SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No:	SB 145	**Hearing Date:**	April 9, 2019
Author:	Wiener		
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Urgency:	No	**Fiscal:**	Yes
Consultant:	GC		

Subject: ***Sex Offenders: Registration***

HISTORY

Source: Los Angeles County District Attorney's Office

Prior Legislation: AB 1640 (Jones-Sawyer), 2014, failed passage on the Assembly Floor

Support: Alliance for Constitutional Sex Offense Laws; American Civil Liberties Union of California; Anti-Defamation League; California Attorneys Criminal Justice; California Coalition Against Sexual Assault; California District Attorneys Association; California Police Chiefs Association; California Public Defenders Association; Equality California; Pacific Juvenile Defender Center; multiple individuals

Opposition: an individual

PURPOSE

The purpose of this bill is to equalize the registration requirements for specified voluntary sexual offenses involving minors aged 14-17, with a person not more than 10-years older.

Existing law mandates sex offender registration for persons, who are no more than 10-years older, who have voluntary sodomy, oral copulation, sexual penetration, or communicated with for purpose of committing one of those offenses with a person under the age of 17-years old. Additionally, existing law makes vaginal sexual intercourse with a minor under the age of 17-years of age discretional upon a ruling by a judge. (Cal. Pen Code, § 290, et. seq.)

Existing law requires persons convicted of specified sex offenses to register a sex offender, or reregister if the person has been previously registered, upon release from incarceration, placement, commitment, or release on probation. States that the registration shall consist of all 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(a).)

Existing law provides that willful violation of any part of the registration requirements constitutes a misdemeanor if the offense requiring registration was a misdemeanor, and constitutes a felony of the offense requiring registration was a felony or if the person has a prior conviction of failing to register. (Pen. Code, § 290.018(a)(b).)

Existing law 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 DOJ. (Pen. Code, § 290.015(b).)

Existing law states 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, 2 or 3 years. (Pen. Code, § 290.018(a)(b).)

Under existing law, the Department of Justice ("DOJ") is required to make information about registered sex offenders available to the public via an Internet Web site, as specified. (Pen. Code, § 290.46.) DOJ is required to include on this Web site a registrant's name and known aliases, a photograph, a physical description, including gender and race, date of birth, criminal history, any other information that the Department of Justice deems relevant unless expressly excluded under the statute. (*Id.*) Existing law additionally requires DOJ to include on its Internet Web site either the home address or zip code of residence of persons who are required to register as sex offenders based upon their registration offense (Pen. Code, §§ 290.46(b)(2); 290.46(d)(2).)

Existing law requires people who are sex offender registrants to disclose this status to the licensee of a community care facility before becoming a client of that facility. (Health and Safety Code § 1522.01.)

Existing law 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 § 1522), residential care facilities (Health and Safety Code § 1568.09), residential care facilities for the elderly (Health and Safety Code § 1569.17), day care facilities (Health and Safety Code § 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.

Existing law provides that the "Department of Corrections, to the maximum extent practicable and feasible, and subject to legislative appropriation of necessary funds, shall ensure, by July 1, 2001, that all parolees under active supervision and deemed to pose a high risk to the public of committing violent sex crimes shall be placed on an intensive and specialized parole supervision caseload." (Pen. Code, § 3005.)

Existing law further provides that the "Department of Corrections shall develop and, at the discretion of the director, and subject to an appropriation of the necessary funds, may implement a plan for the implementation of relapse prevention treatment programs, and the provision of other services deemed necessary by the department, in conjunction with intensive and specialized parole supervision, to reduce the recidivism of high-risk sex offenders." (*Id.*)

Existing law provides that "(n)otwithstanding any other law, an inmate who is released on parole for any violation of Section 288[1] or 288.5[2] shall not be placed or reside, for the duration of his or her period of parole, within one-quarter mile of any school including any public or private school including any or all of kindergarten and grades 1 to 8, inclusive." (Pen. Code, § 3003(g) (emphasis added).)

Existing law creates the Sex Offender Management board to address any issue, concerns and problem related to the community management of adult sex offenders. (Pen. Code, § 9000 et seq)

This bill specifies that registration for sexual penetration, oral copulation, and sodomy amongst minors and persons within ten-years of their age is discretionary upon a determination by the judge.

This bill likewise states that communication with a minor for the purpose of engaging in sexual penetration, oral copulation, or sodomy amongst minors and persons within ten-years of their age shall also have discretionary registration.

COMMENTS

1. Need for This Bill

According to the author:

> Senate Bill 145 ends California's highly discriminatory treatment of specific sex acts by our state's sex offender registry law. Under longstanding California law, if an adult has voluntary penile-vaginal intercourse with a minor aged 14, 15, 16, or 17 and is up to 10 years older than the minor, the court has discretion, based on the facts of the crime, whether or not to place the defendant on the sex offender registry. By contrast, if the sexual act is oral or anal sex, the court must place the defendant on the sex offender registry regardless of the facts of the crime. This distinction in the law is irrational and discriminatory towards LGBT young people. SB 145 ends this irrational distinction by treating all intercourse the same way that the law currently treats penile-vaginal intercourse.
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> Currently, there are several non-forcible, voluntary sexual offenses involving minors that require lifetime sex offender registration. Although minors cannot legally consent to sexual activity, these cases are viewed as "voluntary" because the sexual activity is not forced and the minor is a willing participant. Laws that treat anal and oral sex differently from penile-vaginal sex originate from the anti-LGBT laws that criminalized being LGBT up until the 1970s. These homophobic

[1] Penal Code § 288 pertains to lewd or lascivious acts on a child under the age of 14, as specified.
[2] Penal Code § 288.5 pertains to continuous sexual abuse of a child under the age of 14, as specified.

policies were largely repealed in 1975 by Assembly Bill 489, which decriminalized anal and oral sex – except when performed with a minor.

Until recently, the California Supreme Court found in *People v. Hofsheier* that requiring mandatory, lifetime registration for anal and oral sex, but not penile-vaginal sex, violates the equal protection clause and is unconstitutional. However, more recently in *Johnson v. Department of Justice*, the Court overturned *Hofsheier* based on the dubious rationale that penile-vaginal intercourse can cause pregnancy, whereas anal and oral sex cannot. The California Supreme Court's ruling in Johnson asserts that it is the Legislature's intent, based on its history of criminalizing LGBT people, to treat anal and oral sex differently than penile-vaginal sex.

Current law thus effectively mandates that someone convicted of performing "LGBT" sex acts must be placed on the sex offender registration and courts are prohibited from taking into consideration important facts of their case, such as if the couple was close in age or in a healthy relationship. Meanwhile, we permit the same courts to use their discretion to keep those who are convicted of penile-vaginal sex off of the sex offender registry if the facts of the case demonstrate that the person is not predatory in nature.

In other words, if an 18 year old man has penile-vaginal intercourse with a 17 year old woman, the courts are not mandated to register him as a sex offender for life. By contrast, if the same 18 year old man has oral or anal intercourse with the same 17 year old woman, then the courts must place him on the sex offender registry for life. This rule is irrational in that it treats oral and anal sex (straight or gay) as a more egregious crime than penile-vaginal sex, with the former mandating sex offender registration, but giving discretion to the courts for the latter.

SB 145 changes existing law so that all forms of sexual intercourse are treated the same. This bill ensures that anal and oral sex are treated the same as penile-vaginal sex by replacing mandatory lifetime sex offender registration with discretionary sex offender registration. It also brings parity to sexual penetration (sex with digits, for example) and communication with a minor by giving courts the same discretionary power for these offenses as well. Discretionary sex offender registration allows courts to decide, based on the facts of the crime, whether or not to place a defendant on the sex registry. SB 145 ends blatant discrimination against young people engaged in voluntary sexual activity by treating all sex acts (oral, anal, penetration and penile-vaginal sex) equally under the law and overturning the *Johnson* decision.

2. History of Sex Registration

California was the first state to require sex offender registration in 1947. The stated purpose for sex offender registration is to deter offenders from committing future crimes, provide law enforcement with an additional investigative tool, and increase public protection. [*Wright vs. Superior Court* (1997) 15 Cal.4th 521, 526; Alissa Pleau (2007) *Review of Selected 2007 California Legislation: Closing a Loophole in California's Sex Offender Registration Laws*, 38 McGeorge L. Rev. 276, 277; *Hatton vs. Bonner* (2004) 365 F. 3rd 955, 961.] Pen. Code, § 290

historically required lifetime registration by persons convicted of specified sex crimes that reside in, attend school or work in California. (Pen. Code, § 290 subd. (a).) In 2017 SB 384 (Wiener), Ch. 541 modified California's sex registration to a three-tiered registration system.

Sex offenders are required to register annually within five working days of their birthday. (Pen. Code, § 290 subd. (b).) If the offender has no fixed address, he or she is required to register every 30 days. (Pen. Code, § 290.011 subd. (a).) A person is also required to notify law enforcement of any change of address within five days of moving. (Pen. Code, § 290.014.) A person who fails to register as a sex offender within the period required by law is guilty of a felony punishable by 16 months, 2 or 3 years. (Pen. Code, § 290.018 subd. (b).)

In 1996, California enacted "Megan's Law" allowing the public to access an address list of registered sex offenders. Before 2003, members of the public could only obtain the information on the Megan's Law list by calling a "900" or visiting certain designated law enforcement agencies and reviewing a CD-ROM. However, in 2003, California required the DOJ to put the Megan's Law list of offenders on a public access Web site with the offender's address, photo and list of offenses. [See Pen. Code, § 290.46(a).] For some offenders with less serious offenses, only his or her ZIP code is listed. Now, a citizen can enter his or her address and see if there are registered sex offenders living in his or her community or even next door.

The registration statute does not distinguish crimes based on severity and instead requires all persons convicted of a listed crime must register annually within five days of his or her birthday and for the rest of his or her life. (Pen. Code, § 290.012 subd. (a).) Although most registerable offenses are felonies, there some alternate felony/misdemeanor penalties and a few straight misdemeanors. [*See* (Pen. Code, § 243.4 (sexual battery); (Pen. Code, § 266c (obtaining sexual consent by fraud); (Pen. Code, §§ 311.1, 311.2(c), 311.4, 311.11 (child pornography); (Pen. Code § 647.6 (annoying or molesting a child); and, (Pen. Code, § 314(1)(2) (indecent exposure).)

3. Registration as Applied to Offenses Involving Minors Aged 14-17

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:

1) Sodomy
2) Sexual penetration
3) 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.

4. California Supreme Court Opinions – Equal Protection

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.

Hofsheier

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.

Johnson

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.

5. Discrimination

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.

6. Argument in Support

According to the Los Angeles County District Attorney's Office:

> Currently, there are several non-forcible, "consensual" sexual offenses involving minors which require mandatory sex offender registration. These cases involve minors who are having sexual relationships with someone over the age of 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.
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> 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, 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.

In *People v. Hofsheier* (2006) 37 Cal. 4th 1185, the California Supreme Court ruled that mandatory sex offender registration pursuant to Penal Code 290 for a violation of 288a(b)(1) was unconstitutional. In *Hofsheier*, the defendant at the time was 22 years old when he committed a violation of 288a(b)(1), oral copulation with a minor, who was 16 years old. The *Hofsheier* court noted that if the defendant had been convicted of Penal Code Section 261.5, unlawful sexual intercourse with a minor, he would not have been subjected to mandatory lifetime sex offender registration. Using the rational basis test, the California Supreme Court determined that there was no rational basis for treating convicted offenders of oral copulation differently than those convicted of sexual intercourse. Follwing the *Hofsheier* ruling, courts did not impose sex offender registration for certain offenses. Although the California Penal Code still listed these offense, by case law the courts could not impose it.

However, because of the California Supreme Court's decision in *People v. Johnson* (2015) 60 Cal.4th 871, the law regarding sex offender registration for numerous consensual offenses has changed. The *Johnson* ruling reversed the previous decision in *Hofsheier,* as well as those in several other cases in which the Court held that it was unconstitutional to require mandatory sex offender registration for persons convicted of certain consensual sex offenses as it violated equal protection. The ruling in this case was irrational and in no way addressed the intrinsic unfairness of the disparate registration requirements for these consensual offenses. In fact, it narrowly ruled that because there was an identifiable difference between unlawful sex with a minor and oral copulation- the pregnancy can occur, there was no violation of equal protection. This despite the fact that pregnancy during the commission of a crime is considered a serious bodily injury.

Additionally, it is important to consider the purpose of sex offender registration. Under California law the primary legal purpose of our sex offender registry is to be used as an investigative tool to locate suspects when a new sexual assault occurs. It is also a means of tracking sexual predators through annual and transient registration. Because these offenses do not represent predatory or violent behavior, the registration requirement does not serve its intended purpose. Furthermore, being a sex offender registrant can have catastrophic consequences, particularly for someone of a college age or just beginning their career. It is a hindrance to housing as well as employment. Additionally, if any fact pattern or offense does warrant registration, it can be ordered under Penal Code Section 290.006 (discretionary registration).

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