

SEXUAL OFFENSES AND SENTENCING - BACKGROUND MEMORANDUM

Senate Concurrent Resolution No. 4049 (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. North Dakota Century Code (NDCC) Chapter 12.1-20 contains this state's crimes and penalties for sexual offenses. The 1997 Legislative Assembly passed five bills that substantially affected NDCC Chapter 12.1-20--Senate Bill Nos. 2153, 2168, 2285, and 2364 and House Bill No. 1387.

REVIEW OF 1997 LEGISLATIVE CHANGES

Senate Bill No. 2153 creates a Class A felony for the continuous sexual abuse of a child. The bill defines "continuous sexual abuse of a child" as any combination of three or more sexual acts or sexual contacts with a minor under the age of 15 years during a period of three or more months.

Senate Bill No. 2168 requires that the court grant immunity from prosecution to a person who provides information in a divorce action regarding sexual acts with another person.

Senate Bill No. 2285 provides that a person who engages in a sexual act with another 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.

Senate Bill No. 2364 changes 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.

House Bill No. 1387 makes 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.

REVIEW OF NORTH DAKOTA'S LAWS ON SEXUAL OFFENSES

The following is a review of this state's criminal law on sexual offenses as of August 1, 1997, and as a comparison of sexual offenses by severity as they were before and after the 1997 Legislative Assembly.

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.

North Dakota Century Code 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 NDCC 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 NDCC 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 minor under the age of 15 years during a period of three or more months. This crime is a Class A felony.

Under NDCC 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 NDCC 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 NDCC 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 NDCC 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 is a Class A misdemeanor if the offender is 18, 19, 20, or 21 years of age.

There are other NDCC 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 NDCC Chapter 12.1-20 contains evidentiary rules and the crime of transferring body fluid that may contain the human immunodeficiency virus.

The following table compares the severity of offense for certain sexual offenses as they are before August 1, 1997, and as they will be as of that date.

| Pre-August 1, 1997 | As of August 1, 1997 |
|--|--|
| <p>Class A felony</p> <ul style="list-style-type: none"> • 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 <p>Class B felony</p> <ul style="list-style-type: none"> • Gross sexual imposition - Any sexual act, except | <p>Class A felony</p> <ul style="list-style-type: none"> • 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 <p>Class B felony</p> <ul style="list-style-type: none"> • Gross sexual imposition - Any sexual act, except |

| Pre-August 1, 1997 | As of August 1, 1997 |
|--|---|
| <p>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</p> <ul style="list-style-type: none"> • Sexual imposition - Sexual act or contact on a victim who is 15, 16, or 17 years of age by an irresistible threat <p>Class C felony</p> <ul style="list-style-type: none"> • Sexual imposition - Sexual act or sexual contact on a victim by irresistible threat <p>Class A misdemeanor</p> <ul style="list-style-type: none"> • Corruption of a minor - Sexual act by an adult on a victim who is 15, 16, or 17 years of age • Solicitation of a minor - Solicit a sexual act or contact of a victim who is under 15 years of age • 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 an adult <p>Class B misdemeanor</p> <ul style="list-style-type: none"> • Sexual assault - Sexual contact that is offensive to victim • Sexual assault - Sexual contact on a ward • Sexual assault - Sexual contact on a victim with mental disease or defect • Sexual assault - Sexual contact on victim unknowingly intoxicated or drugged | <p>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</p> <ul style="list-style-type: none"> • Sexual imposition - Sexual act or contact on a victim who is 15, 16, or 17 years of age by an irresistible threat <p>Class C felony</p> <ul style="list-style-type: none"> • 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 <p>Class A misdemeanor</p> <ul style="list-style-type: none"> • 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 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 <p>Class B misdemeanor</p> <ul style="list-style-type: none"> • Sexual assault - Sexual contact that is offensive to victim |

SENTENCING OF SEXUAL OFFENDERS

Under NDCC Chapter 12.1-32, there are specific provisions for the sentencing of sexual offenders. These provisions will be described as they are before the effective dates of the bills affecting these provisions passed by the 1997 Legislative Assembly.

Under NDCC Section 12.1-32-02, before sentencing a defendant on a felony charge for gross

sexual imposition, incest, or certain sexual performances by children, a court shall order a presentence investigation and a presentence report.

Under NDCC Section 12.1-32-06.1, 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 NDCC Section 12.1-32-08, a court may require the defendant to pay the prescribed treatment cost for a victim of a sexual offense.

Under NDCC Section 12.1-32-09.1, 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 NDCC 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 sexual offender is defined as a person who has pled guilty or has been found guilty of the following:

| Sexual Offender Offenses | |
|---------------------------------|--------------------------------------|
| NDCC Citation | Offenses |
| 12.1-20-03 | Gross sexual imposition |
| 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 |
| 12.1-27.2 | Sexual performance by children |

The 1997 Legislative Assembly passed seven bills that substantially affected NDCC Chapter 12.1-32 as it relates to the sentencing of sexual offenders--House Bill Nos. 1044, 1046, 1048, 1089, and 1357 and Senate Bill Nos. 2153 and 2364.

House Bill No. 1044 requires individuals convicted of a relevant offense in municipal court to register as if convicted in district court.

House Bill No. 1046 requires a risk assessment in presentence investigations of individuals charged with gross sexual imposition.

House Bill No. 1048 requires, 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 requires

registration by a sexually violent predator until a court determines that the sexual offender is no longer a sexually violent predator. The bill also 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.

House Bill No. 1089 defines "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.

House Bill No. 1357 requires 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.

Senate Bill No. 2153 forbids 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 NDCC Chapter 12.1-20 and there are extenuating circumstances that justify a suspension. The bill also requires a presentence investigation for sentencing for the crime of continuous sexual abuse of a child.

Senate Bill No. 2364 prohibits 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.

SUGGESTED STUDY APPROACH

The committee may wish to review other states' laws on sexual offenses and the sentencing of sexual offenders. The committee may wish to solicit comment on the operation of this state's laws on sexual offenses from those that administer the law--state's attorneys, defense attorneys, 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.

ATTACH:1

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

SENATE CONCURRENT RESOLUTION NO. 4049
(Senators W. Stenehjem, Nalewaja, Watne)
(Representatives R. Kelsch, Kretschmar, Stenehjem)

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.

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

WHEREAS, the Fifty-fifth Legislative Assembly consider at least 10 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; 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-sixth Legislative Assembly.

Filed March 25, 1997