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FISCAL IMPACT REPORT

ORIGINAL DATE 01/29/08

SPONSOR Carraro LAST UPDATED _____ HB _____

SHORT TITLE Sexual Predator Civil Commitment Act SB 201

ANALYST Geisler

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY08	FY09		
	\$11,500.0	Recurring	General

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY08	FY09	FY10	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		See fiscal impact			Recurring	General

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General (AG)
 Administrative Office of the Courts (AOC)
 Administrative Office of District Attorneys (AODA)
 Public Defender
 Department of Health (DOH)
 Corrections Department (NMCD)
 Health Policy Commission (HPC)

SUMMARY

Synopsis of Bill

Senate Bill 201 appropriates \$11,500,000 from the general fund and enacts the Sexual Predator Civil Commitment Act, a separate act from the laws pertaining to the Sex Offender Registration and Notification Act and the Sexual Offender Management Board. This bill seeks to define certain sexual predators as violent and place such individuals under civil commitment within the State. The court imposed civil commitment would permit long-term control, care, and treatment of sexually violent predators.

The bill provides for the commitment and treatment of sexually violent predators by: (1) creating new processes to identify potentially sexually violent predators (based on mental abnormality or personality disorder and a list of qualifying offenses); (2) referring those potentially sexually violent predators to a committee for review and evaluation; (3) creating new legal proceedings and processes for determining if a potential predator is, in fact, a violent sexual predator; and (4) instituting involuntary and indefinite long-term commitment of persons determined to be violent sexual predators. The legal processes identified and included in SB 201 include jury trials, proof beyond a reasonable doubt, and unanimous verdicts with regard to certain issues, and requires courts to determine mental health status and propensity for sexual violence.

Other state agencies would be involved in enforcing the law including a multi-disciplinary team, the Sex Offender Management Board, the Secretary of Corrections and the Attorney General. Following certain procedures, a petition for commitment would be filed and the district court would determine if a person is a sexually violent predator. Annual review and certain procedures for release are included in the proposal.

FISCAL IMPLICATIONS

Senate Bill 201 appropriates \$11,000,000 to the Department of Health, \$150,000 to the Attorney General, \$150,000 to the Public Defender Department, and \$200,000 to the Administrative Offices of the Courts from the General Fund to carry out the Sexual Predator Civil Commitment Act in fiscal year 2009. The appropriation of \$11,500,000 contained in this bill is a recurring expense to the General Fund. Any unexpended or unencumbered balance remaining at the end of FY08 shall revert to the general fund.

DOH notes that many states that have enacted Sexual Predator Civil Commitment Act have experienced extraordinary financial burdens, including inadequate financial support to carry out the purpose of the acts. A full understanding of fiscal implications would require evaluation of existing housing and treatment resources and an accurate estimation of the number of potential predators and sexually violent predators that would be identified by this bill.

Corrections notes that operation of a new secure treatment facility by DOH (or by contract with Corrections) would likely require additional security personnel and treatment staff. DOH would need to study all cost factors involved to determine if the \$11 million appropriation identified in SB 201 would be sufficient to provide an appropriate facility or facilities and operating budget. Treatment costs (and SB 201 requires an elaborate treatment and evaluation process) would be at the high range for inpatient mental health treatment. For comparison purposes, the contract/private prison annual cost of incarcerating an inmate is \$25,455 per year for males and the cost per client to house a female inmate at a privately operated facility is \$25,805 per year. For probation and parole, the cost per client for a standard supervision program is \$1,019 per year and the cost per client in intensive supervision programs is \$5,151 per year.

AOC notes the fiscal impact on the judiciary would be proportional to the enforcement of this Act and commenced proceedings/hearings/trials related to the determination of probable cause and/or whether the potential predator is a sexually violent predator. New laws, amendments to existing laws, and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

Attorney General

Involuntary civil commitment of violent sexual predators is a significant legal issue and has been challenged in a number of states. Of import is the incredible expense associated with any diagnosis and treatment. Additional costs would be incurred if a person found to be a sexually violent predator is required to be housed in a separate facility, as contemplated by the proposal.

Significant constitutional issues, especially under the New Mexico Constitution, would be raised—including Eighth Amendment cruel and unusual punishment issues, ex post facto issues, and due process issues. A good overview of the difficulties in enforcing an involuntary civil commitment law is presented by the State of Washington. Federal oversight is pervasive, and the actual administrative and other costs are beyond the original estimates.

Public Defender

The U.S. Supreme Court has upheld the constitutionality of certain civil commitment laws, *Kansas v. Hendricks*, 117 S.Ct. 2072 (1997), and several states have them on the books, but if this bill were made law, it would almost certainly be subject to challenge under the state and federal constitutions. The Supreme Court's basis for upholding the constitutionality of the legal confinement provided in Kansas statute in *Hendricks* was treatment of a mental abnormality. Critics challenge whether such therapy is effective and there are no studies demonstrating civil commitment's effectiveness in preventing new crimes because so few offenders have been released from it.

There needs to be a clear statement of whom the district court would appoint to represent the potential predator. An assignment of the case to the Public Defender department may require a judicial examination of whether the Indigent Defense Act and Public Defender Act authorize such representation. A court's decision that experts were not needed for indigent predators would be challenged judicially and would require funding for appellate counsel and appellate courts. The district attorney is forbidden from withdrawing the allegation without approval of the court – this may interfere with the charging authority of the DA and may present separation of powers problems.

Administrative Office of District Attorneys (AODA)

Prevention of future violent sexual offenses by predatory pedophiles is a perpetual concern. As noted in the legislation, certain sexual predators are not amenable to rehabilitation, and are highly likely to continue committing sexual offenses against children during any period of time that the predator is not physically prevented from doing so. At present, in New Mexico, such sexual predators can be confined only for the duration of a criminal sentence for conviction of a crime, with the possibility of parole revocation during the following five to twenty years only after some further violation of conditions of parole. This does little to prevent future harm to the children of New Mexico by sexually predatory individuals who have amply demonstrated their propensity for reoffending and their lack of volition or ability to constrain their unlawful behavior. Such subsequent offenses not only work irremediable harm upon the state's most vulnerable citizens, but fuel the public's perception of the ineffectuality of the “revolving doors of justice.”

Such concerns are not limited to New Mexico. A number of states have enacted civil commitment statutes which are similar in some fashion to the proposed bill, and such a civil commitment statute has withstood scrutiny by the U.S. Supreme Court and been found to be a lawful exercise of legislative authority. See *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072 ((1997)). See also *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867 (2002). Such legislation must be carefully drafted, however, to satisfy the requirements of substantive due process.

It is unclear whether any such legislation will ultimately be held constitutional by the New Mexico Supreme Court. Historically, the New Mexico Supreme Court has interpreted the New Mexico constitution to provide significantly more protection than that provided by the federal constitution. Thus it is essential that such legislation be scrutinized for compliance with recent decisions issued by the New Mexico courts. Senate Bill 201 has been introduced in essentially its present form during each of the past three legislative sessions. Given the continuous and often rapid evolution of the law in this area, it would be appropriate to engage in a deliberate and carefully researched review, both of New Mexico law, and the laws of states which have enacted similar statutes, prior to enactment of the bill. Given the brevity of the present session, and the inherent complexities in such legislation, it would be advisable to assign an interagency task force to review the proposed bill and revise it as necessary to reflect current law, for consideration by the 2009 general session.

If such an effort is undertaken, it would also be appropriate to attempt to determine the scope of the potential commitment burden, in numbers of individuals who might be proposed for civil commitment, in order to more accurately reflect, in current dollars, the actual cost to the state. Such calculations should include a review of the costs experienced by other states in implementation.

Administrative Office of the Courts (AOC)

There may be a constitutional issue with regard to cruel and unusual punishment. Under the Act, a person might have completed his sentence but can continue to be confined. Confinement could continue indefinitely. A *“Research Overview: Sex Offender Treatment Approaches and Programs”* prepared for the New Mexico Sentencing Commission states that, in addition to supervision and registration programs, several states have passed civil commitment statutes as a way to manage their sex offender populations. It is anticipated that the amount of funds needed to handle the growing population of civilly committed persons would be expected to double in the next five years.

Corrections

It is unclear how this type of commitment can be considered a civil commitment. The procedure outlined is the same procedure for a criminal trial. The rules of evidence as applicable to a criminal trial apply. The offender is afforded all the rights available to defendants at a criminal trial and the standard of proof is beyond a reasonable doubt, which is the same standard as for a criminal trial. Then after the trial, the person is at least potentially housed at the Department of Corrections. What separates this from a criminal trial is that the defendant is on trial for what they might do, not for what they have done.

The inclusion of the Children’s Youth and Families Department (CYFD) as an “agency with jurisdiction” seems to imply that children maybe locked up for the rest of their lives if they are

found to be covered by this act. The inclusion of the DOH as an “agency with jurisdiction” seems to indicate that a person who has never been convicted of a crime maybe incarcerated for the rest of their life if they are found to be covered by this act.

This bill probably will be challenged as being unconstitutional double jeopardy. The probability of this challenge succeeding is enhanced by the fact that a person found to be subject to this law is subject to multiple trials before they are released. The provision of this bill applying it to anyone convicted of one of the enumerated offenses, even if the conviction occurred prior to the passage of this bill, probably will be found to violate the ex post facto clause of the United States and New Mexico Constitutions. The indeterminate nature of the commitment is also like to be found in violation of the New Mexico Constitution.

TECHNICAL ISSUES

DOH notes that SB 201 identifies individuals who have committed defined sexually violent offenses and who suffer from “mental abnormality” and/or “personality disorder” as sexually violent predators. Clinical criterion for determining these conditions are not identified in the bill. SB 201 provides for a review of potential predators by a multidisciplinary team. The composition and professional qualifications of members of such a team are not specified.

GG/bb