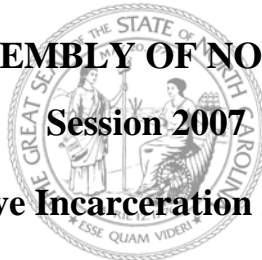


GENERAL ASSEMBLY OF NORTH CAROLINA



Session 2007

Legislative Incarceration Fiscal Note

(G.S. 120-36.7)

**BILL NUMBER:** House Bill 274 (Second Edition)

**SHORT TITLE:** Street Gang Prevention Act.

**SPONSOR(S):** Representatives Michaux, Frye, and Carney

	FISCAL IMPACT				
	Yes (X)	No ( )	No Estimate Available ( )		
	<u>FY 2007-08</u>	<u>FY 2008-09</u>	<u>FY 2009-10</u>	<u>FY 2010-11</u>	<u>FY 2011-12</u>
<b>GENERAL FUND</b>					
<b>Correction – Prisons</b>	<b>Note: Prison cost estimates assumes a <u>minimum fiscal impact scenario</u>; prison population and costs could be significantly higher</b>				
<b>Operating (R)</b>		\$5,028,500	\$10,766,074	\$11,298,850	\$11,884,772
<b>Capital (NR—385 beds)</b>	\$26,195,400				
<b>Correction – DCC</b>	Significant impact anticipated; amount cannot be determined.				
<b>Judicial;</b>	Given the number of misdemeanor offenses that could be charged as gang felonies under this bill, significant increases in man-hours and cost are anticipated for the court system. Cost cannot be determined at this time				
<b>Justice</b>	Justice cost cannot be determined; small cost anticipated to update expunctions on Criminal Information System.				
<b>Crime Control &amp; Public Safety (Grants in Conf Budget)</b>	\$4,760,195				
<b>TOTAL EXPENDITURES:</b>	<b>\$30,955,595</b>	<b>\$5,028,500</b>	<b>\$10,766,074</b>	<b>\$11,298,850</b>	<b>\$11,884,772</b>
<b>REVENUES</b>	\$65 fee for expunction for 16/17 year old first offenders – cannot determine number of likely offenders or amount of revenue generated				
<b>ADDITIONAL PRISON BEDS: (cumulative )</b>	0	178	370	377	385
<b>DOC POSITIONS: (cumulative)</b>	0	71	148	151	154
<b>PRINCIPAL DEPARTMENT(S) &amp; PROGRAM(S) AFFECTED:</b> Department of Correction; Judicial Branch. Crime Control (Governors Crime Commission)					
<b>EFFECTIVE DATE:</b> December 1, 2007 except Section 4 (Grants) July 1, 2007					
*This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.					

**BILL SUMMARY:**

*The 2<sup>nd</sup> edition for House Bill 274 would enact the Street Gang Prevention Act, making it a Class H felony for a person associated with a criminal street gang to conduct or participate in a pattern of criminal gang activity, to solicit or coerce another to participate in a criminal street gang, or to threaten a person to deter that person from withdrawing from a gang. The bill would make it a Class E felony to discharge a firearm from within a vehicle or other enclosure as a part of gang activity, and would provide enhanced punishment for misdemeanors committed as part of gang activity, and for using a deadly weapon in the commission of a Class E or higher felony. The bill would provide for the seizure and forfeiture of property used to facilitate criminal gang activity and declare real property used by gangs to be a public nuisance subject to abatement as provided by law. The bill would provide for the conditional discharge and expunction of records for certain convictions of participation in criminal street gang activity, if the person has not been convicted of any other criminal offense. The bill appropriates \$3 million to the Governor's Crime Commission to fund grants for street gang prevention and intervention programs. The 2<sup>nd</sup> edition also makes technical changes to the bill as introduced.*

**CURRENT LAW:** Under G.S. 15A-1340.16(d)(8), it is an aggravating factor in felony sentencing if the offense was committed for the benefit of, or at the direction of, any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy. A "criminal street gang" is defined as any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of felony or violent misdemeanor offenses, or delinquent acts that would be felonies or violent misdemeanors if committed by an adult, and having a common name or common identifying sign, colors, or symbols.

**BILL ANALYSIS:** *Section 1(a)* of the 2<sup>nd</sup> edition of House Bill 274 would enact the North Carolina Street Gang Prevention Act. The bill defines a criminal street gang as any ongoing organization, association, or group of 3 or more persons having as one of its primary activities the commission of one or more felony offenses. A gang may have a common name or common identifying signs or symbols, and has three or more members engaged in criminal street gang activity. As defined in the bill, "criminal street gang activity" includes the commission or attempt to commit an act in furtherance of the person's involvement in a criminal street gang, in violation of (i) the Controlled Substances Act or (ii) the State's criminal law (with noted exceptions).

***Participation in criminal street gang activity prohibited*** -- The bill would make it a Class H felony for anyone associated with a criminal street gang to do any of the following:

- To conduct or participate in the gang through a pattern of criminal street gang activity, which is defined in the bill as at least two prior incidents of committing an act in furtherance of the person's involvement in a gang and in violation of the criminal law. At least one of the acts must have occurred after the effective date of the bill, and the last of the offenses must have occurred within 3 years of prior gang activity.
- To acquire or maintain real or personal property (including money) through a pattern of criminal street gang activity
- To solicit or coerce another to participate in criminal street gang activity (age 16 or older)

- To threaten a person with the intent of deterring that person from assisting a member of a criminal street gang in withdrawing from the gang
- To threaten a person (or the person's friends or family) with the intent of punishing or retaliating against that person from withdrawing from the gang

The following persons would be guilty of a Class F felony for participation in criminal street gang activity:

- Any person who acts as an organizer, supervisor, or other position of management with regard to a criminal street gang and who engages in a pattern of criminal street gang activity.
- Any person who solicits or coerces a person less than 16 years of age to participate in criminal street gang activity.

***Enhanced punishment for misdemeanors committed as part of gang activity*** – A person convicted of a misdemeanor offense committed in association with a criminal street gang would be guilty of an offense that is one class higher than the offense committed. A Class A1 misdemeanor would be enhanced to a Class I felony. The bill would require that when a defendant is found guilty of a criminal offense, the judge must determine and note on the record whether the offense involved criminal street gang activity.

***Seizure and forfeiture of property*** -- The bill would provide for the seizure and forfeiture of property used in the course of criminal gang activity, or derived from criminal gang activity. The provision would not apply to the property of persons that do not have actual knowledge that property is being used for criminal street gang activity

***No preemption of local authority*** -- Local ordinances consistent with State law related to gangs and gang violence would not be preempted by the State law.

***Real property used by gangs declared to be a public nuisance*** – and the property would be subject to abatement as provided by law. The provision would not apply if the owner or person with legal possession of the property did not have actual knowledge that the property was being used for criminal street gang activity.

***Not applicable to juveniles under 16*** – The provisions of the Street Gang Prevention Act would not apply to juveniles under the age of 16.

***Conditional discharge and expunction of records for first offense*** -- The bill would provide for the conditional discharge and expunction of records for certain convictions of participation in criminal street gang activity. Expunction is a judicial process for removing records pertaining to a criminal case. The purpose of expunction is to clear the public record of entries so that a person who is entitled to expunction may omit reference to the charges to potential employers and others, and so that a records check for prior arrests and convictions will not disclose the expunged entries. Expunction would be available if the person has not been previously convicted of any criminal offense, and the person was age 16 or 17 at the time of the offense. Expunction would not be available for persons who act as an organizer, supervisor, or in any position of management with regard to a criminal street gang in engaging in a pattern of street gang activity, or for persons who recruit minors under age 16 to participate in criminal street gang activity. The expunction provision in the bill is similar to the current law pertaining to the expunction of first offenses under the Controlled Substances Act.

**Section 1(b)** of the bill would make it a Class E felony for a person to discharge a firearm toward a person from within any building, car, or other enclosure, when the shooting is committed as part of a pattern of criminal gang activity. Assuming no prior convictions, the presumptive minimum sentence for a Class E felony is 20-25 months intermediate or active punishment.

**Section 1(c)** of the bill amends the law providing for the forfeiture of gain acquired through felonies, to include money or other property acquired through any violation of the Street Gang Prevention Act.

**Section 2** of the bill creates a rebuttable presumption against the pretrial release of a person who commits an offense in association with a criminal street gang if the offense was committed while the person was on pretrial release for another offense and within the preceding 5 years the person has been convicted of a violation of the Street Gang Prevention Act. The person could only be released if the judge finds that there is a reasonable assurance that the person will appear and release does not pose an unreasonable risk of harm to the community. This is similar to existing law that applies to drug trafficking offenses.

**Section 3** of the bill amends the law that provides for an enhanced penalty if a defendant is convicted of a Class E or higher felony used a firearm during commission of the felony. Currently, use of a firearm during a Class E or higher felony increases the person's minimum term of imprisonment by an additional 60 months. The bill would make the enhanced penalty applicable to the use of any deadly weapon, not just firearms.

**Section 4** of the bill would appropriate \$3 million to the Governor's Crime Commission to provide grants for street gang violence prevention, intervention and suppression programs. The Commission would be required to develop criteria that would include a matching requirement of 25%. The grant funds would be available to public and private entities for juvenile or adult programs that meet the Commission's criteria. The Crime Commission would make a report to the legislature concerning the grants by April 15, 2008.

**EFFECTIVE DATE:** The appropriation would become effective July 1, 2007; the remainder of the act would become effective December 1, 2007 and apply to offenses committed on or after that date.

**ASSUMPTIONS AND METHODOLOGY: (HB 274 2<sup>nd</sup> edition)**

Background for Fiscal Impact for HB 274

This fiscal note attempts to demonstrate the impact of the Street Gang Prevention Act on the prison and probation system and the courts. Providing fiscal impact is difficult since there is limited data on gangs and gang activity to use as a baseline in estimating the impact of HB 274.

However, there is some information available that indicates gang activity is prevalent in the state. A 2004 survey by the Governor's Crime Commission estimated there were 8,517 gang members statewide but the GCC noted that this estimate was flawed and may be low (This survey is being

updated but will not be available until 2008) Table 1 shows the Department of Correction’s estimates of the number of inmates and probationers that are gang affiliated. *These numbers do not include possible gang members that are in county jails*

**Table 1 -- Gang Affiliations: Department of Correction Offenders**

<b>Offender Type</b>	<b>Total Population (as of April 21, 2007)</b>	<b>Gang Affiliated Offenders</b>
Prison Population	31,076	1,631 (5%)
Probation Population	89,821	515 (0.6%)
<b>TOTAL</b>	<b>120,897</b>	<b>2,146 (1.8%)</b>

HB 274 creates a number of new offenses that punish gang involvement or activity when actions of that gang have a criminal purpose. The bill creates (a) nine new offenses; (b) enhances the sentence for misdemeanor offenses by one offense class if the offense was committed in relation to street gang activity spelled out in the bill, and (c) redefines current penalty enhancement (60 months) for use of firearm to include any deadly weapon.

*It is believed the fiscal impact of HB 274 will be substantial, given the following: evidence of growth in criminal gang activity; multiple new offenses in this bill and the large pool of current offenses specified in the bill that could potentially trigger the new gang offenses.* For example, two criteria are required to be met for six of the nine new offenses in order to trigger the street gang offenses

1. The offender must have committed one of the offenses in current statutes specified in this bill (e.g., certain assault offenses, weapons offenses, sex offenses etc). The total offenses in the pool based on 2005/06 conviction data is 129,251 (29,520 felony convictions and 99,731 misdemeanor convictions fall under the General Statutes included in the definition of criminal street gang activity in this bill)
2. The offender must have committed the “triggering” offense as part of *criminal street gang activity*, as defined in SB 1358

For the three other offenses—GS 14-50.17 (a),(b) and (c), an offender can be charged with a Class H felony if they meet criteria 1 and 2 and they have two prior convictions for criminal street gang activity. This establishes a “pattern of criminal street gang activity.” *The offender pool for this group is a subset of the total eligible pool -- 58,515 of the 129,251 offenses are eligible based on two or more prior convictions*

**The offender pool establishes the potentially substantial fiscal impact of this bill.** However, since the offenses in HB 274 are new, there is no data available for the Sentencing Commission to develop official estimates of the impact of this bill on the prison population. It cannot be determined how many offenders will be charged and convicted of the various “street gang” offenses in this bill.

In order to give the General Assembly a plausible estimate of the “minimum” fiscal impact of this bill. Fiscal Research asked the Sentencing Commission to develop a couple scenarios.

1. For the separate new offenses in this bill, the Commission estimated the number of prison beds that would be created for every conviction. These “what if” scenarios are only the starting point for estimating the total impact of this bill

2. For the derivative offenses (committed after two prior convictions that establish a pattern of criminal gang activity), the Commission provided an estimate of the number of prison beds needed if 1% of 58,515 offenses committed by offenders with two or more prior convictions were defined as being committed as part of a “pattern of criminal gang activity”

The potential pool of offenders is shown in Table 2 below

**Table 2 – Convictions in 2005/06**

Column 1	Column 2	Column 3	Column 4	Column 5
<b>Offense Types</b>	<b>Total Convictions</b>	<b>Total Convictions: Offenses Covered by Statutes in SB 1358</b>	<b>Total Convictions: Offenses Covered by SB1358 at Prior Record Level II or higher</b>	<b>Total Convictions: Offenses at PRL II or higher, excluding Felony B1 –H*</b>
Felonies	30,951	29,520	22,179	6,572
Misdemeanors	170,001	99,731	51,943	51,943
<b>TOTAL</b>	<b>200,952</b>	<b>129,251</b>	<b>74,122</b>	<b>58,515</b>

Source: N.C. Sentencing and Policy Advisory Commission

\*The 58,515 offenses in Column 5 are the potential pool just for the “pattern” of gang activity offenses in HB 274—offenders likely to have two or more convictions

**NOTE: The second edition of the bill adds a penalty enhancement for use of a deadly weapon –this applies to all offenders not just gang related offenders. The potential pool of offenders is the 381 convictions in 05/06 (excludes offenders with deadly weapon charges as most serious offense). This pool is separate from offenders in Table 2**

**Department of Correction**

**General:** The Sentencing and Policy Advisory Commission prepares prison population projections for each bill containing a criminal penalty. The Commission assumes for such bills that expanding existing, or creating new criminal offenses produces no deterrent or incapacitative effect on crime. *Therefore, the Fiscal Research Division does not assume deterrent effects for any criminal penalty bill.*

**Department of Correction – Division of Prisons**

The chart below depicts the projected inmate population relative to available prison bed capacity system-wide. Capacity projections assume operation at Expanded Operating Capacity,<sup>1</sup> and represent the total number of beds in operation, or authorized for construction or operation as of December 6, 2006. Official Department of Correction capacity projections also assume the General Assembly will fund 500 additional prison beds, generated by partial double-celling of the future Tabor City facility (inmate admission FY 2008-09). However, Fiscal Research does not include these 500 beds in capacity estimates (row two), since these beds have not been authorized for funding.

Based on the most recent population projections and estimated bed capacity, *there are no surplus prison beds available for the five-year fiscal note horizon or beyond.* Therefore, the number of *additional beds needed* (row five) is *always equal* to the projected number of *additional inmates* resulting from a bill (row

<sup>1</sup> Expanded Operating Capacity (EOC) is: 1) the number of single cells housing one inmate, 2) the number of single cells housing two inmates, and 3) the number of beds in dormitories, allowing between 35 (130% of SOC) and 50 (SOC) square feet per inmate.

four). Rows four and five in the chart demonstrate the impact of SB 1358. As shown, the Sentencing Commission estimates that this specific legislation will add 364 inmates to the prison system by the end of FY 2010. Projections can only be estimated for two years so the number of beds shown is the same for 2011 and 2012 but bed impact will be higher.

	<b><u>June 30</u></b> <b><u>2008</u></b>	<b><u>June 30</u></b> <b><u>2009</u></b>	<b><u>June 30</u></b> <b><u>2010</u></b>	<b><u>June 30</u></b> <b><u>2011</u></b>	<b><u>June 30</u></b> <b><u>2012</u></b>
1. Projected No. of Inmates Under Current Structured Sentencing Act <sup>2</sup>	39,621	40,236	41,021	41,848	42,718
2. Projected No. of Available Prison Beds (DOC Expanded Capacity)	38,505	39,353	39,353	39,353	39,353
3. Projected No. of Beds Over/Under Inmate Population	-1,116	-883	-1,668	-2,495	-3,365
<b>4. Projected No. of Additional Inmates <u>Due to this Bill</u> <sup>3</sup></b>	<i>N/A</i>	<i>178</i>	<i>370</i>	<i>377</i>	<i>385</i>
<b>5. No. of Additional Beds Needed Each Fiscal Year Due to this Bill</b>	<i>N/A</i>	<i>178</i>	<i>370</i>	<i>377</i>	<i>385</i>

**POSITIONS:** It is anticipated that by FY 2010, approximately 148 positions would be needed to supervise the additional inmates housed under this bill. This position total includes security, program, and administrative personnel at a ratio of approximately one employee for every 2.5 inmates. This ratio is the combined average of the last seven prisons opened by DOC – two of the prisons were medium custody and five were close custody.

**FISCAL IMPACT BEYOND FIVE YEARS:** Fiscal notes examine a bill’s impact over a five-year horizon, through FY 2011-12. However, when information is available, Fiscal Research also attempts to quantify longer-term impacts. Accordingly, the chart below illustrates the projected number of available beds given current conditions; the projected number of additional inmates due to HB 274; and, the estimated number of new beds required each year through FY 2015-16.

	<b><u>June 30</u></b> <b><u>2013</u></b>	<b><u>June 30</u></b> <b><u>2014</u></b>	<b><u>June 30</u></b> <b><u>2015</u></b>	<b><u>June 30</u></b> <b><u>2016</u></b>
1. Available Beds (Over/Under) Under Current Structured Sentencing	-4,234	-5,117	-5,996	-6,866
2. <b>Projected No. of Additional Inmates Resulting From <u>(Bill Number)</u></b>				
3. <b>Estimated No. of New Beds Required Under <u>(Bill Number)</u></b>			Cannot be determined	

**CONSTRUCTION:** Construction costs for new prison beds, listed in the following chart, are derived from Department of Correction cost range estimates (FY 2006-07) for each custody level, and assume Expanded Operating Capacity (EOC). Figures represent the midpoints of each range.

<sup>2</sup> The Sentencing and Policy Advisory Commission prepares inmate population projections annually. These projections are derived from: historical information on incarceration and release rates under Structured Sentencing; crime rate forecasts by a technical advisory group; probation and offender revocation rates; and the decline (parole and max-outs) of the stock prison population sentenced under prior sentencing acts. Projections were updated in December 2006.

<sup>3</sup> Criminal penalty bills effective December 1, 2007 should not affect prison population and bed needs until FY 2008-09, due to the lag time between offense charge and sentencing - 6 months on average. No delayed effect is presumed for the Court System.

As shown, there are two primary options for prison bed construction: 1) a “stand alone,” or entirely new institution;<sup>4</sup> or, 2) an addition within or adjacent to the perimeter of an existing institution, termed an “add-on.”<sup>5</sup> Cost estimates for “add-on” beds are based upon a prototypical design, and assume that program/core support from the base institution will support 500 additional close or medium custody inmates, or 250 additional minimum custody inmates. “Add-on” costs are lower, relative to “stand-alone,” due partly to the usage of existing sites and infrastructure.

**Estimated Construction Cost per Custody Level, FY 2006-07**

<u>Custody Level</u>	<u>Minimum</u>	<u>Medium</u>	<u>Close</u>
Cost Per Bed: EOC “Stand Alone”	\$56,000	\$63,000	\$109,000
Cost Per Bed: EOC “Add-On”	\$52,000	\$39,000	\$71,000

Construction costs are shown as *non-recurring costs in the “Fiscal Impact” table* (p.1). An annual inflation rate of eight percent (8.0%) is applied to these base costs.<sup>6</sup> As illustrated (p.1), these costs also assume that funds to construct beds at a “stand alone” facility should be budgeted four years in advance, since building a prison typically requires four years for site selection, planning, design, construction, and occupancy. The overall duration for facility addition (“add-on”) is shorter, requiring that funds be budgeted three years in advance.

Accordingly, given an increase of 385 inmates, bed provision through construction of a “stand alone” facility could cost approximately **\$26,195,400 in 2007/08**. Construction of the beds as “add-ons” would cost approximately **\$16,216,200**. FRD assumed construction of medium custody beds plus inflation.

**OPERATING:** Operating costs are based on actual FY 2005-06 costs for each custody level, as provided by the Department of Correction. These costs include security, inmate programs, inmate costs (food, medical, etc.), and administrative overhead costs for the Department and the Division of Prisons. A three percent (3.0%) annual inflation rate is applied to these base costs, as shown in the *recurring costs estimate in the “Fiscal Impact” table* on Page 1 of this Note.

**Daily Inmate Operating Cost per Custody Level, FY 2005-06**

<u>Custody Level</u>	<u>Minimum</u>	<u>Medium</u>	<u>Close</u>	<u>Daily Average</u>
Daily Cost Per Inmate	\$54.81	\$70.83	\$79.72	\$66.87

For HB 274, FRD assumed these inmates would primarily be housed in medium custody facilities. Given effective date of December 1, 2007 of new offenses, the funds to operated prison beds would not be needed until 2008/09. For the **177 inmates in 2008-09 the cost would be \$5,028,500 and for the 364 inmates in 2009-10, the cost would be \$10,766,074**. To calculate these costs, FRD used the operating cost of a medium bed, with 3% inflation per year

**Methodology for Prison Bed Impact**

Table 3 summarizes the minimum prison bed impact for each criminal penalty in SB 1358. The analysis and assumptions are primarily based on comments from the Sentencing Commission. Since these are new offenses and therefore the Commission cannot use the prison population simulation model, FRD asked the Commission to develop “what if” scenarios to estimate the minimum fiscal impact

<sup>4</sup> New, “stand alone” institution built for Expanded Operating Capacity; single cells are assumed for close custody, and dormitories are assumed for medium and minimum custody (occupancy no greater than 130% of SOC).

<sup>5</sup> Close and medium custody “add-on” facilities are built within the perimeter of an existing 1,000-cell Close Security Institution; a minimum custody “add-on” is built adjacent to an existing perimeter. Add-on facilities built for EOC employ the same custody configurations as “stand alone” (i.e. single cells for close custody, and dorms for medium and minimum custody levels).

<sup>6</sup> Office of State Construction, March 24, 2006.



**Table 3 Prison Bed Impact of HB 274 (2<sup>nd</sup> edit)**

<b><u>Criminal Penalties in Bill</u></b>	<b><u>#Convictions</u></b>	<b><u>FY 07/08</u></b>	<b><u>FY 08/09</u></b>	<b><u>FY 09/10</u></b>	<b><u>FY 10/11</u></b>	<b><u>FY 11/12</u></b>
<b>Section 1 – G.S. 14.50.17</b>						
Sub (a) & (b) Pattern of gang activity						
----(a)&(b) Misdemeanors to Class H	519 (1%)	0	155	322	322	322
--(a &b) I Felonies to Class H	65 (1%)	0	14	22	22	22
Sub(b)acquire property(not “pattern”) Class H	3	0	1	2	2	2
Subsection © Organizer Class F	2	0	1	3	3	3
Subsection (d) Encourage/solicit <age 16 Class F	2	0	1	3	3	3
Subsection (d) Encourage/Solicit 16 or older	3	0	1	2	2	2
Subsection (e) Threats etc Class H	3	0	1	2	2	2
Subsection (f) Retaliate Class H	3	0	1	2	2	2
<b><u>Sect. 1 G.S. 14-50.18 Enhanced Offense</u></b>						
--Class 1, 2, or 3 Misdemeanors		<b><u>Increases in prison beds and probation supervision for offenders with sentences of &gt;90 days; &amp; increase in jail beds if sentences &lt; 90 days</u></b>				
--Class A1 Misd to Class I felony	12	0	1	4	4	4
<b><u>Sect. 1 (b) – Discharge weapon into bldg or enclosure at person Class E (2<sup>nd</sup> edit— was D in 1st)</u></b>	2	0	1	3	3	3
<b><u>Sect 3 (2<sup>nd</sup> edition) Deadly Weapon Enhancement</u></b>	38 (5%)	0	1	5	12	20
<b><u>Total Convictions</u></b>	652	--	--	--	--	--
<b><u>TOTAL PRISON BEDS</u></b>		<b>0</b>	<b>178</b>	<b>370</b>	<b>377</b>	<b>385</b>

Source: Sentencing and Policy Advisory Commission

Assumptions and methodology for specific offenses follow. For the most part, the analysis was provided by the Sentencing Commission. FRD then determined the methodology for estimating the number of beds and the fiscal impact based on scenarios requested from the Commission staff. **A general assumption for all of the new offenses is that any new sentences would run concurrently with other offenses not consecutively. Otherwise, the impact would be more substantial than shown in Table 3**

G.S. 14-50.17(a) and (b):

G.S. 14-50.17(a) makes it a Class H felony for a person employed by or associated with a criminal street gang to conduct or participate in a pattern of criminal gang activity. It is assumed for purposes of this analysis that the “pattern of criminal street gang activity” may be charged and result in conviction only as a derivative of a new (third) offense subsequent to the two prior convictions for criminal gang activity, as described in the proposed G.S. 14-50.16(3). Convictions for the offense of subsection (a) therefore would occur in addition to convictions for other, companion offenses (both misdemeanor and felony). The impact of the derivative Class H offense on the prison population would depend on the offense class for the companion offense and whether the sentences are run concurrently or consecutively

G.S. 14-50.17(b) makes it a Class H felony for a person to acquire or maintain any interest in or control of any real or personal property through a pattern of criminal gang activity or proceeds derived therefrom. This offense may be committed by the person who commits a “pattern of criminal street gang activity” (as a derivative of some other offense) or as a stand-alone felony for any person who acquires an interest in property with the proceeds derived from gang activity (*i.e.*, a person not otherwise involved in gang activity may commit this offense if they acquire any of the proceeds of gang activity or use such proceeds to purchase other property).

- For the 6,572 Class I convictions and the 51,943 misdemeanor convictions in the eligible pool, additional convictions for the derivative Class H offenses may result in additional prison impact. The impact would vary depending on whether sentences are run concurrently or consecutively. The following threshold analyses assume that sentences are run concurrently. However, the impact would be greater if any sentences are run consecutively.
  - If, for example, it is assumed that 519 misdemeanor convictions (**1% of the potentially eligible misdemeanor convictions**) would result in a Class H conviction as the most serious conviction under this proposal, the combination of active sentences and probation revocations would result in the need for 155 additional prison beds the first year and 322 additional prison beds the second year.
  - If, for example, it is assumed that 65 Class I convictions (1% of the potentially eligible Class I convictions) would result in a Class H conviction as the most serious conviction under this proposal, the combination of active sentences and probation revocations would result in the need for 14 additional prison beds the first year and 22 additional prison beds the second year.

G.S. 14-50.17(b) Acquires an Interest in Property (stand-alone felony) In FY 2005/06, 34% of Class H convictions resulted in active sentences, with an average estimated time served of 11 months. If, for example, there were three Class H convictions under this proposed bill per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and two additional prison beds the second year.

G.S. 14-50.17(c) makes it a Class F felony for a person who acts as an organizer, supervisor, or in any other position of management with regard to a criminal street gang to engage in, directly or indirectly, or conspire to engage in, a pattern of criminal gang activity. It is assumed for purposes of this analysis that the “pattern of criminal street gang activity” may be charged and result in conviction only as a derivative of a new (third) offense subsequent to the two prior convictions for criminal gang activity, as described in the proposed G.S. 14-50.16(3). Convictions for the offense of subsection (c) therefore would occur in addition to convictions for other, companion offenses (both misdemeanor and felony).

The offense in subsection (c) is substantially the same as that of subsection (a), with the additional element that the defendant acted as an organizer, supervisor, or manager in the gang and the alternative element (to commission, attempt, solicitation, coercion or intimidation) that the organizer may be convicted based on a conspiracy to engage in the pattern of criminal gang activity.

In FY 2005/06, 47% of Class F convictions resulted in active sentences, with an average estimated time served of 20 months. If, for example, there were two Class F convictions under this proposed bill per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and three additional prison beds the second year.

G.S. 14-50.17(d) makes it a felony for a person to cause, encourage, solicit, or coerce another to participate in criminal street gang activity. Violation of this subsection is a Class H felony when the person solicited is 16 or older and a Class F felony when the person solicited is under the age of 16.

In FY 2005/06, 34% of Class H convictions resulted in active sentences, with an average estimated time served of 11 months. If, for example, there were three Class H convictions under this proposed bill per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and two additional prison beds the second year.

In FY 2005/06, 47% of Class F convictions resulted in active sentences, with an average estimated time served of 20 months. If, for example, there were two Class F convictions under this proposed bill per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and three additional prison beds the second year.

G.S. 14-50.17(e): G.S. 14-50.17(e) makes it a Class H felony for a person to communicate a threat of injury or damage to property with the intent to deter another person from assisting a member or associate of a criminal street gang to withdraw from such criminal street gang.

G.S. 14-50.17(f) makes it a Class H felony for a person to communicate a threat of injury or damage to property with the intent to punish or retaliate against the person for having withdrawn from a criminal street gang.

Persons eligible for conviction of this offense include some portion of those currently convicted of the offenses listed below. The proposed offense does not encompass all conduct covered by the listed offenses because of some differences in the elements of each (e.g., “communicating threats” requires that the victim actually believe the threat may be carried out, which the proposed offense does not, but the proposed offense applies only in the context of threats against those who help gang members defect).

**Table 4: Persons Eligible for Conviction under G.S. 14-50.17(e) and (f)**  
**FY 2005/06**

G.S.	Description	Class	Number of Convictions
14-16.7	Threats against executive, legislative or court officers	I	3
14-196(a)(2)	Threatening phone call	2	208
14-196.3	Cyberstalking <sup>7</sup>	2	11
14-277.1	Communicating threats	1	3,033
14-394	Anonymous or threatening letters, mailing or transmitting <sup>8</sup>	1	No AOC code

**Source:** Sentencing and Policy Advisory Commission

It is not known how many of the convictions in Table 4 would become Class H felonies under this proposed subsection

In FY 2005/06, 34% of Class H convictions resulted in active sentences, with an average estimated time served of 11 months. If, for example, there were three Class H convictions under this proposed bill per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and two additional prison beds the second year.

**G.S. 14-50.18. Enhanced offense for criminal gang activity.**

G.S. 14-50.18 enhances the sentence for a misdemeanor offense by one offense class if it was committed for the benefit of, at the direction of, or in association with, any criminal street gang. Class A1 misdemeanors would be enhanced to Class I felonies under this provision.

In FY 2005/06 there were 170,001 misdemeanor convictions – 15,094 Class A1, 97,039 Class 1, 31,986 Class 2, and 25,882 Class 3 convictions. It is not known how many of these convictions involved an offense committed for the benefit of, at the direction of, or in association with, any criminal street gang. As such, it is not possible to determine how many convictions would be affected by this proposal or to determine the impact of this proposal. *However, enhancing a defendant’s sentence by raising it one offense class higher than the class of the committed misdemeanor offense will, in general, increase the defendant’s likelihood of receiving an active sentence and increase the chance of receiving a longer sentence that would result in the need for additional jail and prison beds.*

<sup>7</sup> The AOC has a single offense code for cyberstalking, which includes four distinct offenses. The proposed offense encompasses only one of those four.

<sup>8</sup> G.S. 14-394 prohibits several forms of threatening or harassing communications, including to corporate victims. Only convictions reflecting communications to individuals would be eligible for conviction under the proposed offense. The AOC currently does not have a specific offense code for violations of G.S. 14-394. The lack of an AOC offense code is some indication that this offense is infrequently charged and/or infrequently results in convictions.

Any Class 1, Class 2, or Class 3 misdemeanor convictions that would be raised one offense class higher (to Class A1, Class 1, or Class 2, respectively) could result in the need for additional jail beds (sentence of 90 days or less) or prison beds (sentence greater than 90 days).

Any Class A1 misdemeanor convictions raised to Class I felony convictions would result in the need for additional prison beds. In FY 2005/06, 15% of Class I convictions resulted in active sentences, with an average estimated time served of 7 months.

- If, for example, there were 12 Class A1 misdemeanor convictions per year that were raised to Class I felonies, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and four additional prison beds the second year.
- If, for example, it is assumed that 151 Class A1 misdemeanor convictions (1% of Class A1 misdemeanor convictions) would be raised to Class I felonies, the combination of active sentences and probation revocations would result in the need for 13 additional prison beds the first year and 44 additional prison beds the second year.

### **FRD assumes 12 Class A1 misdemeanors as the minimum fiscal impact of this bill**

**Section 1 (b)** would make it a Class E felony for a person to discharge a firearm toward a person from within any building, car, or other enclosure, when the shooting is committed as part of a pattern of criminal gang activity. Assuming no prior convictions, the presumptive minimum sentence for a Class E felony is 20-25 months intermediate or active punishment.

Since the proposed bill creates a new offense, the Sentencing Commission does not have any historical data from which to estimate the impact of this bill on the prison population. It is not known how many offenders might be sentenced under the proposed bill.

Under Structured Sentencing, with the exception of extraordinary mitigation, all Class

**Note:** Although the proposed offense is created by amending the existing subsection (b) of G.S. 14-34.1, the offense created by this amendment consists of completely different elements from the existing offense. Persons eligible for conviction of the proposed offense would not necessarily be eligible for conviction of the existing offense. In FY 2005/06, there were no convictions under G.S. 14-34.1(b).

### **Section 3**

Section 3 of HB 274 amends G.S. 15A-1340.16A (the firearm enhancement) such that the minimum sentence imposed upon conviction for a Class A, B1, B2, C, D, or E felony would be enhanced 60 months if the offender committed the felony by using, displaying, or threatening the use or display of, and actually possessed about his or her person, a deadly weapon. The enhancement would not apply if evidence of the use, display, or threatened use or display of the deadly weapon is needed to prove an element of the offense or if the person is not sentenced to active imprisonment. This new enhancement for deadly weapons is not limited to gang-related offenses.

In FY 2005/06 the current firearm enhancement, as defined in G.S. 15A-1340.16A, was not applied to any convictions. For this analysis, it was assumed that the proposed amendment to expand the enhancement to deadly weapons would not affect the application of the enhancement as it exists under current law.

*In FY 2005/06, there were 3,378 Class A through E convictions.<sup>9</sup> Of these convictions, 1,162 had a deadly weapon-related conviction as the most serious conviction, and, therefore, would not be eligible for the proposed deadly weapon enhancement. The identifiable eligible pool for the proposed enhancement would be comprised of 381 convictions that had accompanying charges or additional convictions for deadly weapon-related offenses. It is important to note that the eligible pool does not include situations in which the use, display, or threatened use or display of a deadly weapon did not result in separate charges or convictions.*

It is not possible to estimate the impact of the proposed deadly weapon enhancement since it is not known how many convictions in the eligible pool would receive the 60-month enhancement. The proposed deadly weapon enhancement would result in additional prison impact for each conviction to which it would be applied (*see* the table below for the offense class distribution and average sentence imposed for the eligible pool). Short-term impact (*i.e.*, within the 10-year projection period) would result from the application of the proposed enhancement to Class C, D, and E convictions whose minimum sentences are currently less than 10 years. Long-term impact (*i.e.*, beyond the 10-year projection period) would result from the application of the proposed enhancement to convictions whose minimum sentences are currently greater than 10 years.

### **Eligible Pool for Deadly Weapon Enhancement**

**FY 2005/06**

Offense Class	Number of Convictions	Average Minimum Sentence Imposed for Active Sentences (Months)
<b>B1</b>	9	269
<b>B2</b>	73	172
<b>C</b>	95	94
<b>D</b>	52	72
<b>E</b>	152	31
<b>Total</b>	<b>381</b>	<b>95</b>

**SOURCE:** Sentencing and Policy Advisory Commission

**As requested by Fiscal Research staff**, the following table provides the projected impact of the proposed enhancement using the assumption that 10% (or 38) of the 381 convictions in the eligible pool would receive the 60-month enhancement.

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<sup>9</sup> The following were excluded from the Class A through Class E convictions: 1) 90 convictions that resulted in a life without parole or death sentence (Class A, violent habitual felons, and Class B1 in PRL V or VI sentenced in the aggravated range), and 2) 569 habitual felons who had a Class F through Class I felony as their most serious underlying conviction.

**Deadly Weapon Enhancement  
10% Scenario**

FISCAL YEAR	ESTIMATED ADDITIONAL PRISON BEDS
Year 1	1
Year 2	5
Year 3	12
Year 4	20
Year 5	28
Year 6	36
Year 7	45
Year 8	57
Year 9	71
Year 10	83

Sentencing Commission Notes 7/26/07:

1. Assumes effective for crimes committed on or after 12/1/2007. Based on this effective date, Fiscal Year 2008/09 would represent the first full year of impact due to the gap between the time a felony offense is committed and the offender is sentenced.
2. The eligible pool does not include situations in which the use, display, or threatened use or display of a deadly weapon did not result in separate charges or convictions. Therefore, this projection may under represent the number of convictions to which the deadly weapon enhancement could be applied.
3. Since the enhancement is applied to Class B1 through Class E convictions, impact will also occur beyond the 10-year projection period for those convictions whose minimum sentences are currently greater than 10 years and to which the 60-month enhancement is applied.
4. The assumptions for number of active sentences and number of probation revocations assume the same percentages as found in FY 2005/06. Assumes no changes in judicial or prosecutorial behavior.
5. Assumes no deterrent or incapacitative effects.

## **CURRENT LAW REGARDING CRIMINAL STREET GANG CONDUCT**

G.S. 15A-1340.16(d) lists aggravating factors that can be applied to felony sentences under Structured Sentencing. Under G.S. 15A-1340.16(d) (2a), it is an aggravating factor if:

The offense was committed for the benefit of, or at the direction of, any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy. A “criminal street gang” means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of felony or violent misdemeanor offenses, or delinquent acts that would be felonies or violent misdemeanors if committed by an adult, and having a common name or common identifying sign, colors, or symbols.

The Administrative Office of the Courts’ Automated Criminal Infraction System does not contain data on the application of aggravating or mitigating factors, so it is not known how often this factor is currently used.

### **Department of Correction – Division of Community Corrections**

Although an increased rate of active sentencing (imprisonment) is expected, the effective enhancement of otherwise lower-level offenses will increase the rate of intermediate sanctioning and length of offender supervision.<sup>10</sup> Furthermore, any new conviction and non-active sentence, resultant deferral and mandatory supervised probation, and/or mandatory post-release supervision period will increase the demand for supervisory officers.<sup>11</sup> Presently, the estimated total position cost of an intermediate officer is approximately \$41,643. It is not known how this legislation will alter DCC supervisory officer allocations.

Likewise, it is not known how many of the roughly 400 remaining *non-active sentences* would result in intermediate or community punishments; to which sanction type; or, for how long.<sup>12</sup> However, based on the predominant Class H felony penalty level, it is assumed that most resultant non-active sentences will include intermediate sanctions. In FY 2005-06, for all offenses and prior record levels, approximately 48% of Class H convictions resulted in intermediate sanctions – predominately special probation, intensive supervision probation, or house arrest with electronic monitoring.

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<sup>10</sup> Refers to existing, lower-level criminal offenses containing elements shared by the proposed gang-related offenses (i.e. an offender could be prosecuted under the existing offense, irrespective of the proposed gang-related offense).

<sup>11</sup> Proposed G.S. 14-50.25 authorizes the deferral, discharge, and dismissal for first time offenders: who 1) were convicted of an offense under G.S. 14-50.17 or G.S. 14-50.18; and, 2) were age sixteen or seventeen at the age of the offense.

Per Structured Sentencing, Classes B1-E active sentences are followed by a mandatory period of post-release supervision. Based on the minimum Class D sentence of 50 months, post-release impact will primarily occur beyond the five-year fiscal note window.

<sup>12</sup> Approximation derived from the overall offender pool. Figure represents those convictions which are not assumed to result in active sentences, based on FY 2005-06 sentencing rates.



A brief summary of DCC supervisory costs is included below:

- General supervision of intermediate and community offenders by a probation officer costs DCC \$1.96 per offender, per day; no cost is assumed for those receiving unsupervised probation, or who are ordered only to pay fines, fees, or restitution.
- The daily cost per offender on intermediate sanction is much higher, ranging from \$7.71 (electronic house arrest) to \$14.97 (intensive supervision probation), depending on the type of sanction.
- Intensive supervision probation is the most frequently used intermediate sanction, and costs an estimated \$14.97 per offender, per day; on average, intensive supervision lasts six-months (approx. \$2,732) with general supervision assumed for a designated period thereafter.

## **Judicial Branch**

### **Expunction**

*Proposed G.S. 14-50.25 – Conditional discharge and expunction of records for first offense*

G.S. 14-50.25 authorizes deferred prosecution (probation, dismissal, and discharge) and the expunction of records for offenders who: 1) are convicted under G.S. 14-50.17 or G.S. 14-50.18; 2) have no prior criminal conviction; and, 3) are ages sixteen or seventeen at the time of the offense. The bill also establishes a \$65.00 fee for expunction petitions, which are payable to the clerk of superior court and are remitted to the General Fund.

*Present data precludes an estimate of the number of first time offenders, ages sixteen or seventeen, who would qualify for deferred prosecution, comply with probation requirements, and petition the court for expunction of the complete record. **Consequently, the amount of potential fee revenues and costs are indeterminate.*** Nonetheless, any resultant increase in expunction petitions is expected to increase workload and costs for superior and district court, as well as the Administrative Office of the Courts:

- Clerks would devote time to receiving, filing, and processing petitions, reporting granted expunctions, receiving and processing fees, as well as destroying and otherwise expunging court files and records;
- Judges would review affidavits, preside over hearings, and make final determinations;
- District attorneys would allocate staff and other resources to review petitions, check files, notify victims, and, in some cases, make and argue objections.
- The Administrative Office of the Courts would also assume additional workload and costs for record-keeping; programming; development and production of forms; postage; copying, and other operating costs.

### **Criminal Penalties**

*Proposed G.S. 14-50.16 – 14-50.24, and Sections 1A, 1B, and 2: Criminal and Civil Liability*

Based on the large pool of potential offenders, Fiscal Research anticipates a significant number of new or enhanced criminal cases, accompanied by increased trial rates and case lengths, which will generate significant costs for the court-system. However, given available data, the exact impact of the proposed offenses on court caseload and personnel workload cannot be determined.

The table below illustrates the estimated costs for criminal cases, by trial and guilty plea, for the affected offense classes. *Effectively enhancing otherwise misdemeanor offenses to felonies will elevate future cases to superior court, rather than district court.* This elevation will increase jury involvement and workloads for district attorneys, superior court judges, clerks, court reporters, and indigent defense counsel.

*Table 5 AOC Estimated Costs per Trial and Plea: FY 2007-08*

<i>Offense Class</i>	<i>Trial</i>	<i>Plea</i>
<b><i>G.S. 14-50.18: Criminal gang activity enhancement for misdemeanor offenses.</i></b>		
Class 2 Misdemeanor	\$2,770	\$230
Class 1 Misdemeanor	\$3,702	\$243
Class A1 Misdemeanor	\$4,215	\$245
Class I Felony	\$6,980	\$298
<b><i>G.S. 14-50.17: Participation in criminal street gang activity prohibited.</i></b>		
Class H Felony	\$7,345	\$325
Class F Felony	\$9,310	\$520
<b><i>G.S. 14-34.9: Discharging weapon from building toward a person.</i></b>		
Class E Felony	\$10,551	\$560

Additional court-time requirements could also be assumed for civil forfeiture (G.S. 14-2.3) and nuisance abatement actions (Chapter 19) related to criminal street gang activity, as well as lengthened pre-trial release hearings. However, the number and complexity/ duration of such actions are indeterminate.

**Department of Justice**

The Department of Justice receives expungement orders from the courts and performs the actual expungement from the SBI criminal records database (updating of the Criminal Information System), in addition to forwarding the orders to the Federal Bureau of Investigation (FBI). Consequently, an increase in the number of expunction petitions could necessitate additional processing resources. Additional investigative and prosecutorial workload could also be assumed, contingent upon the number of civil forfeiture (G.S. 14-2.3) and nuisance abatement actions (Chapter 19) commenced.

**Crime Control and Public Safety**

*Section 4* of HB 274 appropriates \$3,000,000 (FY 2007-08) to the Governor’s Crime Commission to provide grants for street gang violence prevention intervention and suppression programs. A matching requirement of 25% is required by HB 274.

The Senate budget (Senate version of HB 1473) appropriates \$3,000,000 for these grants while the House budget appropriates \$4,760,195. *The Conference Budget for HB 1473, which has been approved through second reading as of July 28, 2007, funds the grants at \$4,760,195. That figure is used for purposes of the Fiscal Note.*

**SOURCES OF DATA:** Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission; and Office of State Construction.

**TECHNICAL CONSIDERATIONS:** None

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**Signed Copy Located in the NCGA Principal Clerk's Offices**