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- § 31-20-5.2(B) NMSA 1978, pertaining to district court review of the terms and conditions of sex offender probation, is amended to specify that after the initial 5 years of probation, the court shall also review the duration of the probation at 2 ½ year increments and that the state has the burden of proving that sex offenders should remain on probation.
- § 31-20-10.1(A) NMSA 1978, pertaining to parole period of sex offenders, is amended to require the board to include provisions in their judgments and sentences to require sex offenders to serve indeterminate periods of supervised parole of not less than 5 years and not more than 20 years. The prior language specified an initial period of parole of not more than 20 years and did not include a minimum period. The prior language also appeared to allow parole periods to extend beyond 20 years.
- § 31-20-10.1(B) NMSA 1978, pertaining to board review of terms and conditions of sex offender parole, is amended to specify that after the initial 5 years of parole, the board shall also review the duration of the parole at 2 ½ year increments and that the state has the burden of proving that sex offenders should remain on parole.

Synopsis of Original Bill

House Judiciary Committee Substitute for House Bills 2, 3, 4, 5, and 8/HJCS is a comprehensive bill which creates a sex offender management board, redefines the crime of kidnapping when such involves a minor and a sexual offense is committed, increases the penalties for criminal sexual penetration and criminal sexual contact of a minor, provides for minimum mandatory penalties, permits the placement of a sex offender on probation for a period of up to 20 years, lists factors for the district court to consider when imposing probation, authorizes a period of parole for up to 20 years, and lists factors for the parole board to consider when determining parole. This bill does not contain an appropriation.

HB 2,3,4, & 8/HJCS, which relates to sex offenders, has several purposes as outlined below:

Section 1 of the bill creates the Sex Offender Management Board (SOMB) within the existing New Mexico Sentencing Commission. The membership includes certain members who are already members of the Sentencing Commission, including the Attorney General, a District Attorney appointed by the District Attorneys' Association of New Mexico, the Chief Public Defender, a District Court Judge appointed by the District Court Judges' Association of New Mexico, the Secretary of Corrections, the Secretary of Health, the Secretary of Children, Youth and Families, and one member of the public appointed by the Governor who is a representative of a New Mexico victims organization. The membership also includes several members who are not currently members of the Sentencing Commission, including two representatives appointed by the Governor who are mental health professionals licensed to practice in New Mexico, *at least one of which shall be a member of the Association for the Treatment of Sexual Abusers and one shall be a juvenile sex offender treatment specialist*, a representative appointed by the Governor from the Adult Probation and Parole Division of the Corrections Department who has expertise in the supervision of sex offenders, a representative appointed by the Governor from the law enforcement community who has expertise regarding sex offender community notification, registration, tracking and monitoring, a representative appointed by the Governor who is affiliated with a civil lib-

erties organization, and a representative appointed by the Governor who is affiliated with a faith-based organization.

Responsibilities of the Sex Offender Management Board include the following:

- hold meetings at least eight times a year;
- develop and prescribe a standard procedure for the identification and evaluation of convicted sex offenders, including behavior management, monitoring, treatment and program compliance for sex offenders, as well as developing and recommending measures of success;
- develop and implement guidelines and standards for the treatment of sex offenders that can be utilized by offenders who are placed on probation, incarcerated by the Corrections Department, placed on parole or placed in a community Corrections program. The guidelines and standards shall include a monitoring process and a planned for developing treatment programs for sex offenders, including determining the duration, terms and conditions of probation and parole for sex offenders;
- create a risk assessment screening tool;
- develop guidelines and standards for monitoring sex offenders;
- develop criteria for measuring a sex offender's progress in treatment;
- develop a standardized procedure for the identification and evaluation of juvenile sex offenders;
- develop and implement guidelines and standards for the treatment of juvenile sex offenders;
- research and analyze safety issues raised when sex offenders live in a community;
- study the viability and legality of a civil commitment program for sex offenders;
- research and determine the feasibility and legality of implementing indeterminate sentencing for sex offenders;
- study the use of clinical polygraph testing as a means to evaluate sex offenders;
- evaluate sex offender treatment programs administered by state agencies and recommend necessary changes; and
- review the provisions of the Sex Offender Notification and Registration Act and recommend necessary changes.

The SOMB is required to report its findings and recommendations to the New Mexico Sentencing Commission on a quarterly basis. The Sentencing Commission must vote to approve, disapprove or revise the recommendations of the Board.

Section 2 amends the definition of kidnapping to specify the crime is a second degree felony when a kidnapper releases his victim in a safe place and does not inflict physical injury or a sexual offense upon the victim.

Section 3 amends the definition of and penalty for criminal sexual penetration to specify that criminal sexual penetration in the second degree on a child 13 to 18 years of age represents a second degree felony for a sexual offense against a child and shall result in a minimum three year term of imprisonment, which shall not be suspended or deferred. Under existing law, the sentence can be suspended or deferred. Section 3 also amends existing law to specify that criminal sexual penetration in the third degree, when the victim is a child 13 to 18 years of age, represents a third degree felony for a sexual offense against a child. The amended language specifies that this section does not preclude sentencing provisions of Sections 31-18-17, 31-18-25 and 31-18-26 NMSA 1978.

Section 4 amends the definition of and penalty for criminal sexual contact of a minor. This bill makes a distinction between touching the clothed as opposed to the unclothed intimate parts of a minor. Criminal sexual contact to the unclothed intimate parts of a minor would constitute a second degree felony for a sexual offense against a child and, notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall result in a minimum three year term of imprisonment, which shall not be suspended or deferred. Under existing law, criminal sexual contact of a minor is a third degree felony and the entire sentence can be suspended or deferred. The imposition of a minimum, mandatory term of imprisonment pursuant to this section does not preclude sentencing provisions of Sections 31-18-17, 31-18-25 and 31-18-26 NMSA 1978.

Section 5 amends existing law to establish a sentence of 15 years imprisonment (three years of which cannot be suspended or deferred as set out in Section 3) for a second degree felony sexual offense against a child and 6 years imprisonment (three years of which cannot be suspended or deferred as set out in Section 4) for a third degree felony for a sexual offense against child. The fine for a second degree felony for a sexual offense against child is \$12,500 and \$5000 for a third degree felony for a sexual offense against a child.

Sections 6 and 7 change the maximum period of probation and conditions of probation for sex offenders. Under current law, the maximum period of probation for any felony offender, including a sex offender, is 5 years. This bill would allow the period of probation for a sex offender to extend up to 20 years.

HB 2,3,4, & 8/HJCS defines "sex offender" to mean a person who is convicted of, pleads guilty to, or pleads no contest to any one of the following offenses:

- kidnapping, as provided in Subsection C of Section 30-4-1 NMSA 1978, when committed with intent to inflict a sexual offense upon the victim;
- criminal sexual penetration in the first, second or third degree, as provided in Section 30-9-11 NMSA 1978;
- criminal sexual contact of a minor in the second or third degree, as provided in Section 30-9-13 NMSA 1978;

House Bill 2, 3, 4 & 8/HJCS/aSJC -- Page 5

- sexual exploitation of children in the second degree, as provided in Section 30-6A-3 NMSA 1978; or
- sexual exploitation of children by prostitution in the first or second degree, as provided in Section 30-6A-4 NMSA 1978

HB 2,3,4, & 8/HJCS provides that, prior to placing sex offenders on probation, the district court shall conduct a hearing to determine the duration, terms, and conditions of probation for sex offenders. A sex offender's initial period of probation shall not exceed 20 years. The district court may consider any relevant factors, including:

- the nature and circumstances of the offense;
- the nature and circumstances of a prior sex offense committed by the sex offender;
- rehabilitation efforts engaged in by the sex offender, including participation in treatment programs while incarcerated or elsewhere;
- the danger to the community posed by the sex offender; and
- a risk and needs assessment regarding the sex offender, developed by the Sex Offender Management Board of the New Mexico Sentencing Commission or other appropriate entity, to be used by appropriate district court personnel.

According to this bill, the district court must review the terms and conditions of a sex offender's probation at 2 1/2 year intervals. During the review hearing, the state shall bear the burden of proving to the district court that a sex offender should remain on probation. The district court may decide to continue a sex offender's probation and that certain terms and conditions of probation are no longer necessary.

The district court may order sex offenders to abide by reasonable terms and conditions of probation, including:

- being subject to the intensive supervision by a probation officer of Corrections Department;
- participating in an outpatient or inpatient sex offender treatment program;
- a probationary agreement by the sex offender not to use alcohol or drugs;
- a probationary agreement by the sex offender not to have contact with certain persons or classes of persons; and
- being subject to alcohol testing, drug testing or polygraph examinations used to determine if the sex offender is in compliance with the terms and conditions of his probation.

The district court must notify the sex offender's counsel of record of the upcoming probation hearing for a sex offender. The sex offender's counsel of record shall represent the sex offender

at the probation hearing unless the sex offender's counsel of record provides the court with good cause that counsel of record should not represent the sex offender. If the sex offender is subsequently unable to obtain counsel, the district court shall notify the Chief Public Defender of the upcoming probation hearing and the Chief Public Defender shall make representation available to the sex offender. "Sex offender" is defined in the new Section to mean any person convicted of Criminal Sexual Penetration in the first, second, or third degree, Criminal Sexual Contact of a Minor in the third degree, or Sexual Exploitation of Children in the second degree.

If the district court finds a sex offender has violated the terms and conditions of his probation, the district court may revoke probation or may order additional terms and conditions of probation.

Sections 8 and 9 amend existing law as to allow the parole period for "sex offenders" (as defined above) to extend up to 20 years, whereas under current law the maximum mandatory period of parole is 2 years.

Section 10 amends the Sex Offender Registration and Notification Act to expand and clarify the definition of "sex offense" as it pertains to the crime of sexual exploitation of children.

Section 11 amends the registry portion of the Sex Offender Registration and Notification Act. The amendments essentially are limited to the inclusion of the new crime of criminal sexual contact of a minor (2nd Degree).

Section 12 amends the active community notification portion of the Sex Offender Registration and Notification Act to make the same clarification as noted in Sections 10 and 11 above as to the crime of sexual exploitation of children.

Section 13 amends the Earned Meritorious Deductions Act to provide that second degree sexual contact of a minor (in addition to third degree criminal sexual contact of a minor, as set out in existing law) is included within the definition of a serious violent offense.

Section 14 of the bill is a severability clause.

Significant Issues

According to the Corrections Department, studies and experience demonstrate that many sex offenders continue to commit sex offenses into middle and old age. They often commit dozens of offenses each year and are rarely apprehended because they target children and/or adult victims who do not report such crimes. Although there is no cure for sex offenders, their behavior can be controlled through treatment and intensive supervision, and thus longer periods of probation and parole should be an available option.

The proposed legislation would increase the minimum sentence faced by many sex offenders. There is a strong likelihood that such a penalty increase would result in a decrease in the number of plea bargains entered and a concomitant increase in the number of trials required.

Sex offenders are also rarely convicted on just one count – at least two counts is a common occurrence and often there are dozens of charges involved with sex offenses against minors. Whether or not these counts were run consecutively, the proposed legislation could greatly increase the time that sex offenders would remain on probation. The proposed legislation could

ensure that sex offenders could remain on parole for much of their entire natural lifespan. Additionally, because probationers often violate their conditions of probation, the extended period of probation will extend the timeframe within which the probationers might violate.

While HB 2,3,4, & 8/HJCS contemplates use of polygraph examinations to determine if offenders are in compliance with probation conditions, the New Mexico Supreme Court is presently considering whether to continue to allow such evidence at trials in the state. This decision might affect admissibility of such evidence at in-court probation hearings. This decision is unlikely to affect admissibility of such evidence at parole hearings, however.

FISCAL IMPLICATIONS

According to the New Mexico Sentencing Commission (NMSC), a \$250.0 appropriation is needed to allow the NMSC to properly carry out its responsibilities under this bill. The NMSC's current budget is devoted to contractual services, and therefore there are no direct FTE's on staff. Additional direct costs include information systems services, printing, travel costs, equipment purchases, office supplies, building rental, meeting room and equipment rental, subscriptions, education and training, and advertising. In addition to staff and direct costs, an appropriation is needed for contractual services necessary to develop sentencing reform.

The Corrections Department believes there will be minimal to moderate cost increases in the short-term and substantial cost increases in the-long term. This bill will increase probation and parole caseloads and may increase the prison population due to the longer periods of probation and parole, which will increase the chances of probation and parole violations. However, these should be offset somewhat from lower recidivism rates and a better quality of life for New Mexico citizens due to fewer sexual crimes being committed.

Governor Richardson by executive order made approximately \$1.0 million in nonrecurring federal grant funds available to the Corrections Department to address concerns related to sex offenders. An additional \$3.4 million will also be incorporated into the Department's executive budget request for FY04 and FY05 to retain current probation and parole officers, to fund 10 new probation and parole officers, to lease state-of-the-art electronic monitoring devices, and for increasing prison sex offender treatment programs. Long-term prison population cost increases will be addressed in the future.

According to the Administrative Office of the Courts, there will be new costs associated with statewide update, distribution, and documentation of statutory changes. Additional fiscal impact on the judiciary would be proportional to the enforcement of this law and the number of commenced prosecutions. New laws and increased penalties have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

According to the Public Defender Department, additional resources will be necessary since they expect more cases go to trial due to the increased sentences. These trials will be relatively long and complex, and will require the use of advanced attorney staff and expert witnesses. During the 2003 Regular Legislative Session, they estimated (for a similar bill) that \$389.3 would be needed for three felony attorneys, two investigators, two legal liaisons and for furniture and equipment.

Additionally, since probationers often violate the conditions of their probation, the extended pe-

riod of probation will expand the timeframe within which probationers may violate their probation provisions. This will lead to additional violations, and will likely require additional funding for staff and attorney resources. As the sex offenders convicted under the new law come up for parole, there will be an increase in the Public Defender Department workload. Based on projected numbers the Department may require additional resources for attorneys and support staff, probably increasing from FY2012-FY2015, and then beginning to decrease in FY2025.

ADMINISTRATIVE IMPLICATIONS

According to the NMSC, passage of this bill would have a long-term administrative effect on the agency requiring new FTEs and associated resources.

According to the Corrections Department, this bill will result in an increase in the administrative burden on probation and parole officers and prison sex offender treatment personnel, thus requiring additional FTE's and associated resources. The Corrections Department states that these issues will be addressed in their executive budget requests for FY 04 and FY 05.

The Public Defender Department stated that this bill would require additional trial attorneys, expert witness funds, and concomitant additional administrative and appellate resources.

CONFLICT, DUPLICATION, RELATIONSHIP

The language in sections 1D(7) and 1D(8) of the new section of Chapter 9, Article 3, Sex Offender Management Board, may be viewed to conflict with the duties and authorities granted to the CYFD under the Delinquency Act in the Children's Code.

TECHNICAL ISSUES

Enactment of this Bill may require an amendment of the Public Defender Act, NMSA 1978, Sections 31-15-1 to -12. Presently it appears the Public Defender Department is authorized only to represent individuals charged with crimes that carry a possible sentence of imprisonment and individuals in post-conviction proceedings.

According to the CYFD, the following technical issues pertaining to the duties of the SOMB should be considered before passage of this bill:

- Section 1D(2): The intent of "identification" in the first sentence is unclear. The second sentence seems misplaced and a variation of the sentence would be more appropriate in section 1D(3) which discusses treatment for sex offenders. The third sentence seems misplaced and a variation of the sentence would be more appropriate in section 1D(6) which discusses criteria for measuring a sex offenders progress in treatment programs.
- Section 1D(3): The language, "including determining the duration, terms and conditions of probation and parole for sex offenders" in the last sentence seems problematic. Replacing the word, "determining" with "recommending" may resolve issues that may arise regarding the authority of the courts and the parole board. This language is repeated in section 1D(4) and seems more appropriate there with the same modification.

- Section 1D(5): “Behavior monitoring” is vague and should be defined.
- Section 1D(6): The use of “parole board” in the second sentence is problematic since the sentence also addresses the discharge of an offender from probation. In addition, the language should be modified to avoid issues that may arise regarding the authority of the courts and the parole board.
- Section 1D(7): The intent of “identification” in the first sentence is unclear. The second sentence seems misplaced and a variation of the sentence would be more appropriate in section 1D(8) which discusses treatment for juvenile sex offenders. The third sentence seems misplaced and a variation of the sentence would be more appropriate in section 1D(6) which discusses criteria for measuring a sex offenders progress in treatment programs.
- Section 1D(10): “civil commitment program” is vague and should be defined.

OTHER SUBSTANTIVE ISSUES

The NMSC’s current work on juvenile programming needs is extremely important. During its first few years of operation, the NMSC focused exclusively on adult-related criminal justice issues, and decided to turn its focus in FY02 and FY03 to juvenile-related issues that desperately need attention. The membership of the NMSC is concerned that if the additional mandates imposed by this bill are not adequately funded, this important work will fall by the wayside.

AMENDMENTS

The Bill’s addition of duties to the Chief Public Defender may require an amendment of the Public Defender Act, NMSA 1978, Sections 31-15-1 to–12. Presently the Department of the Public Defender appears to be authorized only to represent individuals charged with crimes that carry a possible sentence of imprisonment and for individuals in post-conviction proceedings.

According to the Attorney General’s Office, the following changes should be considered:

- Section 1, Creation of a SOMB. The purpose of this board seems to be to act as an advisory committee to the New Mexico Sentencing Commission, but some of the directives to the SOMB appear to empower it to act directly. The board is a non-voting entity. Amendments are necessary to clarify the strictly advisory role of the Board; the availability of an expert in the field of the treatment of sex abusers (the term should be “sex offenders” at page 3, line 6); the lack of funding for the SOMB to implement the duties and responsibilities; the review of Megan’s Law should be more specific, i.e. to include the duty to recommend changes to Megan’s Law in accordance with federal rules and regulations in order to receive all available federal grants and monies.
- Section 2, Kidnapping. The definition of kidnapping is amended to include the kidnapping and commission of a sexual offense of a minor as a first-degree felony. Unlike Section 30-4-1(B), no safe harbor provision is provided for this new crime—the crime is not mitigated if the minor is returned and freed in a safe place. The use of the phrase “with the intent to commit a sexual offense when the victim is a minor” should be clarified to

include both an attempted sexual offense crime and the commission of the sexual offense. Also, the definition of “sexual offense” is unclear and should be explicitly stated, i.e. commit a sexual offense including the crimes of first-degree criminal sexual penetration, etc. The term “sexual offense” may be interpreted to range from a simple assault to a criminal sexual penetration, depending on the facts and circumstances of the crime. Similar to fourth degree criminal sexual penetration, it might be wise to add language to provide for an age differential for the commission of the crime. For example, the proposed change in the definition of kidnapping may apply in the situation of an 18-year-old assistant athletic coach and a sexual offense committed against a 17-year-old student. Applying the same four-year age differential in Criminal Sexual Penetration to this crime would mean that the penalty against an 18-year old would not apply unless the victim was 14 or younger.

- Section 3, Criminal Sexual Penetration. Provides for a minimum mandatory sentence for a second-degree felony when the Criminal Sexual Penetration is committed on a victim between the ages of thirteen to eighteen years. Suggested language could include an age differential such as the situation presented above (assistant coach and student-athlete).
- Section 5, Sentencing Authority. Provides for a lengthened sentence for a second-degree felony of 15 years for a sexual offense against a child. Provides for an increased sentence for a third degree felony of 6 years for a sexual offense against a child. Clarification is probably needed for the crimes that explicitly fall within the definition of “sexual offense against a child.” A direct reference to the proposed increase in probation and parole for sex offenders should be included.
- Section 6, Probation. Sex offenders are excluded from the general provisions regarding probation. No appropriation is made for the supervision of sex offenders on probation and specialized training for those probation officers supervising sex offenders. The implementation of any extended probation for sexual offenders would require the actions and adoption of recommendations from the Sex Offender Management Board and the Sentencing Commission. A prospective date should therefore be included to avoid any statutory interpretation issue about the effective date.
- Section 7, Terms and Conditions of Probation. This proposal lists those factors to be considered by the district court when probation is ordered. Registration as a sex offender should be included as one requirement. Terms and conditions of probation could be determined after the Sex Offender Management Board and the Sentencing Commission determining the relevant factors as described in Section (A)(1-5). The procedure for review at two and one-half year intervals fails to address burden of proof, need for expert testimony and payment of fees, a remedy for the failure to hold a probation hearing within the specific time frame, notification to victims, and right to legal counsel. Also, it is unclear what agency has the duty and responsibilities throughout the extended period of parole to represent the State (Department of Corrections? District Attorney? Attorney General?). This legal representation should be clarified as well as what legal counsel is afforded a probationer and the funding for this legal representation. Notification to the victim(s) should also probably be specifically included. A prospective effective date should be included as well.

- Section 8, Parole. This proposal creates extended parole for sex offenders. Fiscal implications should be considered for both the Parole Board as well as administrative and legal costs. A prospective effective date should be included. Similar to the extended probation propose, the procedural aspects should be considered. Notification to victim(s) is important and should be part of the proposed law.
- Section 9. Parole. The recommendations and adopting of standards would be required to implement and enforce the extended parole for sex offenders. Expert witnesses and advisers would be required. One requirement for extended parole should include registration as a sex offender. An effective date for the application of extended parole should be included.
- Section 10, Definitions for SORNA. The definition of a “sex offender” should include the definition of “resident.” Currently, transient sex offenders are not included in the definition of a sex offender because a transient has no residence. Registration as a sex offender should therefore perhaps include any sex offender who lives in New Mexico, is employed in New Mexico, or contemplates living in New Mexico for a period exceeding ten (10) days.
- Section 12, Public Access for SORNA. Public access to information should be afforded about not only those sex offenders who have direct contact with children but also about those offenders who may be employed or volunteer as a caretaker or work in a nursing home, care facility or hospital environment, e.g. as a nurse’s aide, maintenance worker. According to a recent report regarding sexual assault, victims include not only children but also mentally or physically disabled individuals. Amendments to that effect should therefore also be considered.
- Section 13, Meritorious Deductions. No significant issues noted.