Prepared by the North Dakota Legislative Council
staff for the Criminal Justice Committee
September 1999

SEXUAL OFFENSES, SENTENCING, AND TREATMENT STATUTES - BACKGROUND MEMORANDUM

Senate Concurrent Resolution No. 4048 (attached as an appendix) directs the Legislative Council to study the feasibility and desirability of revising the sections of the North Dakota Century Code which relate to sexual offenses, sentencing of sexual offenders, and sexual offender commitment treatment. North Dakota Century Code (NDCC) Chapter 12.1-20 contains this state's crimes and penalties for sexual offenses. Penalty statutes and sentencing alternatives are contained in Chapter 12.1-32. The 1999 Legislative Assembly passed three bills that affect statutes related to this study. The bills--Senate Bill Nos. 2223, 2299, and 2305--are discussed later in this memorandum.

PREVIOUS STUDIES AND LEGISLATION

1991-92 Interim

During the 1991-92 interim, the Legislative Council interim Judiciary Committee, pursuant to Senate Concurrent Resolution No. 4061, studied the investigation, prosecution, and treatment of offenders in child sexual abuse cases. As an added committee assignment, the study was expanded to include the investigation, prosecution, and treatment of sexual offenders of developmentally disabled individuals. The committee recommended two bills that were enacted by the 1993 Legislative Assembly. The first bill permitted a guardian ad litem to be appointed for a developmentally disabled victim in a sexual offense case. The second bill consolidated the sexual offender and crimes against children offender registration statutes.

1995-96 Interim

During the 1995-96 interim, the Legislative Council interim Criminal Justice Committee, pursuant to Senate Concurrent Resolution No. 4001, studied the dispositional alternatives available in cases involving sexual offenses against children, disposition of cases involving perpetrators who do not attend court-ordered treatment, and the court's use and compliance with NDCC Chapter 12.1-35 and Rule 803(24) of the North Dakota Rules of Evidence. In addition, pursuant to House Concurrent Resolution No. 3016, the committee studied the feasibility and desirability of providing a community notification process by which communities would be informed of the release of a convicted sexual offender and of persons charged with or convicted of sexual offenses. The committee recommended that the 56th Legislative Assembly approve funding for the administration of the sexual offender registration and notification law as requested by the Bureau of Criminal Investigation. The committee also recommended six bills, all of which were passed in 1997, and which are discussed later in this memorandum.

1997 Legislation

The 1997 Legislative Assembly passed five bills that substantially affected NDCC Chapter 12.1-20, which deals with sexual offenses:

1. Senate Bill No. 2153 created a Class A felony for the continuous sexual abuse of a child. The bill defined "continuous sexual abuse of a child" as any combination of three or more sexual acts or sexual contacts with a person under the age of 15 years during a period of three or more months.
2. Senate Bill No. 2168 required that the court grant immunity from prosecution to a person who provides information in a divorce action regarding sexual acts with another person.
3. Senate Bill No. 2285 provided that a person who engages in a sexual act with another person is guilty of gross sexual imposition if that person or someone with that person's knowledge has substantially impaired the victim's power to appraise or control the victim's conduct by administering without the victim's knowledge a controlled substance as defined in Chapter 19-03.1.
4. Senate Bill No. 2364 changed the penalty from a Class A misdemeanor to a Class C felony for an adult engaging in a sexual act with a minor if the adult is at least 22 years old and the minor is at least 15 years old.
5. House Bill No. 1387 made it an infraction for a person to willfully own, rent, lease, manage, or exercise control of any portion of an adult entertainment center if that portion contains any partition between subdivisions of a room or area that has an opening that facilitates a sexual act between individuals on either side of the partition. The bill further requires that any room or portion of a room used for an adult entertainment center must have at least one side open to an adjacent public space and adequate lighting.

The 1997 Legislative Assembly also passed seven bills that substantially affected Chapter 12.1-32 and various other sections of the Century Code as it relates to the sentencing of sexual offenders:

1. House Bill No. 1044 (recommended by the interim Criminal Justice Committee) required individuals convicted of a relevant offense in municipal court to register as if convicted in district court.
2. House Bill No. 1045 (recommended by the interim Criminal Justice Committee) allowed for the prosecution of an adult for an offense committed while a child when the offense was not adjudicated in the juvenile court, unless the state intentionally delayed the prosecution to avoid the juvenile court jurisdiction.
3. House Bill No. 1046 (recommended by the interim Criminal Justice Committee) required a risk assessment in presentence investigations of individuals charged with gross sexual imposition.
4. House Bill No. 1047 (recommended by the interim Criminal Justice Committee) established the procedures for the civil commitment of sexually dangerous individuals. The bill included provisions for the confidentiality of proceedings, right to counsel, notice, appeal, limitation of liability, and recovery of expenses.
5. House Bill No. 1048 (recommended by the interim Criminal Justice Committee) required, upon a motion by the state's attorney, the district court to make a determination as to whether a sexual offender is a "sexually violent predator." The bill required registration by a sexually violent predator until a court determines that the sexual offender is no longer a sexually violent predator. The bill also required the release of registration information if a law enforcement agency determines that a sexual offender is a public risk and registration information is necessary for public protection.
6. House Bill No. 1089 defined "sentence imposed" as used in a statute requiring 85 percent of the sentence imposed to be served for the crime of gross sexual imposition, among other crimes, to mean the remaining life expectancy of the offender on the date of sentencing if the sentence is to a term of life imprisonment.
7. House Bill No. 1357 required registration as a sexual offender for a person who has twice surreptitiously intruded on another by looking through a window of a person's home or the person's hotel room or by looking at a person using a tanning booth or by surreptitiously installing a device for photographing or recording a person while in a hotel or a tanning booth.
8. Senate Bill No. 2030 (recommended by the interim Criminal Justice Committee) provided for data collection on certain juvenile offenders.
9. Senate Bill No. 2153 prohibited a court from deferring imposition of sentence or suspending any part of a sentence for the continuous sexual abuse of a child unless the offense was the defendant's first violation of Chapter 12.1-20 and there were extenuating circumstances that justify a suspension. The bill also required a presentence investigation for sentencing for the crime of continuous sexual abuse of a child.
10. Senate Bill No. 2364 prohibited the deferred imposition of sentence for gross sexual imposition on a victim under 15 years of age in cases where the defendant cannot prove by clear and convincing evidence that the defendant reasonably believed the victim was 15 years of age or older.

1997-98 Interim

During the 1997-98 interim, the Legislative Council interim Criminal Justice Committee, pursuant to Senate Concurrent Resolution No. 4049, studied the feasibility and desirability of revising the sections of the Century Code which related to sexual offenses. In addition, the committee, pursuant to Senate Concurrent Resolution No. 4025, studied the effects of sexual abuse on child victims. As a result of these studies, the committee recommended two bills to the 56th Legislative Assembly. The first, House Bill No. 1030, would have required a school to provide information to the coroner or the Child Fatality Review Panel upon the death of a child. The second, House Bill No. 1031, would have required a mark on the driver's license of a felonious sexual offender and an individual who has committed a felony against a child. Both bills failed to pass the House.

1999 Legislation

Senate Bill No. 2223 increased the penalty for assault from a Class A misdemeanor to a Class C felony if the victim is under the age of 12 years and increased the penalty for aggravated assault from a Class C felony to a Class B felony if the victim is under the age of 12 years or if the victim suffers permanent loss or impairment of the function of a bodily member or organ.

Senate Bill No. 2305 expanded the meaning of "communicates in writing" for the purposes of the crime of harassment to include electronic transmissions, electronic mail, facsimile, or other similar means. The bill also permitted a court to impose as a condition of probation that a person refrain from any subscription to, access, or use of the Internet.

Senate Bill No. 2299 provided for the registration requirements for an individual who has pled guilty or been found guilty of a sexual offense, including juvenile delinquent adjudications of equivalent offenses.

NORTH DAKOTA CENTURY CODE PROVISIONS - SEXUAL OFFENSES AND SENTENCING

Under NDCC Section 12.1-20-01, if a victim of a sexual offense is under the age of 15, it is not a defense that the offender thought the victim to be older. However, if the victim is 15, 16, or 17 years of age, then it is an affirmative defense that the offender reasonably believed the victim to be an adult.

Section 12.1-20-02 contains the definitions for "sexual act" and "sexual contact." The term "sexual act" includes certain defined sexual contacts. The term "sexual contact" is broadly defined to include any touching of the sexual or intimate parts of another for arousing or satisfying sexual or aggressive desires. Generally, the certain sexual contacts contained in the definition of sexual act are punished more severely than sexual contacts as broadly defined.

Under Section 12.1-20-03, the crime of "gross sexual imposition" is defined. Gross sexual imposition is categorized by whether a sexual act or a sexual contact was performed. Gross sexual imposition that results from a sexual act includes:

1. A forced victim. This is a Class A felony.
2. An unknowingly intoxicated or drugged victim. This is a Class A felony if there is serious bodily injury. Otherwise, it is a Class B felony.
3. An unknowing victim. This is a Class A felony if there is serious bodily injury. Otherwise, it is a Class B felony.
4. A victim under 15 years of age. This is a Class A felony.
5. A victim with a mental disease or defect. This is a Class A felony if there is serious bodily injury. Otherwise, it is a Class B felony.

Gross sexual imposition that results from sexual contact includes:

1. A victim under 15 years of age. This is a Class A felony if there is serious bodily injury. Otherwise, it is a Class B felony.
2. A forced victim. This is a Class A felony if there is serious bodily injury. Otherwise, it is a Class B felony.

Under Section 12.1-20-03.1, the crime of "continuous sexual abuse of a child" is defined as a combination of three or more sexual acts or sexual contacts with a person under the age of 15 years during a period of three or more months. This crime is a Class A felony.

Under Section 12.1-20-04, the crime of "sexual imposition" is defined as a sexual act or contact as a result of a threat of a victim that would render a person of reasonable firmness incapable of resisting. This crime is a Class C felony unless the victim is 15, 16, or 17 years of age, then the crime is a Class B felony.

Under Section 12.1-20-05, the crime of "corruption or solicitation of minors" is defined as a sexual act by an adult on a victim that is 15, 16, or 17 years of age. This crime is a Class A misdemeanor unless the offender is at least 22 years of age, then the crime is a Class C felony. The solicitation of a sexual act or contact with a victim under 15 years of age is a Class A misdemeanor.

Under Section 12.1-20-06, the crime of "sexual abuse of wards" is defined as a sexual act performed on a victim in official custody by an offender with supervisory or disciplinary authority over the victim. This crime is a Class A misdemeanor.

Under Section 12.1-20-07, the crime of "sexual assault" is defined as sexual contact that is:

1. Offensive to the victim. This is a Class B misdemeanor.
2. On a victim with a mental disease or defect. This is a Class C felony.
3. On an unknowingly intoxicated or drugged victim. This is a Class C felony.
4. On a victim in official custody by an offender with supervisory or disciplinary authority over the victim. This is a Class A misdemeanor.
5. On a victim that is 15, 16, or 17 years of age and the offender is a parent or guardian. This is a Class C felony.
6. On a victim that is 15, 16, or 17 years of age and the offender is 18 years of age or older. This is a Class C felony if the offender is 22 years of age or older and a Class A misdemeanor if the offender is 18, 19, 20, or 21 years of age.

There are other Chapter 12.1-20 sexual offenses; however, they do not interrelate in the same manner as the sexual offenses previously listed. The other sexual offenses include:

1. Section 12.1-20-06.1 - Sexual exploitation by a therapist. Sexual contact with a patient is a Class C felony.
2. Section 12.1-20-08 - Fornication. A sexual act in public is a Class A misdemeanor. A sexual act by a minor is a Class B misdemeanor.
3. Section 12.1-20-09 - Adultery. This crime is a Class A misdemeanor.
4. Section 12.1-20-10 - Unlawful cohabitation. Living openly and notoriously as a married couple without the benefit of being married is a Class B misdemeanor.

5. Section 12.1-20-11 - Incest. This crime is a Class C felony.
6. Section 12.1-20-12 - Deviate sexual act. Sexual contact with an animal, bird, or dead person is a Class A misdemeanor.
7. Section 12.1-20-12.1 - Indecent exposure. Exposing certain body parts with the intent to annoy or harass another or masturbating in public is a Class B misdemeanor.
8. Section 12.1-20-13 - Bigamy. This crime is a Class C felony.

The remainder of Chapter 12.1-20 contains evidentiary rules and the crime of transferring body fluid that may contain the human immunodeficiency virus.

The following table indicates the classification of penalties for certain sexual offenses:

Class A felony
- Gross sexual imposition - Sexual act by force
- Gross sexual imposition - Sexual act on a victim under 15 years of age
- Gross sexual imposition - Any sexual act or sexual contact that is defined as gross sexual imposition which results in serious bodily injury
- Continuous sexual abuse of a child

Class B felony
- Gross sexual imposition - Any sexual act, except an act by force or on a victim under 15 years of age, or sexual contact that is defined as gross sexual imposition and does not result in serious bodily injury
- Sexual imposition - Sexual act or contact on a victim who is 15, 16, or 17 years of age by an irresistible threat

Class C felony
- Sexual imposition - Sexual act or sexual contact on a victim by an irresistible threat
- Corruption of a minor - Sexual act by an adult who is at least 22 years of age on a victim who is 15, 16, or 17 years of age
- Sexual assault - Sexual contact on a victim with mental disease or defect
- Sexual assault - Sexual contact on a victim unknowingly intoxicated or drugged
- Sexual assault - Sexual contact on a victim who is 15, 16, or 17 years of age and the offender is a parent or guardian
- Sexual assault - Sexual contact on a victim who is 15, 16, or 17 years of age and the offender is at least 22 years of age

Class A misdemeanor
- Corruption of a minor - Sexual act by an adult who is 18, 19, 20, or 21 years of age on a victim who is 15, 16, or 17 years of age
- Solicitation of a minor - Solicit a sexual act or sexual contact of a victim who is under 15 years of age
- Sexual assault - Sexual contact on a ward
- Sexual assault - Sexual contact on a victim who is 15, 16, or 17 years of age and the offender is 18, 19, 20, or 21 years of age

Class B misdemeanor
- Sexual assault - Sexual contact that is offensive to a victim

Chapter 12.1-32 contains specific provisions for the sentencing of sexual offenders. Under Section 12.1-32-02, before sentencing a defendant on a felony charge for gross sexual imposition, continuous sexual abuse of a child, incest, or certain sexual performances by children, a court shall order a presentence investigation and a presentence report. This section requires a risk assessment in presentence investigations of individuals charged with gross sexual imposition.

Section 12.1-20-03.1 provides that a court may not defer imposition of sentence or suspend any part of a sentence for the continuous sexual abuse of a child unless the offense was the defendant's first violation of Chapter 12.1-20 and there are extenuating circumstances that justify a suspension.

Section 12.1-32-04 provides that a court is prohibited from deferring imposition of sentence for gross sexual imposition on a victim under 15 years of age in cases where the defendant cannot prove by clear and convincing evidence that the defendant reasonably believed the victim was 15 years of age or older.

Section 12.1-32-06.1 provides that a court may impose an additional period of probation not to exceed five years for a person found guilty of a felony sexual offense against a minor which is a gross sexual imposition, sexual imposition, or incest if the additional period of probation is in conjunction with sexual offender treatment. If a person is guilty of a misdemeanor sexual offense that is a corruption or solicitation of a minor, a sexual abuse of a ward, or a sexual assault, the court may impose an additional period of up to two years if in conjunction with sexual offender treatment.

Under Section 12.1-32-08, a court may require the defendant to pay the prescribed treatment cost for a victim of a sexual offense.

Section 12.1-32-09.1 provides that a person who is convicted of and receives a sentence of imprisonment for forcible gross sexual imposition or other certain crimes is not eligible for release from confinement until 85 percent of the sentence imposed has been served.

Under Section 12.1-32-15, a person who commits a crime against a child or is a sexual offender is required to register in the county in which the person resides. A crime against a child includes a violation of Chapter 12.1-16 (Homicide); Chapter 12.1-17 (Assaults - Threats - Coercion - Harassment); Chapter 12.1-18 (Kidnapping); or Chapter 12.1-29 (Prostitution). A "sexual offender" is defined as a person who has pled guilty or has been found guilty of the following:

Sexual Offender Offenses	
NDCC Citation	**Offense**
12.1-20-03	Gross sexual imposition
12.1-20-03.1	Continuous sexual abuse of a child
12.1-20-04	Sexual imposition
12.1-20-05	Corruption or solicitation of minors
12.1-20-06	Sexual abuse of wards
12.1-20-07	Sexual assault
12.1-20-11	Incest
12.1-22-03.1	Surreptitious intrusion
12.1-27.2	Sexual performance by children

Section 12.1-32-15 requires the release of registration information if a law enforcement agency determines that a sexual offender is a public risk and registration information is necessary for public protection. A person required to register under this section is required to comply with the registration procedures for a period of 10 years after the date of sentence or release from incarceration, whichever is later, or until a court determination is made that the person is no longer a sexually violent predator.

SUGGESTED STUDY APPROACH

The committee in its study of sexual offenses, sentencing of sexual offenders, and sexual offender commitment treatment may wish to approach this study as follows:

1. Review other states' laws on sexual offenses and the sentencing of sexual offenders.
2. Receive testimony on the operation of this state's laws on sexual offenses from those that administer the law--state's attorneys, defense attorneys, the Attorney General, and the judiciary. The state's attorneys, in particular, have been involved in the legislative process of changing sexual offense laws and will have an interest in any future changes.
3. Review testimony from agencies that deal with the treatment of sexual offenders.
4. Develop recommendations and prepare legislation necessary to implement the recommendations.

ATTACH:1

Fifty-sixth Legislative Assembly, State of North Dakota, begun in the Capitol in the City of Bismarck, on Tuesday, the fifth day of January, one thousand nine hundred and ninety-nine

SENATE CONCURRENT RESOLUTION NO. 4048
(Senators W. Stenehjem, Traynor, Watne)
(Representatives DeKrey, Hawken, Mahoney)

A concurrent resolution directing the Legislative Council to study the feasibility and desirability of revising the sections of the North Dakota Century Code which relate to sexual offenses, sentencing of sexual offenders, and sexual offender commitment treatment.

WHEREAS, it is a legislative responsibility to review existing laws to ensure that they address the problems they are intended to rectify; and

WHEREAS, in 1997 and 1999 the Legislative Assembly considered at least 15 measures relating to sexual offenders; and

WHEREAS, the sexual offense statutes are interrelated and sometimes a change in one section necessitates a reevaluation of other sections;

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE OF NORTH DAKOTA, THE HOUSE OF REPRESENTATIVES CONCURRING THEREIN:

That the Legislative Council study the feasibility and desirability of revising the sections of the North Dakota Century Code which relate to sexual offenses, the sentencing of sexual offenders, and sexual offender commitment treatment; and

BE IT FURTHER RESOLVED, that the Legislative Council report its findings and recommendations, together with any legislation required to implement the recommendations, to the Fifty-seventh Legislative Assembly.