

Date of Hearing: August 14, 2019

ASSEMBLY COMMITTEE ON APPROPRIATIONS

Lorena Gonzalez, Chair

SB 145 (Wiener) – As Amended July 11, 2019

Policy Committee: Public Safety

Vote: 6 - 2

Urgency: No

State Mandated Local Program: No

Reimbursable: No

**SUMMARY:**

This bill exempts a person convicted of non-forcible voluntary 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 (SORA) if the person was not more than ten years older than the minor at the time of the offense and the conviction is the only one requiring the person to register.

**FISCAL EFFECT:**

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.

**COMMENTS:**

1) **Purpose.** According to the author:

SB 145 ends blatant discrimination against young people engaged in voluntary sexual activity by providing courts the discretion to decide, at sentencing, if registering the defendant as a sex offenders is appropriate, regardless of the sex act they performed.

2) **Hofsheier Offenses.** This bill states non-forcible sodomy, oral copulation, and sexual penetration with a minor do not require mandatory sex offender registration unless there is a ten-year gap between the minor and the other person. However, a court may still require registration if it deems appropriate. These offenses, when committed without force, where the minor was a willing participant and 14 years of age or older are referred to as “Hofsheier offenses.” People v. Hofsheier (2006) 37 Cal.4th 1185 held that requiring mandatory sex offender registration for one such an offense – oral copulation – was unconstitutional if the state did not also require registration for a person convicted non-forcible sexual intercourse with a minor because it made an illegal distinction based on the sex act itself.

Offenses in which the victim is under the age of 14 are not considered Hofsheier offenses and they are prosecuted as a “lewd and lascivious act with a minor.” Lewd and lascivious acts refer to any sort of touching of a person with the intent to sexually arouse the perpetrator or the minor. Sex offender registration is mandatory for lewd and lascivious acts with minors,

even if the conduct was non-forcible and the minor was a willing participant. The penalties for lewd and lascivious acts with a minor are also very lengthy and may subject an offender to a commitment as a sexually violent predator, depending on other requirements.

The Hofsheier case involved a 22-year old man who was convicted of engaging in non-forcible, voluntary oral copulation with a 16-year old. Under existing law, he was required to register as a sex offender for life. During his sentencing, the defendant argued mandatory registration was an unconstitutional violation of equal protection because if he had engaged in voluntary vaginal intercourse instead of voluntary oral copulation with the same minor, the registration would be a discretionary decision on the part of the judge. The California Supreme Court agreed and reversed Hofsheier's registration requirement. However, the court reversed its decision in Johnson v. Department of Justice (2015) 60 Cal. 4th 871. The court specifically found teen pregnancy and its "costly consequences" was a sufficient rational basis to require registration for voluntary oral copulation while maintaining discretion for vaginal intercourse. This holding uniquely penalizes consensual sex between members of the LGBTQI community.

3) **Support.** According to the Los Angeles District Attorney's Office:

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.

4) **Prior Legislation.** AB 1640 (Jones-Sawyer), of the 2013-2014 Legislative Session, was substantially similar to this bill. AB 1640 failed passage on the Assembly Floor.

**Analysis Prepared by:** Kimberly Horiuchi / APPR. / (916) 319-2081