MONTANA LEGISLATIVE SERVICES DIVISION
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Law and Justice Interim Committee
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SJ 19 STUDY OF SEXUAL AND VIOLENT OFFENDER REGISTRIES: SEXUAL OFFENDER EVALUATOR QUALIFICATIONS

BACKGROUND

At its January 2020 meeting, the Law and Justice Interim Committee (LJIC) requested a preliminary draft bill that revises sex offender evaluator qualifications to include membership in the Montana Sex Offender Treatment Association (MSOTA). A 2019 bill removed a reference to MSOTA from a law that governs how presentence investigations (or PSIs) are conducted for criminal defendants.

The LJIC should consider reconciling three different sets of qualifications for sexual offender evaluators. At best, the statutes are confusing. At worst, they conflict.

The LJIC also asked for more information about the qualifications for sex offender evaluators in other states.

This paper explains a complication resulting from the 2019 change and provides an initial answer to the committee's question about other states' evaluator requirements.

When considering the bill draft SJ19-1, the following questions might be helpful for members to keep in mind:

- What entity should set qualifications for sex offender evaluators? The Legislature? An agency? A private organization?
- How detailed should statute be when creating qualifications for evaluators?
- Should the qualifications be standardized or do the different times and settings in which evaluations are conducted require variety?
- Should evaluators and treatment providers possess the same qualifications?

SJ19-1 PROVISIONAL DRAFT SUMMARY

WHAT'S THE PROBLEM?

SJ19-1 is the provisional bill draft revising qualifications for sexual offender evaluators. The 2019 Legislature removed language from section 46-18-111, MCA, that stated MSOTA membership was a qualification to conduct a psychosexual evaluation. This law creates requirements for conducting PSIs in criminal cases. However, the 2019 Legislature did not remove identical language in section 46-23-509, MCA, which generally governs psychosexual evaluators and sex offender risk designations. As a result, those two laws now provide different qualifications for evaluators depending mainly but not entirely on when an evaluation is conducted.

Adding to the complication, section 46-23-509(1), MCA, delegates administrative rulemaking authority to the Department of Corrections (DOC) to establish qualifications for sexual offender evaluators. The DOC rules are contained in ARM 20.7.301-304. The subsection language is broad and could be read to apply to all evaluators not just those conducting evaluations for DOC.

Currently, state law allows licensed clinical professional counselors or licensed clinical social workers (or trainees) to conduct psychological assessments under their scopes of practice. The Board of Behavioral Health (housed in the Department of Labor and Industry) promulgated ARM 24.219.1003 to provide specific requirements for the minimum qualifications of the licensees conducting these assessments. While the rule currently references the prior version of section 46-18-111, MCA, the rule is on the board's schedule to be updated.[1]

In short, four entities have a statutory role in determining qualifications for sex offender evaluators:

- the sentencing court in which a defendant charged with a sexual offense appears;
- the Department of Labor and Industry (DLI);
- the DOC; and
- MSOTA.

The table on page 3 list each statute, the qualification it contains, and the year the statute was last amended to change qualifications for sexual offender evaluators.

The LJIC should consider reconciling these different sets of qualifications to provide clarity to evaluation stakeholders. At best, the statutes are confusing. At worst, they conflict.

[1] Conversation and email correspondence with DLI and board staff.

MCA Section	Qualifications for Sexual Offender Evaluators	The Statute Applies…	Year Last Amended
46-18-111 (1)(b)(ii)	"Unless a psychosexual evaluation has been provided to the court prior to the plea or the verdict or finding of guilty, the evaluation must be completed by a sexual offender evaluator selected by the court and who has credentials acceptable to *the department of labor and industry and the court*."	…when psychosexual evaluations are conducted as part of sentencing for a criminal defendant.	2019
46-23-509(1)	"*The department [of corrections]* shall adopt rules for the qualification of sexual offender evaluators who conduct psychosexual evaluations of sexual offenders and sexually violent predators and for determinations by sexual offender evaluators of the risk of a repeat offense and the threat that an offender poses to the public safety."	…broadly. It's unclear if or how courts, the Department of Justice, or the Department of Labor and Industry use the DOC rules, but the statutory language is broad and can be read as applying to all sexual offender evaluators regardless of who requests an evaluation or the timing of that evaluation (presentence or postconviction).	1997
46-23-509(6)	"Any offender without a risk assessment or psychosexual evaluation shall, at the offender's expense, undergo a psychosexual evaluation with a *sexual* offender evaluator who is *a member of the Montana sex offender treatment association or has comparable credentials acceptable to the department of labor and industry*."	…when an offender who must register as a sex offender and who was not given a risk designation at sentencing undergoes an evaluation to provide risk information for the registry.	2015

HOW'D WE GET HERE? IT'S COMPLICATED.

The legislative history of establishing qualifications for sexual offender evaluators is complex because it requires tracing the development of each standard through several decades.

SECTION 46-18-111, MCA

The history of evaluator qualifications in section 46-18-111, MCA, stretches back to the early 1990s:

- The 1991 Legislature changed "professional experience" as a sufficient qualification for conducting an evaluation to "a person who is determined to be qualified under guidelines from the Department of Institutions" (prior name for the DOC).
- The 1997 Legislature enacted Senate Bill No. 109 (SB 109), which added membership in MSOTA as an acceptable qualification and changed the agency responsible for determining comparable credentials from the DOC to the Department of Commerce.[2]
- The 2001 Legislature replaced the Department of Commerce with the DLI as part of a larger bill assigning responsibility for most professional and occupational licensing boards to the DLI.
- The 2019 Legislature removed the reference to MSOTA and allowed the sentencing court to determine acceptable qualifications.

SECTION 46-23-509(1), MCA

The 1997 Legislature required DOC to adopt administrative rules setting evaluator standards in HB 111, a bill that also substantially revised the sexual and violent offender registry.

SECTION 46-23-509(6), MCA

The evolution of section 46-23-509(6) is comparatively simple: the 2015 Legislature enacted House Bill No. 88 (HB 88), a bill requested by the Department of Justice (DOJ). In part, the bill created a process for the DOJ to request a risk tier for offenders without one.[3] The HB 111 standard mirrored that contained in section 46-18-111 at the time.

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[2] The fiscal note for SB 109 (1997) estimated that the DOC reviewed 2 to 3 applications per year from therapists who were not members of MSOTA to determine if the therapist was qualified.

[3] Typically, these are offenders with out-of-state or federal convictions who aren't currently supervised by the DOC. The DOC does have the authority to assign a risk level prior to releasing an offender from prison. If an offender doesn't have a prior assessment or evaluation, the offender must pay for one to be completed by a qualified evaluator. The DOJ or a county attorney can petition a district court to assign a risk designation.

THE 1997 LEGISLATIVE CHANGES

The 1997 Legislature looms large in the quest to understand how three separate sets of evaluator qualifications developed. Prior to 1997, only one statute governed evaluator qualifications: section 46-18-111, which governs PSIs and allowed an evaluator to be an MSOTA member or have comparable credentials as determined by DOC.

After 1997, DOC had authority from section 46-23-509 to determine evaluator qualifications, but it no longer had the responsibility in section 46-18-111 to determine if an evaluator had comparable credentials to MSOTA members. That duty went to the Department of Commerce. These two changes, however, happened in separate bills:

- SB 109 assigned the Department of Commerce to consider comparable credentials; and
- HB 111 delegated rulemaking authority to DOC.

The bills' legislative histories reveal some clues but do not solve the puzzle. As a result, it is difficult to determine what the legislators might have intended.[4]

The issue of who should determine evaluator qualifications did not appear to be discussed in SB 109 deliberations. But committee members who heard HB 111 certainly considered the subject. In 1997, the legislature required a statement of intent be included in any bill granting rulemaking authority to an agency. For HB 111's rulemaking delegation, "the Legislature intend[ed] that sexual offender evaluators possess education and experience similar to the education and experience requirement of therapists certified by the Montana sex offender treatment association." The statement also included guidance on risk evaluation of sexual offenders. Documents provided as exhibits by proponents and opponents of the bill and the MSOTA language indicate that how risk should be evaluated and by whom were topics raised to legislators during committee hearings.

In 1997, the Legislature was beginning its transition to recorded minutes as official minutes. The committee hearing minutes for HB 111 and SB 109 are a mix of written minutes (lengthier descriptions of conversations not verbatim transcripts) and tape recordings with time-stamped summary minutes similar to what committees use today. The recordings are archived at the Montana Historical Society. Without listening to the tapes, it is hard to say if the committees' discussions on the bills provide answers to the development of two seemingly conflicting laws.

Regardless, the situation facing the LJIC remains the same. The committee should examine the current language of the statutes and, if needed, recommend revisions to the 2021 Legislature.

[4] Another complication is that even prior to HB 111, the DOC already had adopted rules governing how it judged evaluator qualifications, presumably to guide its prior responsibility in 46-18-111 to determine "comparable credentials".

WHAT DO OTHER STATES DO?[5]

I was unable to identify another state that delegates qualification standards to a private association in statute or uses statute to set out specific qualifications for evaluators. That doesn't mean they doesn't exist; I just have not been able to identify one at this point. Several state legislatures have created sex offender management boards that develop standards for sex offender evaluators and treatment providers and guide the state's overall philosophy of sex offender management. Other states delegate the standard-setting to an executive branch agency and require the creation of administrative rules. In addition, cross-state comparisons can be tricky to make because not all states use evaluations to set risk levels in a sex offender registry as Montana does, instead using the evaluations to drive treatment recommendations. The table on page 7 contains information for other similar-sized Western states for comparison.

In the end, considering the answers to several questions might help the LJIC members determine what, if anything, the committee might propose to the 2021 Legislature:

- What entity should set qualifications for sex offender evaluators? The Legislature? An agency? A private organization?
- How detailed should statute be when creating qualifications for evaluators?
- Should the qualifications be standardized or do the different times and settings in which evaluations are conducted require variety?
- Should evaluators and treatment providers possess the same qualifications?

[5] Thank you to Ann Snyder, Public Affairs Coordinator with the Association for the Treatment of Sexual Abusers, and Katharine Gotch, a certified clinical sexual offense therapist in Oregon, for their time on the phone and sharing their knowledge and resources in this area.

State	Method Used to Set Qualifications for Evaluators/Treatment Providers	Additional information
Alaska	A sex offender treatment committee housed in the Department of Corrections develops and maintains a standard of care manual and provides oversight of treatment providers	Alaska Administrative Code, Title 22, chapter 30 DOC Approved Provider Level System
Idaho	The Idaho Legislature created a sex offender management board (SOMB) in 2011 to set policies and practices related to sex offender management.	Idaho Sex Offender Management Board website Section 18-8314, Idaho Statutes, Powers and Duties of the SOMB
North Dakota	A judge can order that certain offenders be "evaluated by a qualified counselor, psychologist, or physician before sentencing."	Attorney General appoints a committee to assign a risk level to offenders 12.1-32-15, North Dakota Century Code
South Dakota	The state's Department of Corrections sets standards for treatment providers.	DOC Policy 1.4.A.3: Sex Offender Management Program
Wyoming	The state's Department of Corrections' website provides the following information: "Contracted sex offender treatment services are provided by licensed clinicians who provide services in accordance with the standards set forth in the Association for Treatment of Sex Abusers (ATSA) Practice Standards and Guidelines for the Evaluation, Treatment and Management of Adult Male Sexual Abusers and The ATSA Professional Code of Ethics." This requirement doesn't appear to be set in statute or administrative rule, however.	Wyoming Department of Corrections: Sex Offender Treatment

MONTANA RESOURCES

- Staff Summary: 2019 Revisions to Sex Offender Evaluator Qualifications, January 2020, available at: https://leg.mt.gov/content/Committees/Interim/2019-2020/Law-and-Justice/Meetings/Jan-2020/MSOTA-SJ19-january-2020.pdf
- DOC Administrative Rules on Sex Offender Evaluation and Treatment Provider Guidelines and Qualifications, ARM 20.7.301-304, available at: http://www.mtrules.org/gateway/Subchapterhome.asp?scn=20%2E7.3
- Board of Behavioral Health Administrative Rule on Educational Requirements for Performing Psychological Assessments Without Supervision, ARM 24.219.1003, available at: http://mtrules.org/gateway/RuleNo.asp?RN=24%2E219%2E1003
- House Bill No. 88 (2015) text: https://leg.mt.gov/bills/2015/billhtml/HB0088.htm
- House Bill No. 111 (1997) legislative history, available at: https://leg.mt.gov/content/Committees/Interim/2019-2020/Law-and-Justice/Committee-Topics/SJ-19-Study/1997-HB-111.pdf
- House Bill No. 111 (1997) Statement of Intent, available at: https://leg.mt.gov/content/Committees/Interim/2019-2020/Law-and-Justice/Committee-Topics/SJ-19-Study/1997-HB-111-statement-of-intent.pdf
- Staff Summary of Selected Montana Legislation Amending the Sexual or Violent Offender Registry Act (including HB 111), available at: https://leg.mt.gov/content/Committees/Interim/2019-2020/Law-and-Justice/Committee-Topics/SJ-19-Study/sj19-summary-svor-bills.pdf