence.

At present, New Mexico allows for involuntary civil commitment but has no current provisions specifically relating to violent sexual predators.

The bill raises significant issues involving the rights of the sexual predator, due process considerations, authority to review a commitment, allocation of resources for the determination of sexual predator status and the treatment and housing of sexual predators. The bill anticipates coordinated efforts by law enforcement agencies, the Department of Health (DOH), district attorneys, district courts, the Attorney General (AG), and mental health professionals.

The AG and DOH each make reference to Kansas v. Hendricks, 521 U.S. 346 (1997) and Kansas v. Crane, 534 U.S. 407 (2002), the United States Supreme Court interpretation of the Kansas involuntary civil commitment law. The Supreme Court ruling on the Kansas Act relied heavily on the state’s precise criteria for such terms as “mental abnormality”, and “personality disorder.” Although reference is made to the terms “personality disorder” and “developmental disability” throughout SB 21, they are not defined in the definitions section.

AG also indicates New Mexico constitutional provisions may provide greater protections for an individual than the U.S. Constitution does, particularly in the case of involuntary civil commitment. The AG notes that life imprisonment, as opposed to involuntary civil commitment, may be a more legal and appropriate avenue to address this issue. Additionally, the AG recommends a review of the current involuntary civil commitment statute to determine if the mental illness or disability could be expanded to include the diagnosis or prognosis for violent sexual offenders. (ALSO SEE TECHNICAL ISSUES)

DOH notes that the bill contains a savings clause intended to address problems of conflict of laws and constitutionality; however, a large proportion of mental health and forensics professionals have serious reservations regarding the validity and effectiveness of evaluations to determine propensity for violence and sexual predation.

### **FISCAL IMPLICATIONS**

There is no appropriation in the bill to cover the many significant costs it invites. These costs include investigation, litigation, appeal, experts and provision of counsel for the alleged predator. Treatment and security costs of in-patient mental health treatment in what is an essentially foren-

sic hospital setting are extremely high. DOH reports that states have cited average costs of several hundred thousand dollars to complete commitment proceedings for a single individual.

AG notes that in 1990, Washington became the first state to enact a sexual predator civil commitment law (Chapter 71.09 *et seq.*) and that most states, including Kansas, have patterned legislation after Washington's. Washington maintains a department consisting of six full time attorneys, two paralegal, three legal assistants, and two investigators, and the state houses 150 sexual predators in a facility devoted exclusively to the treatment of sexual predators. Currently, 150 sexual predators are housed in a separate facility.

AG estimates reports that the estimated annual cost for housing and administration pursuant to Washington's civil commitment law is between \$200.0 and \$300.0 per individual. This includes the appointment of an attorney, mental health treatment, housing and other collateral expenses.

AG notes that the mental health treatment and conditions of confinement in Washington have been challenged in a federal civil rights proceeding. (*Turay v. Anderson*, 2001 WL 725277 (9<sup>th</sup> Cir. 2001) (unpublished decision)). A companion case discussing the injunction is *Sharp v. Weston*, 233 F.3d 1166 (9<sup>th</sup> Cir. 2000). The federal case involves the requirement that the "least restrictive alternative" be used in the confinement of committed individuals. AG indicates that the state should anticipate ongoing costs of litigation once the commitment process begins, noting that for involuntary civil commitment to be constitutionally valid, the primary emphasis must be on mental health treatment. AG reports that criminal or punitive implications would likely be challenged as unconstitutional in New Mexico.

AG suggests the definition of a "sexual predator" be extremely precise and notes the experience in Wisconsin, where the state defined the term "predator" to include individuals who commit incest. AG notes that Wisconsin currently has over 300 individuals committed pursuant to the sexual predator act as a result of this broad definition.

AG notes that it would require, at minimum, an additional attorney, a paralegal and an investigator at an estimated annual cost of \$170,000 to carry out the provisions of the bill. This estimate is based on the assumption that the population of violent sexual predators in New Mexico is less than the population of Washington.

The greatest fiscal impact will be felt at DOH. If the court or jury determines that the person is a sexually violent predator, the person is committed to the custody of DOH for control, care and treatment until such time that the committed person's mental abnormality or personality disorder is reversed. DOH would likely need a significant increase in clinical and administrative staff to carry out the provisions of the bill. DOH is responsible for

- Keeping the court and victims informed of any change in status of a committed sexual predator and for
- All costs relating to the evaluation and treatment of persons committed to the Secretary's custody under any provision of the Sexual Predator Commitment Act.

Fiscal implications at CD may also be significant. The department may be required to

- Notify the AG as to the anticipated release of such potential predators;
- Establish a multi-disciplinary team and

- House these persons after a probable cause determination but before trial.

DOH notes that the state would have to make resources available to build separate secure state facilities for males and females.

The AG and the courts will carry a significant burden in implementing the enforcement and review provisions of the bill. To do this effectively, these agencies will likely need additional attorneys, legal support staff, and administrators. The bill's provision that any party may demand a twelve-person jury trial creates the potential for enormous costs. The following consequences of the bill will have a significant impact on these agencies:

- Any increase in petitions filed in district court;
- The requirement to determine whether there is probable cause that the potential predator is a sexually violent predator;
- The requirement to order an evaluation where there is probable cause;
- Hearings to contest probable cause findings;
- Trials to determine whether individuals are sexually violent predators;
- 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;
- The requirement to conduct an annual review hearing of the status of the committed person;
- The requirement to hold a hearing for transitional release which may include a jury trial;
- Hearings resulting from the return of a person to a commitment facility after being in a transitional release program or to determine transfer from transitional release to conditional release and for final discharge from conditional release and
- Any emergency ex parte orders.

The state will provide counsel and the necessary expert witnesses to indigent persons in the required civil proceedings.

This bill will have a minimal fiscal impact on district attorneys and the Public Defender Department (PDD).

## **RELATIONSHIP**

Partially Duplicates SB 21 and HB 165. Unlike SB 21, SB 88 does not require that a person have "a serious difficulty in controlling his behavior," to be defined as either "likely to engage in repeat acts of sexual violence" or as a "sexually violent predator." There are other non-substantive technical differences. SB 88 also has no effective date. Relates to HB 42 (provides for life imprisonment of certain sex offenders).

## **TECHNICAL ISSUES**

DOH notes that there is potential conflict with the state statutory scheme for the evaluation and commitment of dangerous individuals determined to have mental retardation and not competent to stand trial (see Section 31-9-1.6 NMSA 1978) and related statutes for diversion of developmentally disabled persons from the criminal justice system. The provisions for legal proceedings for incompetent persons are untested as a matter of law, and it is unclear how state courts will

choose applicable law for persons with mental retardation charged with the crimes enumerated in this bill.

AOC suggests that the bill be amended so that Section 4(A) refers to subsection C in addition to subsection D.

AG notes the following concerns:

- The bill could be construed to be additional punishment for certain sex offenders and may not survive a double jeopardy challenge. The basis for the involuntary civil commitment is the same act used to convict in a criminal prosecution.
- The bill could be construed to be an involuntary criminal commitment because of the various procedures that closely resemble criminal proceedings.  
-- For example, the term “probable cause” relies on the same standard used in criminal law.
- The bill could be construed to be a punitive criminal law as opposed to a regulatory civil procedure with legitimate remedial purposes.
- A potential conflict could exist because the AG acts as a special prosecutor at times. The bill requires the AG be on the review panel and administer portions of the law. This dual function is problematic.
- A distinction should be made between “sexual predators” and “violent sexual predators.” The definition of a “sexually violent predator” refers to a person convicted or charged with a sexually violent offense. The charge of a sexually violent offense may be insufficient to establish that an individual is a sexually violent predator.
- The bill provides that the committed person is not entitled to be present during an annual review. The committed person should be in attendance.
- The standard “sexual motivation” may be difficult to define and prove in a criminal proceeding. The term “motivation” is not used in any criminal sexual assault offense.
- Some of the offenses listed as “sexually violent” may not qualify, based on the facts and circumstances of a specific case, as sexually violent offenses.
- Section 13 could be construed to be a banishment provision, as it details where a committed person “shall reside” and “with whom.”

**JCF/njw**