
UNFINISHED BUSINESS

Bill No: SB 145
Author: Wiener (D)
Amended: 7/11/19
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE: 6-0, 4/9/19
AYES: Skinner, Moorlach, Bradford, Jackson, Mitchell, Wiener
NO VOTE RECORDED: Morrell

SENATE APPROPRIATIONS COMMITTEE: 4-2, 5/16/19
AYES: Portantino, Bradford, Hill, Wieckowski
NOES: Bates, Jones

SENATE FLOOR: 25-3, 5/28/19
AYES: Allen, Archuleta, Atkins, Beall, Bradford, Caballero, Dodd, Durazo,
Glazer, Hertzberg, Hill, Hueso, Jackson, Leyva, McGuire, Mitchell, Monning,
Pan, Portantino, Roth, Skinner, Stern, Umberg, Wieckowski, Wiener
NOES: Grove, Jones, Morrell
NO VOTE RECORDED: Bates, Borgeas, Chang, Galgiani, Hurtado, Moorlach,
Nielsen, Rubio, Stone, Wilk

ASSEMBLY FLOOR: Not available

SUBJECT: Sex offenders: registration

SOURCE: Equality California
Los Angeles County District Attorney

DIGEST: This bill exempts defendants convicted of specified, non-forcible sex offenses involving minors from mandatory registration as a sex offender.

Assembly Amendments remove provisions of the bill that would have mandated that specified offenders would still have to comply with provisions of Megan's Law, despite the fact that they would no longer be registered sex offenders.

ANALYSIS:

Existing law:

- 1) Criminalizes the acts of non-forcible sodomy, oral copulation, and sexual penetration, with a minor, and punishes those offenses as either alternate felony/misdemeanors (“wobbler” offenses) or as felonies, depending on the age difference between the perpetrator and the minor. (Pen. Code §§ 286 subd. (b), 287 subd. (b), and 289 subds. (h) and (i).)
- 2) Requires, until January 1, 2021, lifetime sex offender registration for persons convicted of various offenses, including offenses that criminalize the acts of non-forcible sodomy, oral copulation, and sexual penetration, with a minor. (Pen. Code, § 290, subds. (a) - (c) [effective until January 1, 2021, repealed as of that date].)
- 3) Requires, as of January 1, 2021, sex offender registration for persons convicted of various offenses for a period of 10 years, 20 years, or life, depending on the nature of the conviction. For persons convicted of non-forcible sodomy, oral copulation, and sexual penetration, with a minor, the registration period is 10 years. (Pen. Code, § 290, subds. (c) and (d)(1)(A) [operative January 1, 2021].)
- 4) Criminalizes the act of vaginal sexual intercourse with a minor, punishes a violation of that offense as either a misdemeanor or an alternate felony/misdemeanor (a “wobbler”), and does not require sex offender registration for a violation of that offense. (Pen. Code, §§ 261.5 and 290 *et. seq.*)
- 5) Criminalizes the act of willfully and lewdly committing any lewd or lascivious act upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child; punishes that conduct as a prison felony and requires sex offender registration for life until January 1, 2021, and for twenty years thereafter. (Pen. Code §§ 288, subd. (a) and 290, subds. (a) - (c).)
- 6) Requires a person who must register as a sex offender to register, or reregister if he or she has previously registered, upon release from incarceration, placement, commitment, or release on probation with the local law enforcement agency. (Pen. Code, § 290.015, subd. (a).)

- 7) Provides that within three days thereafter, the registering law enforcement agency or agencies shall forward the statement, fingerprints, photograph, and vehicle license plate number, if any, to the Department of Justice (DOJ). (Pen. Code, § 290.015, subd. (b).)
- 8) Authorizes the court to order a person convicted of an offense that does not require registration as a sex offender to nonetheless register as such if it finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification and states on the record the reasons for its findings and the reasons for requiring registration. (Pen. Code § 290.006.)
- 9) States that registration as a sex offender shall consist of the following:
 - a) A statement signed in writing by the person, giving information as shall be required by DOJ and giving the name and address of the person's employer, and the address of the person's place of employment, if different from the employer's main address;
 - b) Fingerprints and a current photograph taken by the registering official;
 - c) The license plate number of any vehicle owned by, regularly driven by or registered in the name of the registrant;
 - d) Notice to the person that he or she may have a duty to register in any other state where he or she may relocate; and,
 - e) Copies of adequate proof of residence, such as a California driver's license or identification card, recent rent or utility receipt or any other information that the registering official believes is reliable. (Pen. Code, § 290.015, subd. (a).)
- 10) Provides that a willful violation of any part of the registration requirements constitutes a misdemeanor if the offense requiring registration was a misdemeanor, and constitutes a felony if the offense requiring registration was a felony or if the person has a prior conviction of failing to register. (Pen. Code, § 290.018, subds. (a) and (b).)
- 11) Provides that a misdemeanor failure to register shall be punishable by imprisonment in a county jail not exceeding one year, and a felony failure to register shall be punishable in the state prison for 16 months, two or three years. (Pen. Code, § 290.018, subds. (a) and (b).)

- 12) Requires DOJ to make information about registered sex offenders available to the public on its internet website, as specified. (Pen. Code, § 290.46, subd. (a).)
- 13) Requires DOJ to include on its website a registrant's name and known aliases, a photograph, a physical description, including gender and race, date of birth, criminal history, the home address at which the registrant resides, and any other information that DOJ deems relevant unless expressly excluded under the statute. (Pen. Code, § 290.46, subd. (b).)
- 14) Imposes a 20-year parole term for persons convicted of a felony offense of sodomy, oral copulation, or sexual penetration in which one or more of the victims of the offense was a child under 14 years of age. (Pen. Code § 3000, subd. (b)(4)(A).)
- 15) Imposes specified restrictions on persons registered as sex offenders with respect to employment in certain areas, such as in education (Education Code §§ 35021, 44345), community care facilities (Health and Safety Code (HSC) § 1522), residential care facilities (HSC § 1568.09), residential care facilities for the elderly (HSC § 1569.17), day care facilities (HSC § 1596.871), engaging in the business of massage (Government Code § 51032), physicians and surgeons (Business and Professions Code § 2221), registered nurses (Business and Professions Code § 2760.1), and others.

This bill:

- 1) Exempts a person convicted of non-forcible sodomy with a minor, oral copulation with a minor, or sexual penetration with a minor, as specified, from having to automatically register as a sex offender under the Sex Offender Registry Act if the person was not more than 10 years older than the minor at the time of the offense, and the conviction is the only one requiring the person to register.
- 2) Specifies that a person convicted of one of those specified offenses may still be ordered to register in the discretion of the court, if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification

Background

California mandates sex offender registration for the following offenses involving voluntary sexual acts minors with someone who is aged within 10 years of the minor:

- Sodomy
- Sexual penetration
- Oral copulation

However, California fails to mandate registration as a sex offender who commits a violation of sexual intercourse with a minor who is within 10 years of the offender. Sexual penetration is distinguishable from sexual intercourse in that the vaginal penetration is anything other than a penis.

Additionally, the crimes of sexual conduct with a minor under the age of 14 are punished in a separate code section, as lewd and lascivious acts with a minor under the age of 14. (Cal. Pen. Code § 288.)

At the time that California created the sex offender registry in 1947, all of these acts were likewise illegal amongst consenting adults. At the time, that was likely the reason these offenses were included in the registry. The articulated conduct was legalized between consenting adults in 1975 by AB 489.

The California Supreme Court has twice spoken on the issue of unequal registration requirements for similarly situated offenders. The first case on this issue was *People v. Hofsheier* (2004), 37 Cal. 4th 1185. The second case was *Johnson v. Department of Justice* (2015), 60 Cal. 4th 871. The two decisions reached very different results with very similar fact patterns. The Legislature speaking on this issue would provide the necessary guidance to resolve the issue going forward.

The *Hofsheier* case involved a 22-year old offender who was convicted of oral copulation with a 16-year old. The defendant argued at his sentencing that the mandatory registration requirement he was forced to undergo was a violation of equal protection because if he had engaged in vaginal intercourse instead of oral copulation with the minor the registration would be discretionary on the part of the judge. Both the prosecutor and the judge agreed that the mandatory registration for oral copulation was “out of whack” with the discretionary registration for vaginal intercourse.

Both the Court of Appeal and the California Supreme Court held that the mandatory registration for oral copulation was a violation of the defendant’s Constitutional right to Equal Protection under the law. Specifically, the Supreme Court ruled that the government had no legitimate reason to treat these similarly situated offenses differently.

The Supreme Court rejected the government's assertion that the disparate treatment by the Legislature was due to the fact that one offense could result in impregnation and the other could not. The rationale for the government making this argument as the reason for the Legislature's disparate treatment was that the risk of impregnation could cause stigmatization of the parent registrant and that the behavior would be more likely to be committed again if impregnation was not possible. The court rejected these arguments as not reasonable or rational.

The Supreme Court found that the far more likely reason for the disparate treatment was that oral copulation was illegal in California between consenting adults until 1975, and sex offender registration was implemented in California in 1947. The conduct was seen as distinguishable in 1947, but was treated the same amongst consenting adults as of 1975.

The Court remanded the case to the Superior Court to apply sex offender registration at its discretion as it would have had the offender been convicted of an offense involving voluntary sexual intercourse.

In 2015, the Supreme Court overruled its *Hofsheier* ruling in the *Johnson* case. The *Johnson* opinion was drafted by Justice Baxter, who wrote the dissenting opinion in *Hofsheier*. The Supreme Court in *Johnson* gave wide interpretation into what the legislature must have meant when drafting the law that created sex offender registration in 1947. In *Johnson*, the court reversed its rationale in *Hofsheier* finding that teen pregnancy and its costly consequences was a rational basis to discriminate between the offenses. The court further found that the stigmatization of sex offender registration might interfere with employment opportunities and the support of children conceived as a result of unlawful intercourse, which would not be a factor if the conduct could not result in impregnation.

Under current California law *Johnson* is the controlling opinion. The opinion is based on what the intent of the Legislature was in 1947. Even though the offense in question (oral copulation) was illegal between consenting adults until 1975, and sexual intercourse was not, the Court was convinced that a rational basis for the disparate treatment was that one could result in impregnation and the other may not. As specifically articulated in *Hofsheier* that rationale is challenging to achieve and it is far more likely that the distinction on mandatory vs. discretionary registration was made because intercourse between consenting heterosexuals was legal and the other acts were illegal among consenting adults. Furthermore, the Court reasoned that the Legislature intended offenses that could not result in teen pregnancy to be more burdensome than an offense that could result in teen

pregnancy. The risk of pregnancy or the risk of a sexually transmittable disease seems far more like a factor in aggravation rather than a factor in mitigation. In fact, under California law, impregnation caused during the commission of a crime is considered “serious bodily injury.”

Putting aside the Court’s findings, the treatment of these offenses differently is inherently discriminatory. Sexual acts that could result in pregnancy are treated more leniently than those that could not result in pregnancy. Some partners are incapable of achieving conception. The *Johnson* decision cited that fact that the Legislature has failed to act to remedy the inconsistency as a rationale to continue to discriminate amongst these offenses for the purpose mandating registration. If the issue of inconsistency is going to be resolved it must therefore be accomplished by the action of the California Legislature.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

According to the Assembly Appropriations Committee, “One-time costs (GF) in the hundreds of thousands of dollars to low millions of dollars for the first three years to Department of Justice (DOJ) in increased workload to address claims for removal from the Sex Offender Registry. DOJ estimates workload costs of \$945,000 in FY 2019-20, \$2.8 million dollars in FY 2020-21, \$2.6 million dollars in FY 2021-22, and \$58,000 annually thereafter.”

SUPPORT: (Verified 8/29/20)

Equality California (co-source)
Los Angeles County District Attorney (co-source)
Alliance for Constitutional Sex Offender Laws
American Civil Liberties Union of California
Anti-Defamation League
California Attorneys for Criminal Justice
California Civil Liberties Advocacy
California Coalition Against Sexual Assault
California District Attorneys Association
California Police Chiefs Association
California Public Defenders Association
Prostasia Foundation
Stonewall Democratic Club
William A. Percy Foundation for Social and Historical Studies

OPPOSITION: (Verified 8/29/20)

California Statewide Law Enforcement Association

ARGUMENTS IN SUPPORT: According to the Los Angeles County District Attorney:

“Currently, there are several non-forcible, ‘consensual’ sexual offenses involving minors which require mandatory sex offender registration. These cases involve minors who are having a sexual relationship with someone over age 18. Although minors cannot legally consent to sexual activity, the cases are viewed as ‘consensual’ or ‘voluntary’ in that the sexual activity is not forced and the minor is a willing participant.

“The California Supreme Court and Appellate Courts had previously found that mandatory registration violated equal protection laws under these circumstances. Under current law the sex offender registration requirements differ between the ‘consensual’ acts of oral copulation, sodomy, sexual penetration and sexual intercourse. This has a direct discriminatory effect for people in same sex relationships. For example, if a 19-year-old male in a romantic relationship with a 17-year-old male were to be prosecuted for sodomy or oral copulation with a person under 18, he would be required to register as a sex offender. However, a 24-year-old male who had vaginal intercourse with a 15-year-old girl and impregnated her is not required to register.”

ARGUMENTS IN OPPOSITION: According to the California Statewide Law Enforcement Association, “SB 145 exempts persons convicted of non-forcible voluntary sodomy with a minor, oral copulation with a minor or sexual penetration with a minor from having to automatically register as a sex offender if the person wasn’t more than 10 years older than the minor at the time of the offense. According to the Child Advocacy Center, 1 in 3 girls and 1 in 5 boys are sexually abused before the age of 18. Additionally, approximately 20% of victims of sexual abuse are under the age of eight. This is absolutely unacceptable; as Californians, and law enforcement partners who are on the front lines called to sexual assault and domestic violence cases, laws like SB 145 will only enable pedophiles to prey on children closer to their age.”

Prepared by: Gabe Caswell / PUB. S. /
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