SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	AB 2569	**Hearing Date:**	June 28, 2016
Author:	Melendez		
Version:	May 27, 2016		
Urgency:	No	**Fiscal:**	Yes
Consultant:	AA		

Subject: ***Registered Sex Offenders; Megan's Law***

HISTORY

Source: Author

Prior Legislation: AB 1844 (Fletcher) – Ch. 219, Stats. of 2010
AB 1323 (Vargas) – Ch. 722, Stats. of 2005
AB 488 (Parra) – Ch. 745, Stats. of 2004

Support: California Alliance of Child and Family Services; California National Organization for Women; California Protective Parents Association; City of Hemet; City of Murrieta; City of Richmond; Crime Victims United of California; Incest Survivors' Speakers Bureau of California; STAND! For Families Free of Violence; United Advocates for Children of California

Opposition: California Attorneys for Criminal Justice; California Civil Liberties Advocacy; California Public Defenders Association; California Reform Sex Offender Laws; Legal Services for Prisoners with Children; one individual

Assembly Floor Vote: 78 - 0

PURPOSE

The purpose of this bill is to provide that, before certain intra-familial sex offenders who have been granted probation can be excluded from public disclosure on Megan's Law, 1) they would be required to have been on probation for at least one year, and 2) a local assistance center for victims and witnesses, as specified, would be required to speak to the victim to determine if granting the exemption would be in the best interest of the victim.

Current law generally requires persons convicted of specified sex offenses to register with law enforcement where they reside for life, as specified. (Penal Code § 290 *et seq*.)

Current law generally requires that the Department of Justice ("DOJ") make available information concerning persons who are required to register as a sex offender to the public via an internet website, as specified. (Pen. Code § 290.46.)

Current law provides that persons required to register for certain enumerated sex offenses may file an application with DOJ for exclusion from the Internet Web site. "If the department

determines that the person meets the requirements of this subdivision, the department shall grant the exclusion and no information concerning the person shall be made available via the Internet Web site described in this section. He or she bears the burden of proving the facts that make him or her eligible for exclusion from the Internet Web site. However, a person who has filed for or been granted an exclusion from the Internet Web site is not relieved of his or her duty to register as a sex offender pursuant to Section 290 nor from any otherwise applicable provision of law." (Penal Code § 290.46(e).) No person may be excluded unless he or she is determined to have a risk level of low or moderate low risk according to the State Authorized Risk Assessment Tool for Sex Offenders (SARATSO). (Penal Code § 290.46(e)(4).)

Current law authorizes this exemption for the following offenses:

A. A felony violation of sexual battery (Penal Code § 243.4(a).)
B. Misdemeanor child annoyance (Penal Code § 647.6.)
C. Felony crimes relating to obscene matter depicting a minor, as specified (Penal Code §§ 311.1, 311.2 (b), (c) or (d), or 311.3, 311.4, 311.10, or 311.11), if the person submits a certified copy of a probation report filed in court that clearly states that all victims involved in the commission of the offense were at least 16 years of age or older at the time of the commission of the offense. (Penal Code § 290.46(e).)

Current law additionally authorizes this exemption for certain intra-familial crimes, as follows:

- Where the offender was the victim's parent, stepparent, sibling, or grandparent, the crime did not involve either oral copulation or penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, and the offender successfully completed probation, as clearly demonstrated by a certified copy of an official document, as specified; or
- The offender was the victim's parent, stepparent, sibling, or grandparent, the crime did not involve either oral copulation or penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, and the offender is on probation at the time of his or her application, as clearly demonstrated by a certified copy of official documents, as specified. (Penal Code § 290.46(e)(2)(D).)

This bill would require, in the cases of intra-familial abuse described above, that an offender who is on probation at the time of his or her application have been on probation *for at least one year* prior to the granting of his or her application.

Current law provides that if, subsequent to his or her application, the offender commits a violation of probation resulting in his or her incarceration in county jail or state prison, his or her exclusion, or application for exclusion, from the Internet Web site shall be terminated. (Penal Code § 290.46(e)(2)(D)(iii).)

Current law provides that, for purposes of this subparagraph, "successfully completed probation" means that during the period of probation the offender neither received additional county jail or state prison time for a violation of probation nor was convicted of another offense resulting in a sentence to county jail or state prison. (Penal Code § 290.46(e) (2) (D)(iv).)

This bill would require additionally that, prior to DOJ granting an application under this subparagraph, a local assistance center for victims and witnesses, established pursuant to Article

2 (commencing with Section 13835) of Chapter 4 of Title 6 of Part 4 shall speak to the victim to determine if granting the exemption would be in the best interest of the victim.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Stated Need for This Bill

The author states:

> As statistics show, the most common sex crimes committed against children are committed by a family member, someone the child knows and trusts. Since 2011, over 1000 sex offenders have been excluded from the Megan's Law website with nearly half of those exclusions being from the family member exemption. The intent of Megan's Law is to provide the public with the information on the whereabouts of sex offenders so communities may protect themselves and their children. If the intent of Megan's Law is to protect the public against sex offenders, yet we are allowing the exclusion of people who are committing sex crimes against their own kin; then the intent of Megan's Law is not being met under the current law. We cannot continue to keep sexual predators and pedophiles hidden from the public. It heavily contradicts the main purpose of Megan's Law: to keep families safe.
>
> Statistics also show that children who are sexually abused have a higher risk of committing crime throughout their life. Young boys who were molested are 19% more likely to commit burglary, 25% more likely to commit armed robbery and grand theft, and 41% more likely to commit assault than other young boys who were not sexually abused. Preventing sex offenders to continue with their crimes will prevent others from leading a life of crime and will overall decrease the recidivism rate in our state.

2. Sex Offender Registration and the Megan's Law Website

California has had a sex offender registry since 1947. As explained by a 2014 report by the California Sex Offender Management Board[1], the original purpose of sex offender registration was to assist law enforcement in tracking and monitoring known sex offenders since they were viewed as the group most likely to commit another sex offense.

In 2004, legislation enacted "Megan's Law," to provide an Internet-based resource for the public to become aware of known sex offenders in their neighborhoods and communities. Exempting a narrow category of offenders from the publicly available registry was included in the original Megan's Law legislation in 2004, and the following year these provisions were revised and tightened. As explained in a 2005 analysis by this Committee:

> When the Legislature required the Department of Justice last year to establish a Megan's Law Web site containing information about registered sex offenders in California, the legislation created a limited category of offenders who could apply to be exempted from disclosure on the Internet (although would continue to be subject to all other registration and public disclosure laws). The intent of these provisions with respect to persons who receive probation for intrafamilial

[1] http://www.cce.csus.edu/portal/admin/handouts/Tiering%20Background%20Paper%20FINAL %20FINAL%204-2-14.pdf

molestation was explained in the Committee analysis of AB 488 (Parra and Spitzer), Ch. 745, Stats. 2004 as follows:

> This bill would allow persons who are eligible for, granted and have successfully completed probation pursuant to Penal Code Section 1203.066 to apply to be excluded from Internet listing. This is a very narrow category of non-violent, intra-familial offenders convicted of child molestation who, unlike all other sex offenders, are eligible for probation. (Penal Code §§ 1203.065; 1203.166.) In some instances, these are cases that can be prosecuted only because family member witnesses are willing to cooperate with prosecutors because of the availability of probation. . . .

. . . Members may wish to consider whether an approach more narrowly crafted than current law would assure the public safety interests of Megan's Law without unnecessarily exposing families where little value in terms of enhanced public safety is likely to be gained. For example, an approach that specifically excludes all penetration offenses, including oral copulation, is limited only to cases involving a parent, stepparent, sibling or grandparent, and applies only to cases where probation has been granted and not violated, may promote and balance these interests. These types of true incest cases (limited for these purposes to fondling and masturbation-type offenses) are predicated on a closer familial relationship where the offender is more likely to live with the victim and recidivism rates are low.

. . . With respect to the bill now before the Committee, members may wish to consider the extent, if any, to which the identity of victims might be disclosed if these particular offenders are included on the Megan's Law Web site, and whether the risk of this disclosure – which may include home address – is outweighed by the potential public and child safety risk posed by these offenders.[2]

Current law strictly limits, and largely prohibits, probation for child sex crimes. For offenses which are not expressly excluded from probation eligibility by law, probation in child molestation cases may be granted only if the following terms and conditions are met:

> (A) If the defendant is a member of the victim's household, the court finds that probation is in the best interest of the child victim.
>
> (B) The court finds that rehabilitation of the defendant is feasible and that the defendant is amenable to undergoing treatment, and the defendant is placed in a recognized treatment program designed to deal with child molestation immediately after the grant of probation or the suspension of execution or imposition of sentence.
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> (C) If the defendant is a member of the victim's household, probation shall not be granted unless the defendant is removed from the household of the victim until the court determines that the best interests of the victim would be served by his or her return. While removed from the household, the court shall prohibit contact by

[2] Analysis of AB 1323 (Vargas), Senate Committee on Public Safety (June 28, 2005).

the defendant with the victim, with the exception that the court may permit supervised contact, upon the request of the director of the court-ordered supervised treatment program, and with the agreement of the victim and the victim's parent or legal guardian, other than the defendant.

(D) If the defendant is not a member of the victim's household, the court shall prohibit the defendant from being placed or residing within one-half mile of the child victim's residence for the duration of the probation term unless the court, on the record, states its reasons for finding that this residency restriction would not serve the best interests of the victim.

(E) The court finds that there is no threat of physical harm to the victim if probation is granted. (Penal Code § 1203.066.)

The bill now before the Committee concerns the intra-family crimes eligible for probation, which under current law are required to have these limitations in order to not be publicly listed on Megan's Law:

- the offender was the victim's parent, stepparent, sibling, or grandparent;
- the crime did not involve either oral copulation or penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object; and
- the offender was granted probation and successfully completed it, or the offender is on probation at the time of the application to not be listed on the public Megan's Law site.

This bill would apply two additional restrictions to this category of exemptions from public disclosure on Megan's Law:

- This bill would require that an offender who is on probation at the time of his or her application have been on probation for at least one year prior to the granting of his or her application; and
- This bill would require that before DOJ could grant an application, a local assistance center for victims and witnesses, which in California often are located in the offices of district attorneys, "shall speak to the victim to determine if granting the exemption would be in the best interest of the victim."

3. Potential Equal Protection Issue

Members may wish to consider whether this bill would pose a constitutional question relating to equal protection because it could result in two similarly situated registrants confronted with different outcomes – one subject to the public Megan's Law website, another not – potentially based on the determination of a victim.

It is not completely clear from the bill how its victim notification proposal would work. A victim/witness center speaking with a victim clearly would be a prerequisite to DOJ granting an exemption. What is not clear from the language is whether a victim's objection would affect or determine the DOJ action. To the extent it would, members may wish to consider whether that would violate equal protection.

4. Policy Considerations for This Bill

There are a number of policy considerations members of the Committee and the author may wish to discuss concerning this bill, including:

- Would public safety be improved if a parent, stepparent, sibling or grandparent who has been granted probation for child molestation is disclosed on the Megan's Law website during his or her first year of probation?
- How would requiring an intra-familial offender who has been granted probation to be disclosed on the public Megan's Law website for the first year of probation affect the victim?
- Would public disclosure that a parent, stepparent, sibling, or grandparent has been convicted of child molestation unnecessarily expose a child victim to further anguish and emotional pain?
- Would the public safety benefit of public exposure outweigh any potential negative impact on the child?
- How would requiring an intra-familial offender who has been granted probation to be on the public Megan's Law website for the first year of probation affect the rehabilitation of the offender?
- Would the public safety benefit of this disclosure outweigh any potential negative impact on the ability of the offender to successfully rehabilitate?
- Would this bill discourage the reporting of intra-familial abuse by family members because it would assure the public disclosure of the crime and the family for at least some period of time?
- Would requiring a victim/witness center to speak to a victim about a Megan's Law exemption be good for the victim, who in these cases are children?
- Should a child victim be put in the position of determining whether his or her parent, stepparent, sibling or grandparent should be publicly disclosed on Megan's Law?
- Would this provision be somewhat redundant, since for an offender to be granted probation in these cases the court must make certain findings that probation would be in the best interest of the victim?
- Would this bill violate equal protection to the extent it would give victims the decision making authority to not allow an otherwise eligible offender to be excluded from the public Megan's law website?

5. Background

As explained in the Assembly Public Safety Committee analysis of this bill, there are about 98,000 registered sex offenders on California's registry. About 76,000 live in California communities and the other 22,000 are currently in custody. Of these offenders, 80% are posted on the state's Megan's Law web site with their full address or ZIP Code and other information, depending upon the offense they committed. About 20% are not posted or are excluded from posting on the web site by law, again depending on the conviction offense. Posting on the web site does not take into account years in the community without reoffending, the offender's risk level for committing a new sexual or violent crime, or successful completion of treatment. About one-third of registered offenders are considered "moderate to high risk" while the remaining two-thirds are "moderate to low risk" or "low risk."

Local police departments and sheriff's offices are charged with managing the registration process. Registered sex offenders must re-register annually on their birthdays as well as every time they have a change of address. Transient sex offenders re-register every 30 days and sexually violent predators every 90 days. Registration information collected by law enforcement is sent to the California Department of Justice (DOJ) and stored in the California Sex and Arson Registry. If an offender's information is posted online and he fails to register or re-register on time, he will be shown as "in violation" on the Megan's Law web site. When proof is provided by local law enforcement to DOJ of a registrant's death, he or she is removed from the registry. Every ten years since the Registry was first established has been marked by a dramatic increase in the number of registrants.

A 2014 background paper prepared by the California Sex Offender Management Board summarized the research on what is known about sex offenders and effective sex offender management:

> As noted above, the original goal of registration was to assist law enforcement in tracking and monitoring sex offenders. Over time, registration was expanded to include community notification and also began to encompass a wider variety of crimes and behaviors. Due to these changes, research has focused on exploring the changes in sex offender registration laws and this has resulted in a constantly growing body of research that has altered the perspective on sex offender registration. This research has made it clear that:
>
> - The sexual recidivism rate of identified sex offenders is lower than the recidivism rate of individuals who have committed any other type of crime except for murder.
>
> - Not all sex offenders are at equal risk to reoffend. Low risk offenders reoffend at low rates, high risk offenders at much higher rates.
>
> - It is possible to use well-researched actuarial risk assessment instruments to assign offenders to groups according to risk level. (i.e. Low, Medium, High.)
>
> - Risk of a new sex offense drops each year the offender remains offense-free in the community. Eventually, for many offenders, the risk becomes so low as to be meaningless and the identification of these individuals through a registry becomes unhelpful due to the sheer numbers on the registry. Research has identified differing time.
> - Frames of decreased risk for the various categories of offenders (i.e. low, medium, high).
>
> - Research on both general and sexual offenders has consistently indicated that focusing on higher risk offenders delivers the greatest return on efforts to reduce reoffending.
>
> - Completing a properly designed and delivered specialized sex offender treatment program delivered within the context of effective supervision reduces recidivism risk even further. In California, all registered sex

offenders on parole or probation are now required by state law to enter and complete such a program. [3]

6. Author Amendments

The author intends to offer the following amendments in Committee:

- The Department of Justice, which receives application, shall contact the local assistance center for victims and witnesses in the county of conviction for the registrable sex offense.
- Once the Department of Justice submits the request for the local assistance center for victims and witnesses to contact the victim, written determination of the victim's best interest is due to Department of Justice within 60 days after the Department of Justice contacts the center.
- If the victim is unable to be located, refuses to partake in interview, or the local assistance center for victims and witnesses does not interview victim and submit determination within 60 days, the offender will be granted exclusion if statutory criteria are met.
- Reconsideration of the exclusion application can be granted only after 3 months from the denial of the last exclusion application.
- If there are multiple offenses committed by the offender against multiple victims, one local assistance center for victims and witnesses shall consider the familial situation and find that it would be in the best interest of all victims in the case to deny the application for exclusion.
- If offenders commit an offense in another state and want to apply for exclusion, the local assistance center for victims and witnesses in the county in which the offender is registered on the date the exclusion application is filed must contact the victim and determine if it is in the best interest of the victim to grant or deny the application for exclusion.
- Notwithstanding subdivision (m) of 290.46 exclusion applications already granted prior to the effective date of AB 2569 shall not be subject to reconsideration.

-- END –

[3] *A Better Path to Community Safety* (2014), California Sex Offender Management Board (citations omitted) (http://www.casomb.org /docs/Tiering%20Background%20Paper%20FINAL%20FINAL%204-2-14.pdf)