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## FISCAL IMPACT REPORT

SPONSOR HJC DATE TYPED 03/14/05 HB 165/HJCS

SHORT TITLE Sex Offender Registration Requirements SB \_\_\_\_\_

ANALYST McSherry

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
			Indeterminate	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

House Bill 165 conflicts with Senate Bill 55.

#### SOURCES OF INFORMATION

- LFC Files
- Attorney General's Office (AGO)
- Corrections Department (CD)
- Department of Indian Affairs (DIA)
- Department of Public Safety (DPS)
- Department of Health (DH)
- New Mexico Sentencing Commission
- Administrative Office of the District Attorneys (AODA)
- Public Defender (PD)

#### SUMMARY

##### Synopsis of Substitute Bill

Committee Substitute for House Bill 165 proposes to amend the Sex Offender Registration and Notification Act to expand the definition of sex offenders required to register pursuant to the Act, to change some requirements for registration and notification of sex offenders, to increase the offenses recognized by the act and to take preemptive actions over local government sex offender requirements.

The bill indicates that a conviction for a sex offense includes those offenders given a deferred sentence, but not those given a condition discharge.

The bill expands the definition of a sex offender (with a corresponding duty to register) to include a individuals under 18 years old and to include individuals without an established residence in New Mexico, but who live in a shelter, halfway house or transitional living facility or

stay in multiple locations within NM and have been convicted of a sex offense in New Mexico or any other state.

The bill expands the Act's jurisdiction to include individuals convicted of a sex offense pursuant to tribal law.

The proposed bill expands the scope of individuals required to register in New Mexico to include those individuals who reside in another state but engage in any of the following activities within New Mexico: employment or vocation (regardless of financial compensation), volunteer work for government or educational benefit, and/or enrollment in any institution of higher education within New Mexico. The bill states that nonresident sex offenders attending an institution of higher education, or public or private school in New Mexico must register with the county sheriff and school principal or registrar.

The bill proposes that those sex offenders who, as described above, do not have an established residence (and instead live in a shelter, halfway house or transitional living facility or resides in multiple locations in New Mexico) must register with the county sheriff in each county where the offender is living or temporarily located, and must register within 10 days after any change in living arrangements or temporary location occurs. In the same manner, sex offenders who are registered, or required to register, must disclose their activity when the individual begins a vocation or enrolls at an institution of higher education, or public or private school in New Mexico to the sheriff in the county and with the institution's registrar or principal within 10 days; the same is required if the offender changes enrollment status. In all cases the offender would be required to notify the same individuals (sheriff, principal, registrar) when any change in residence should occur. The bill also requires sex offenders who have become employed for compensation, or as a volunteer, to immediately inform their supervisor or employer, in writing, of their sex offender status.

Along with offender requirements proposed in the bill, corresponding proposed notification requirements for the courts, Corrections Department, municipal and county jails and detention centers are included. Each of these entities would be responsible for providing written notice to the sex offender included in judgment and sentence forms (for the courts) or upon release (for corrections, jails and detention centers) regarding the offenders statutory responsibility for registration. An official designated from Corrections, CYFD, the jail or detention center would have to explain the notification to the offender and provide written notification of the offender's release to the local county sheriff and DPS.

The enumerated sex offenses that trigger offender registration is proposed in HB 165 to be increased by the following offenses: aggravated indecent exposure, enticement of a child, and incest when the victim is less than 18 years of age.

The facilities from which an offender would be released from custody is proposed to be expanded from solely the Corrections Department to include CYFD, municipal and county jails and federal, military and tribal correctional or detention centers.

Certain sex offenders (convicted of the crimes listed in Section 29-11A-5 (D)) would have to renew their registration with the county sheriff once every 90 days for the entirety of the offenders' natural lives. Further, sex offenders convicted of the crimes listed in Section 29-11A-5 (E), who are normally required to register only for ten years, would have to register every ninety days for the entirety of their natural lives if they are ever convicted a second or subsequent time of any of the crimes listed in Section 29-11A-5(E).

The bill proposes to require DPS to maintain sex offender registration information for the offender's entire life (instead of for only 20 years), for certain enumerated sex offenses. Three new sex offenses for which DPS would have to retain registration information for ten years are proposed and are equivalent to those included in the proposed definition of "sex offender." The ten year period increases to the offender's lifetime if the offender commits a second or subsequent designated sex offense.

When a sex offender registers with the county, the bill proposes requiring the individual to provide a DNA sample pursuant to the provisions of the DNA Identification Act. The bill would also allow the Secretary of the Corrections Department to send a representative to serve on the DNA Oversight Committee, instead of requiring the secretary serve on the committee. The penalty for sex offenders who fail to comply with the registration requirements would be raised from a misdemeanor to a third degree felony; the penalty for those sex offenders who knowingly provide false information in complying with the registration requirements would be raised from a fourth degree felony to a third degree felony; the penalty for those sex offenders who willfully fail to comply with the registration requirements for those sex offenders moving to New Mexico (from another state) would be raised from a misdemeanor to a fourth degree felony.

Additional offenses, should the bill be enacted, would include "criminal sexual penetration in the third degree," "criminal sexual contact of a minor in the fourth degree," and criminal sexual contact in the fourth degree."

The proposed bill specifies that only certain youthful offenders would be posted on the DPS maintained internet website: those, that if convicted as a youthful offender, were found by the court to not be amenable to treatment and a danger to the community. An offender's DNA information is specified by the proposed bill to not be included on the DPS web site, unless the offender's place of employment requires direct contact with children.

A severability clause is included in the proposed bill, specifying that if any part of the Act is held invalid, the remainder of the Act would be unaffected.

A preemption clause is included in the bill, asserting that proposed Act will have control over all local ordinances.

The committee substitute for HB 165 changes the original language regarding the preemption clause which prohibited states from adopting or continuing in effect any ordinance, rule, regulation, resolution or statute on sex offender registration and notification. The proposed new language provides that after January 18, 2005 cities, counties and home rule municipalities are prohibited from adopting or amending a ordinance on sex offender registration. It also provides that any ordinances already in place on January 18, 2005, will continue in effect.

### Significant Issues

According to the Attorney General's Office (AGO), the Sex Offender Management Board (SOMB) was created during the 2003 Special Session for the purpose of proposing sex offender registration and notification changes to NM statute in order to comply with minimum federal requirements. AGO notes that HB 165 appears to reflect the changes proposed by SOMB.

The Department of Public Safety (DPS) states that this bill, introduced for the Corrections Oversight, Courts and Justice Committee, is the bill presented by the Sex Offender Management Board, and endorsed by the New Mexico Sentencing Commission. DPS identifies HB165 as the

culmination of approximately ten months of effort in order to amend New Mexico Sex Offender and Notification Act. The proposed legislation, according to DPS, is intended to be in compliance with the Federal Jacob Wetterling Act, and the various amendments to that Act.

According to DPS, major changes proposed in HB165 include compliance with the CJSA Amendments to the Jacob Wetterling Act in that sexual violent offenders and recidivists will be required to register for a period of their natural life, with quarterly (90 day) address verification and re-registration. Additionally, DPS asserts, language in the bill is intended to bring the state into compliance with the Campus Sex Crime Prevention Act and with the Federal PROTECT legislation.

According to the New Mexico Sentencing Commission, under the proposed statute, multiple violations between convictions would be treated as a single violation which would avoid the possibility of an offender being charged with a new crime for every "90 days" that an offender fails to renew. NMSC asserts that convictions under the Act could not be used for the habitual offender statute and that because of this, if an offender who failed to register and was convicted, the individual would not receive an increased sentence based upon prior convictions unrelated to violations of the Act. Likewise, NMSC relates, a conviction for a violation of the Act would not count as a prior conviction to increase the sentence of an offender later convicted for an offense unrelated to the Act.

NMSC notes that, currently, the following sex offenses require 20-year registration in NM: criminal sexual penetration in the 3<sup>rd</sup> degree; criminal sexual contact of a minor in the 4<sup>th</sup> degree; criminal sexual contact in the 4<sup>th</sup> degree; and attempt to commit any of the three acts. With the enactment of the proposed bill, lifetime registration will be required for those listed and for criminal sexual penetration in the 1<sup>st</sup> or 2<sup>nd</sup> degree, criminal sexual contact of a minor in the 2<sup>nd</sup> or 3<sup>rd</sup> degree, sexual exploitation of children, kidnapping (when the victim is less than eighteen years of age and the offender is not a parent of the victim), or attempt to commit any of the described sex offenses.

The Corrections Department (CD) cites that sex offenders who fail to register, who knowingly provide false registration information, and who move here from another state and fail to properly register would face convictions for a third degree felony, fourth degree felony, and fourth degree felony respectively, and that an increase in the prison population would result. Further, CD predicts, prison sentences for those sex offenders initially placed on probation who fail to comply with the registration requirements would be more likely if the proposed bill were to be enacted.

If HB165 were enacted, the Department of Indian Affairs points out, tribal court convictions would be recognized for sex offender registration purposes. Tribal court convicted sex offenders would be required to register with the State through the county sheriff in the county that sex offender resides. The Department states that tribal courts are not required to report tribal court convictions to the state.

AGO asserts that significant issues in HB165 include the requirement that youthful offenders (32A-2-1) sentenced as adults and convicted of one of the enumerated offenses would now be required to register as a sex offender. This is proposed for federal compliance, states AGO, which, according to the Jacob Wetterling Act, considers the conviction of a juvenile who is prosecuted as an adult, a conviction for purposes of the Act's registration requirements. AGO reflects that language proposed that stipulates DPS will not post offenders on the internet web site who were less than 18 years old at the time they committed the sex offense, unless the court

makes a finding that the sex offender is not amenable to treatment and is a danger to the community, will not affect federal compliance for juvenile registration.

“Conditional discharges,” AGO explains, are exempted from the definition of “conviction” to allow limited discretion and to avoid potential disputes over whether a “conditional discharge” is in fact a “conviction.” The Office states that the proposed language is consistent with the most recent appellate decisions regarding convictions.

AGO also cites that convictions under the proposed Act cannot be used for the habitual offender statute; thus, an offender who fails to register and is convicted would not receive an increased sentence based upon prior convictions unrelated to violations of the Act. The Office asserts that likewise, a conviction for a violation of the Act would not count as a prior conviction to increase the sentence of an offender later convicted for an offense unrelated to the Act. This would grant a special exception for failure to register, the AGO states, from the general felony requirement for the purpose of the imposition of sentencing enhancements.

House Bill 165 includes the proposal for a “preemption clause” to clarify that the State Act will control all local ordinances. According to the AGO, this will ensure consistent treatment of offenders statewide, although local governments with more stringent requirements may find this objectionable.

The committee substitute addresses an issue presented in CYFD’s original analysis on this bill. The amendment deletes references to CYFD as being in custody of anyone required to register, which is correct, since only youthful offenders sentenced as adults must register and they do not come into CYFD custody. According to CYFC, the committee substitute bill is now clear that the only individuals under 18 who must register are those “convicted” of the listed offenses, which means they must be sentenced as adults, not simply adjudicated as delinquents.

## **PERFORMANCE IMPLICATIONS**

The New Mexico Attorney General’s office reports that it is currently handling various district court cases concerning the standing sex offender registration and notification act. AGO reports that in most cases, the district court has failed to comply with the notification requirements or has entered a sentence contrary to the requirements of the sex offender registration and notification act.

According to the New Mexico Department of Public Safety, there are positive performance implications from passage of the proposed legislation. The proposed legislation will enable the New Mexico Department of Public Safety to better track and maintain accurate records on sex offenders in New Mexico. Language in the proposed legislation ensures that sex offenders will be required to provide better and more accurate information to their County Sheriffs, and in turn, the New Mexico Department of Public Safety, thus, enabling better tracking for all sex offenders who are in New Mexico as a resident, attending school, or working here.

The Administrative Office of the District Attorneys states that the proposed bill increases registration requirements and that there will be more cases referred to district attorneys to prosecute. AODA is not certain how many cases may be referred. The Office cites that the proposal also increases penalties which could make current cases more difficult to prosecute.

## **FISCAL IMPLICATIONS**

House Bill 165 does not include an appropriation.

According to DPS, federal compliance through the Sex Offender Registration and Notification Act will result with roughly \$1.3 million dollars appropriated to the State of New Mexico retroactively, and a full distribution of New Mexico's share of Edward Byrne Formula Grants. Currently, DPS cites, as New Mexico is not in compliance with the Federal Wetterling Act, New Mexico receives a ten percent cut in Byrne Formula Grants. DPS projects that New Mexico's full share of the grant funds could total roughly \$3.5 to \$4 million annually, and reports that the grants would be spread across multiple program areas enabling many facets of the criminal justice system to obtain additional funding.

The Corrections Department (CD) states that it is difficult to estimate the number of sex offenders who will be sentenced to additional felony time for failing to properly register, and the number of sex offenders on probation that will be sent to prison for failing to properly register while on probation. CD predicts that if numbers remain small, the negative fiscal impact on the Department will be minimal, and that if numbers grow larger, the negative fiscal impact on the Department will be moderate.

NMSC asserts that local law enforcement agencies would have to absorb the increased costs of registering and notifying sex offenders more frequently. NMSC cites two groups: those offenders who would have to register every 90 days rather than each year, and those offenders who would be on the registration list for life rather than a maximum of 20 years.

## **ADMINISTRATIVE IMPLICATIONS**

DPS relates that passage of the proposed legislation would have administrative implications for the Department, specifically the Technical Emergency Support Division, which houses the Sex Offender Registration Program, and would have an increased workload as a result of passage of the proposed legislation.

The Corrections Department states that the proposed amendments would result in a small to moderate increase in the administrative burden on prison staff and probation and parole officers.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

CYFD and DPS cite that HB 165 conflicts with SB 55. DPS notes that SB 55 amends the same act, but in significantly different ways. DPS states that SB 55 will not result in federal compliance, and would result in greater administrative, fiscal and performance implications for the Department and NM.

AGO relates that, although the proposed legislation was adopted by the New Mexico Sentencing Commission on January 24, 2005, and HB 165 appears to follow most of the Sex Offender Management Board (SOMB) recommendations, it does reflect the most recent changes in the final draft proposed by the SOMB. .

## **TECHNICAL ISSUES**

CYFD recommends that on page 34, line 14, the language be written as follows: "a person con-

victed and sentenced as a youthful offender on or after July 1, 2005.”

### **OTHER SUBSTANTIVE ISSUES**

The Department of Health (DOH) reports that it would be impacted by House Bill 165, as the Las Vegas Medical Center has a specialized Sex Offender Treatment Program that is required to make certain all sex offenders admitted into the program are taken to the local sheriff’s office, as well as, Probation and Parole for purposes of registration.

According to the Public Defender, because the scope of the city ordinance will be so confusing, the agency anticipates a significant number of cases of failure to register under the city ordinance. Violation of any law or ordinance results in probation or parole revocation on the state level and individuals who fail to comply with the city ordinance would be litigating its constitutionality of that statute in state court during the probation revocation hearings.

### **ALTERNATIVES**

The New Mexico Sentencing Commission recommends review and comparison of this proposed bill with the Sex Offender Management Board (SOMB) draft bill for complete federal compliance and all revisions adopted by the NM Sentencing Commission.

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL?**

According to AGO, the current sex offender registration and notification law would remain in effect if HB 165 is not enacted, and the State would not be eligible for approximately \$1.3 million retroactively in federal money for non compliance with federal standards.

DPS states that if HB 165 is not enacted, the status quo will remain, and New Mexico’s Sex Offender Registration and Notification Act will less of a functional a tool than it potentially could be for New Mexico’s communities and law enforcement. Additionally, New Mexico will not be in compliance with the Federal Wetterling Act.

According to NMSC, if HB 165 is not enacted, certain sex offenders can “dodge” registration by moving every 9 days, certain sex offenders will be off the registration list in 20 years, and New Mexico will continue to lose approximately \$400,000 in Byrne Grant federal money each year (although the continuation of such Byrne Grant funding is not guaranteed).

### **POSSIBLE QUESTIONS**

How will cooperation with Tribal courts be coordinated? Can these courts be required to report convicted sex offenders?

**EM/lg**