

NOTE: As provided in LFC policy, this report is intended for use by the standing finance committees of the legislature. The Legislative Finance Committee does not assume responsibility for the accuracy of the information in this report when used in any other situation.

Only the most recent FIR version, excluding attachments, is available on the Intranet. Previously issued FIRs and attachments may be obtained from the LFC office in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

SPONSOR:	Foley	DATE TYPED:	02/10/00	HB	174
SHORT TITLE:	Amend Sex Offender Registration/Notification			SB	
				ANALYST:	Trujillo

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY00	FY01	FY00	FY01		
		See Narrative			

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to SB 125

SOURCES OF INFORMATION

LFC Files

Administrative Office of the Courts (AODA)

Attorney General (AG)

Commission on Higher Education (CHE)

Corrections Department (CD)

SUMMARY

Synopsis of Bill

HB174 amends the existing Sex Offender Registration Act to better define what constitutes employment or attending school in New Mexico for the purpose of sex offender registration requirements; add kidnaping and some false imprisonment convictions to the list of crimes for which registration is required; make failure to register a fourth degree felony (instead of a misdemeanor); provide for notifications to daycare centers and schools in the sex offender's neighborhood; push back the date of offenses to which its provisions apply; and allow for creation of a website by the department of public safety at which the public may gain access to registration information.

Significant Issues

The Attorney General reports the main impact is to provide public access to the registration information through the proposed website and to clarify the circumstances and details required for a sex offender to provide and maintain registration (such as providing notice of a change of address or of intent to move out of the state) and to change failure to register or maintain registration current from a misdemeanor to a felony. No significant issues appear with regard to the details or information requirements for sex offenders. The legality of public access and "retroactive" provisions of the proposed legislation are similar to provisions which have been tested in the courts of other jurisdictions and have survived. On the assumption that New Mexico courts will analyze the public access provisions of this bill as have other courts, the notification should survive legal challenge.

According to the AG, the other changes proposed in HB174 do not appear to present significant issues. During the 1999 session, SB77 and HB134 proposed the kidnaping and false imprisonment to the list of offenses for which registration was required but these provisions were deleted in later versions of the

adopted bills. Adding these offenses to the crimes for which registration is required presents no significant issues.

The Commission on Higher Education (CHE) reports according to the Bernalillo County Sheriff's Office and the Albuquerque Police department, the state of New Mexico risks losing up to \$400.0 in federal enforcement funds if the New Mexico Sex Offender Registration and Notification Act is not improved to meet the minimal guidelines issued in the Jacob Wetterling Act by the Federal Department of Justice.

While the act requires notification of licensed childcare centers, elementary, middle and high schools of proximal residence of sex offenders, it does not require notification of post-secondary institutions, except as such institutions may operate a licensed daycare center. Yet approximately 2,500 secondary students spent part of their academic semester on the campuses of New Mexico public colleges, universities or branch campuses in Fall 1999 through Concurrent Enrollment in Area Vocational Schools and academic courses.

The most significant issue presented is the requirement involving the submission of a DNA sample. The act is also retroactive to 1995.

FISCAL IMPLICATIONS

Department of Public Safety (DPS)

There is positive fiscal impact on the New Mexico Department of Public Safety (DPS) and the State of New Mexico because the bill will allow the State of New Mexico to comply with the requirement of the Jacob Wetterling Act. The Jacob Wetterling Act is the Federal Law mandating that individuals convicted of crimes and sex crimes against children be placed in a publicly accessible database and additional requirements. As of January 25, 2000, the State of New Mexico has received its Edward Byrne formula grant disbursement, and this disbursement from the Federal Government does reflect reduction for non-compliance with the Jacob Wetterling Act provisions. Compliance in this regard may result in the reallocation of approximately \$400.0, or 10% of the award.

DPS reports aside from Byrne formula grants, it is unknown whether passage of the proposed legislation will affect any other federal appropriation, or any other federal, state or local matching fund.

Corrections Department (CD)

The most significant issue to the Corrections Department (CD) is the increase in the length of prison terms and probation terms that will result from increasing from a misdemeanor to a 4th degree felony, the penalty for failure to register as a sex offender or providing incorrect information. On the other hand, there is some possibility that the more stringent reporting requirements and the greater availability to sex offender registration information will have a deterrent effect and will result in a lesser number of sex offenses being committed.

An issue for CD is the increased administrative burden that will result from having to provide a detailed written and verbal explanation to the sex offender regarding the registration requirements immediately before release from custody.

There is no appropriation to cover the increase in costs to CD from longer prison sentences and probationary terms for those convicted of the offense with the increased penalty. Since most sex offenders have prior felony convictions, it is anticipated most persons convicted of the offense of the failure to register or providing false information will be sentenced to additional prison time as a habitual felony offender. However, a number of those convicted of these offenses could also receive probationary terms. While currently there are few persons convicted of these offenses, it is anticipated that in the future the number will increase as greater numbers of sex offenders will be required to register, the information systems become more reliable and comprehensive, and the reporting requirements become more stringent.

The private prison annual cost of incarcerating an inmate based on FY99 actual expenditure is \$19,084 per year for males. The cost per client to house a female inmate at the privately operated facility in Grants is \$23,111 per year. Any net increase in inmate population will be housed at a private facility.

The cost per client in Probation and Parole on a standard supervision program is \$1,531 per year. The cost per client in Intensive Supervision is \$3,312 per year. The cost per client in Community Corrections Department operated programs is \$5,783 per year. The cost per client in Community Corrections privately operated programs is \$10,315 per year.

Administrative Office of the Courts (AOC)

AOC reports it will cost the judicial system \$400 for statewide update, distribution, and documentation of statutory changes. Any additional impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions and sentencing hearings.

Other

The bill will result in a minimal increase in revenues due to the larger fines and slightly more probation supervision fees that are collected as a result of the offense being increased from a misdemeanor to a felony.

ADMINISTRATIVE IMPLICATIONS

AOC reports there may be an administrative impact on the courts as a result of an increase in case load or in the amount necessary to dispose of cases.

There is no major administrative impact on DPS who is already tasked with enforcement and record keeping responsibilities regarding the sex offender registration and notification act. There could be an increase in the workload for DPS Records and Information Systems personnel. Programming and software support will be required to modify the current SOR database and to provide complete information on the web site for the general public. There are additional administrative responsibilities placed on county sheriffs. The bill requires the county sheriff who obtains sex offender registration to obtain a DNA sample and, within 48 hours, to notify all licensed daycare centers, elementary schools, middle schools and high schools within a one mile radius of a sex offender's residence and provide them with the sex offender's registration information. Compliance with this very short turn around time may pose a problem for various of the county sheriffs.

CD reports there will be a minor increase in the administrative burden upon prison personnel who will be required to provide a detailed, written and verbal explanation of the duty to register to sex offenders immediately before their release. In the long term, there will be an increase in work for prison and probation officers required to administer a larger prison population and a larger caseload as a result of the increase in the penalty from a misdemeanor to a felony

CONFLICT/DUPLICATION/COMPANIONSHIP/RELATIONSHIP

HB174 is a duplicate of SB125. There appears to be some conflict with the existing statutory structure found at Sections 29-16-1 through 13, NMSA 1978. This issue is more fully discussed in No. 5 below.

TECHNICAL ISSUES

DPS reports there are two issues noted in the proposed legislation, one an actual conflict as noted above, and the other a potential constitutional situation. As this discussion may properly occur in either Section 5 or Section 6 of this analysis, DPS placed both here and utilized Section 6 for a detailed breakdown of exact changes to the bill. At page 5, lines 24 and 25, new language is added which states "a DNA sample". This language is added into the required list of items that a county sheriff shall obtain from a sex offender. The issue with the submission of a DNA sample is multifold. Initially, it should be noted that the DNA Identification Act, previously cited, was enacted by laws of 1997 and became effective July 1, 1997. The Act states that a covered offender means a person convicted of a felony offense as an adult under the Criminal Code, the Motor Vehicle Code or the Constitution of New Mexico or convicted as an adult pursuant to the Serious Youthful Offender proceedings under the Children's Code. Further, the Act defines covered offenders subject to collections of samples in States that a covered offender is subject to having a DNA sample submitted or are convicted on or after the effective date of the DNA Identification Act, meaning July 1, 1997. The proposed legislation has a retroactive date to 1995. It would appear that several years worth of offenders would potentially be required to submit a DNA sample under the Megan's Law provisions, although not covered or subject to the DNA Identification Act. This may cause a conflict. Further, it should be noted that the DNA Identification Act identifies certain entities that may be appropriate for collecting samples. It is unknown whether or not individual county sheriffs, perhaps in some of New Mexico's smaller counties, would be the appropriate entity to take such a DNA sample from a sex offender under the proposed legislation. Last, of critical importance, is the fact that under the DNA Identification Act an individual is required to submit DNA sample for only convictions under New Mexico Laws. It is clear under the proposed legislation, and under New Mexico's current sex offender registration and notification act that an individual will be required to submit a DNA sample who does not fall within that category, as it may be an individual who is going to school, working in New Mexico, or an individual who has moved to New Mexico from another jurisdiction where their sex offense was committed. These issues must be addressed.

The other potential situation in the proposed legislation is the retroactivity of the covered sex offender back to 1995. This may pose an ex-post facto problem, and should be addressed at a policy level.

OTHER SUBSTANTIVE ISSUES

DPS utilized the other substantive issues section of the proposed legislation to simply detail the changes.

First, page 2 beginning on line 16 and ending on line 24, new language is added in which defines what employed means, and what is meant by a student. This language is taken directly from the Federal Compliance guideline on the Jacob Wetterling Act. It should be noted that throughout the proposed legislation there are very minor language and stylistic clean up items, which I shall not address in this review.

On page 3, beginning on line 11 and ending on line 18, new language is added in involving the predicate offenses of kidnaping and false imprisonment. It should be noted that the perpetrator of kidnaping or false imprisonment must be someone other than the parent of the victim and the victim must be less than 18 years of age. It should further be noted that this requirement is taken directly from the Jacob Wetterling Act, as that Act involves crimes and sex crimes against children. It is clear this is the category of crimes against children and not necessarily sex crimes.

On page 5, beginning on line 23 and ending on line 24 is the previously mentioned requirement of obtaining a DNA sample from a sex offender.

On page 6, beginning on line 17 and ending on line 27 is new language which simply tracks language found further in the Act regarding the amount of time the state is actually required to keep on file sex offender registration. It should be noted that in July of 1999, the New Mexico Department of Public Safety obtained a good faith two-year extension to comply with the requirements of the Pam Linchner Act. The Pam Linchner Act requires states to have provisions for lifetime registration for certain aggravated offenders and for sexual offender recidivist. We have not tried to comply with the requirement of the Pam Linchner Act in the current legislation, although we will likely need to within the next legislative cycle.

On page 7, in paragraphs I and J, the current misdemeanor level crime is enhanced to a fourth degree felony. On page 7 also, beginning on line 25 and ending on line 27 is clarifying language regarding the requirement that a county sheriff forward all subsequently obtained information on a sex offender to the New Mexico Department of Public Safety. Additionally, on page 8 beginning on line 2 and ending on line 6 is clarifying language requiring the Department of Public Safety to forward information sex offenders that it acquires to the county sheriff. This is all in an effort to comply with the Federal requirement that information freely flow between entities, such that no sex offender is left out of the loop. Also on page 8, beginning on line 12 and ending on line 17 is language requiring the Department of Public Safety to send conviction and finger print information of sex offenders registered in New Mexico to the National Sex Offender Registry administered by the Department of Justice, and further to the Federal Bureau of Investigation. This is also a federal requirement.

Page 9, beginning on line 2 and ending on line 4 is the addition of kidnaping in the predicate list of offenses, and also beginning on line 21 and ending on line 24 is the inclusion of false imprisonment in the predicate list of offenses.

Page 10, in the act, NMSA 1978 29-11A-5.1 adds new language regarding active community notification

and allow the Department of Public Safety to create a web site.

On page 11, paragraph D, lines 22 through line 1 on page 12, the proposed legislation states that within 48 hours of receiving registration information from a sex offender the county sheriff shall contact every licensed daycare center, elementary school, middle school and high school within a one mile radius of the sex offenders residences and provide them with the sex offender's registration information. Further, page 12, paragraph E, lines 2 through 5 state that DPS may establish and manage an Internet web site that provides the public with registration information. Beginning on page 12 and proceeding to the bottom of page 13 are four new categories of information that both a court or the corrections department must provide a sex offender with. The language is basically taken completely from the federal act, and is one of the compliance criteria for the State of New Mexico. It should be noted that the language is the same for both a court and the corrections department. This is in keeping with the federal governments requirement that there be fail-safes on information in order to ensure that no individual slips through the cracks.

On page 14, within Section 29-11A-8 involving immunity, a new paragraph and sub-sections are added regarding immunity of elected or appointed public officials, school administrators or individuals or entities acting upon directions given them by law enforcement agency responsible for enforcement of the registration act.

On page 15 the new section 7 is added to comply with federal requirements regarding individuals who move from New Mexico to another state, and includes a list of information and time frames within which information must be provided to individuals who fall in this category. Again it should be noted this is in order to comply with the federal requirements.

On page 16, Section 9 is a severability clause stating that if any or part of the application the sex offender registration notification act is held invalid, the remainder or its application to other situations or persons shall not be effected. Finally, Section 10 regarding applicability states that persons convicted of a sex offense on or after July 1, 1995 or persons convicted of a sex offense prior to July 1, 1995 who are currently incarcerated, on probation or on parole. The potentiality regarding this issue has been addressed above in Section 5.

The AG reports current law will remain the same, with the existing frustration of public access to information about persons who have committed sex offenses and are required to register. In addition, retaining the failure to register as a misdemeanor provides less coercive incentive to comply than does the proposed change to a felony.

Amendments

AG suggests the following amendments for the following reasons:

- A published New Mexico case permits a court to grant a conditional discharge for an admitted sex offender, which allows the offender to avoid registration since one who obtains a conditional discharge is not "convicted" of a sex offense. This appears to be contrary to legislative intent in requiring the registration of persons who admit to committing the acts which constitute a sex offense. The following amendments to HB174 as written are proposed to provide that the requirement to register, and the public access to information regarding persons who have committed sex offenses, applies to persons who obtain a conditional discharge for a sex offense:
- Amend the definitions section of 29-11A-3(A) on page "2" of the bill add a NEW subsection (5) under part A. defining "sex offender" to include: "(5) a person who is a resident of New Mexico or who is employed or attending school here and who has been granted a conditional discharge for a sex offense in any jurisdiction.
- For the same reason a NEW part C of the same section would be added at page "3" of the bill as follows: "C". As used in the Sex Offender registration and Notification Act, the terms "convicted," "conviction" and "adjudicated guilty" include a person granted a conditional discharge for a sex offense. Such persons must comply with the registration and notification provisions of the Sex Offender registration and Notification Act."

LAT/gm