

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website (www.nmlegis.gov). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

ORIGINAL DATE 02/18/13

SPONSOR Youngblood LAST UPDATED _____ HB 437

SHORT TITLE Human Trafficking Attempts & Info System SB _____

ANALYST Trowbridge

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrec	Fund Affected
Total	Unknown*	Unknown*	Unknown*	Unknown*	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

*See “Fiscal Implications” below.

Relates to HB 121, HB 195, and HB 304

Conflicts with HB 48, 121 and 304 and SB 149 HB 121, HB 195, and HB 304

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Sentencing Commission (NMSC)
 Public Defender Department (PDD)
 Association of District Attorneys (AODA)
 Administrative Office of the Courts (AOC)
 New Mexico Corrections Department (NMCD)
 Attorney General’s Office (AGO)

SUMMARY

Synopsis of Bill

HB 437 amends statutory sections related to human trafficking, as follows:

- amends the definitions section, 29-11A-3 NMSA 1978, within the Sex Offender Registration and Notification Act (SORNA), to add definitions for “department” (Department of Public Safety or “DPS”), “human trafficker” (definition requires that the person have been convicted of human trafficking for an offense that involves commercial sexual activity) and “human trafficking,” and to revise the definition of “registration requirement” to mean any requirement that requires a sex offender or human trafficker whose human trafficking offense involves commercial sexual activity to register, or take other required action;

- amends Section 29-11A-4 NMSA 1978 to require human traffickers to register, in addition to sex offenders, or be subject to criminal penalties;
- amends Section 29-11A-4.1 NMSA 1978 to now govern “Procedures When a Sex Offender or Human Trafficker Moves from New Mexico to Another State,” providing that a human trafficker who willfully fails to comply with requirements is guilty of a fourth degree felony;
- amends Section 29-11A-5 NMSA 1978, to include a requirement for a county sheriff and DPS to maintain a local registry that includes human traffickers as well as sex offenders, for the sheriff to forward human trafficker DNA samples, and for DPS to retain registration information regarding a human trafficker convicted of human trafficking in the first or second degree, pursuant to Section 30-52-1 NMSA 1978, for the entirety of the human trafficker’s natural life;
- amends Section 29-11A-5.1 NMSA 1978 to expand it to cover public access to information regarding registered human traffickers, as well as registered sex offenders, and governing active community notification and the internet web site;
- amends Section 29-11A-7 NMSA 1978 to govern notice to sex offenders and human traffickers of duty to register, requiring a court or other entities to provide written notification regarding a human trafficker’s release;
- amends Section 29-11A-9 NMSA 1978 to provide that the state preempts the field of sex offender *and* human trafficker registration and notification;
- amends the definitions section, 29-16-3 NMSA 1978, within the DNA Identification Act, to define “human trafficker DNA identification system” to mean the human trafficker identification system established by the DNA Identification Act;
- amends Section 29-16-4 NMSA 1978 to require the administrative center, as defined in the DNA Identification Act, to establish and administer the human trafficker DNA identification system as part of the DNA identification system
- amends Section 29-16-5 NMSA 1978 to require the DNA Oversight Committee to oversee the establishment of the human trafficker DNA identification system and to adopt rules and procedures regarding the administration and operation of the same;
- amends Section 30-52-1 NMSA 1978, governing the offense of human trafficking, to add attempt to the crime, to provide a third degree felony penalty for a person who attempts to commit human trafficking, except that if the victim is under 16 years old, the person is guilty of a second degree felony, and to prohibit human trafficking victims from being charged with non-homicide crimes committed due to coercion caused by a person committing human trafficking or by duress when the victim feared immediate great bodily harm to the victim’s self or another if the victim did not commit the crime and if a reasonable person would have acted in the same way under the circumstances. (Also requires a person convicted of a human trafficking offense involving commercial sexual activity to register in accordance with the Sex Offender Registration and Notification Act, tracking the bill’s amendments to that Act.)

The effective date of the Act is July 1, 2013.

FISCAL IMPLICATIONS

The Public Defender Department (PDD) notes that the HB 437’s proposed increase in penalty could make trials (requiring court, police, DA and PDD resources, as well as court, PDD and AG resources on appeal) often seem to be more attractive than plea bargaining. While it is likely that the PDD would be able to absorb some higher-penalty cases under the proposed law, any

increase in the number of higher-penalty prosecutions would bring a concomitant need for an increase in indigent defense funding.

The New Mexico Corrections Department (NMCD) indicates that it seems likely that only a small number of individuals would be convicted of these new and expanded felony crimes. The additional felony convictions resulting from this bill would increase NMCD's costs by leading to a minimal increase to the inmate population and probation/parole caseloads. However, NMCD states the bill seems unlikely to lead to a substantial number of new convictions, or to result in a substantial increase in the Department's inmate population or probation/parole caseloads. NMCD concedes however, that it is difficult to predict or estimate the ultimate effect of any new crime bill with any certainty. NMCD also notes that there is no appropriation in the bill for NMCD to cover any of the increased costs associated with the creation of these new and expanded felony crimes.

According to NMCD, the classification of an inmate determines his or her custody level, and the incarceration cost varies based on the custody level and particular facility. The cost to incarcerate a male inmate ranges from an average of \$38,070 per year in a state owned/ operated prison to \$31,686 per year in a contract/private prison (where primarily only level III or medium custody inmates are housed). The cost to house a female inmate at a privately owned/operated facility is \$29,375 per year. Because the capacities of medium and higher custody state owned prisons are essentially at capacity, any net increase in inmate population will likely have to be housed at a contract/private facility.

The cost per client in Probation and Parole for a standard supervision program is \$2,227 per year. The cost per client in Intensive Supervision programs is \$4,311 per year. The cost per client in Community Corrections is \$3,489 per year. The cost per client per year for female residential Community Corrections programs is \$33,281 and for males is \$21,728.

The Association of District Attorneys (AODA) indicates the fiscal implications of HB 437 for the district attorneys should be minimal. Most of the administrative work will fall on other agencies, such as the county sheriffs and the Department of Public Safety. However, the district attorneys will be responsible for the following, which involve increased costs:

- Registration information will be forwarded to the district attorney for the district in which the human trafficker resides, and the public may request that information from the district attorney.
- The president of the district attorneys' association, or his designee, is a member of the DNA oversight committee, and that body is charged with establishing and administering the human trafficker DNA identification system, and with establishing rules and procedures for that system.
- The district attorneys will be responsible for prosecuting violations of the reporting requirements applicable to human traffickers.
- The district attorneys will be responsible for prosecuting violations of the new "attempt" crimes. (Note that attempt to commit human trafficking is already subject to prosecution under NMSA 1978, Section 30-28-1. See "Technical Issues," below.)

The Administrative Office of the Courts (AOC) reports that there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions, and the fulfillment of court-assigned requirements under the

Sex Offender Registration and Notification Act. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

The Attorney General's Office (AGO) reports several significant legal issues presented by HB 437:

- Sections 1-7: The "human trafficker" definition in new 29-11A-3(C), and "human trafficking" definition in new 29-11A-3(D), omit the situations where human trafficking occurs in relation to labor or services that are not commercial sexual activity. Furthermore, these "human trafficker" and "human trafficking" definitions contained in the bill are contrary to Chapter 30, Article 52 Human Trafficking, federal law on human trafficking, and the laws of other states. The inconsistency of these definitions in the bill can lead to confusion or error in application of the law.
- Section 13: By inserting "attempting to obtain" into Section 30-52-1(A)(1) and (A)(2), it places the attempt of a human trafficking crime that was not accomplished into a statute section dealing with a completed crime of human trafficking. It is mixing apples and oranges unnecessarily, and from a legal perspective, is technically, legally incorrect. Whenever a prosecutor needs to charge an attempted human trafficking on facts that satisfy 30-52-1(A)(1) or (A)(2), all that needs to be done is charge that subsection that applies along with Attempt to commit a felony, Section 30-28-1. There is no legal benefit to creating these new attempted human trafficking charges within Section 30-52-1.
- The second amendment to Section 30-52-1(A)(2) changing the language to "younger than the age of eighteen years" is semantic and adds no legally significant distinction, while at the same time changing from "under the age of eighteen years" which is the standard language used in the Criminal Code when delineating age groups.
- Again, the amendment to Section 30-52-1(C) classifying the attempted human trafficking newly created by amended Section 30-52-1(A)(1) and (A)(2) provide no additional legal benefit. When a prosecutor needs to charge an attempted human trafficking, they charge either 30-52-1(A)(1) or (A)(2) in conjunction with the attempt statute 30-28-1, and the provisions of 30-28-1 automatically readjust the degree classifications of the crimes downward to account for the attempt versus a completed crime.
- The amendment to Section 30-52-1(E) prohibits charging the victim for "nonhomicide crimes" due to coercion or duress, however does not address "force" or "fraud", which may be present in human trafficking cases under 30-52-1(A)(1) and (A)(3). Also, would it allow charges of homicide although coerced or under duress? This amendment may not protect minor victims of 30-52-1(A)(2), those cases do not require evidence force, fraud or coercion.
- The addition of new Section 30-52-1(G), requiring registration, is unnecessary if the requirement itself is placed in the Sex Offender Registration and Notification Act.

The New Mexico Sentencing Commission (NMSC) states that as defined under U.S. federal law, victims of human trafficking include children involved in the sex trade, adults age 18 or over who are coerced or deceived into commercial sex acts, and anyone compelled into forced labor. This bill strongly addresses the commercial sex portion of human trafficking.

NMSC indicates currently seven states (Arizona, Indiana, Kansas, Louisiana, Nebraska,

Tennessee and Vermont) require human trafficking offenders to register with their sex offender registration system.

Beginning in January 2013, the national FBI UCR Program began collecting offense and arrest data regarding human trafficking as authorized by the *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*. The act requires the FBI to collect human trafficking offense data and to make distinctions between assisting or promoting prostitution, purchasing prostitution, and prostitution. Human trafficking/commercial sex acts and human trafficking/involuntary servitude will be Part 1 offenses. Part 1 offenses include: Homicide, Rape, Robbery, Assault, Burglary, Larceny, Motor Vehicle Theft, Arson, and Human Trafficking.

The AODA states that while it is possible that there would be a Fourth Amendment challenge to the requirement that persons convicted of human trafficking provide DNA samples, that challenge is likely to fail. See, for example, Banks v. U.S., 490 F.3d 1178 (10th Cir. 2007), discussing the requirement that all federal felons provide DNA samples, not just those convicted of crimes typically solved by DNA evidence.

The AOC notes that Section 30-52-1 NMSA 1978 defines “commercial sexual activity,” triggering required inclusion in the sex offender and human trafficker registry, to mean “any sexual act or sexually explicit exhibition for which anything of value is given, promised to or received by any person.”

NMCD reports the bill seeks to track and monitor individuals convicted of certain human trafficking crimes (involving commercial sexual activity) in the same manner as convicted sex offenders, requiring registration, notification, the taking of a DNA sample, and otherwise compliance with SORNA.

PERFORMANCE IMPLICATIONS

AODA states that the registration of human traffickers and the human trafficker DNA identification system should be useful to law enforcement entities, including the district attorneys. For district attorneys, HB 437 will mean increased administrative duties relative to handling requests for information on registered human traffickers, and increased duties for implementing the human trafficker DNA identification system. The district attorneys may have additional prosecutions related to violations of the registration requirements. HB 437 includes requirements that governmental entities notify offenders who will be subject to the registration requirements – any failure to follow those notice requirements could result in issues on appeal.

The AOC reports that the courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

ADMINISTRATIVE IMPLICATIONS

The NMCD states the bill would only negatively impact its ability to perform prison-related and probation/parole supervision services (with current levels of staffing) if it resulted in more than just a few additional convictions. This seems unlikely.

The bill would require NMCD staff to notify those human traffickers in its custody of their duty to register once they parole or discharge from prison, just like NMCD staff must already notify sex offenders in its custody of their duty to register under SORNA. NMCD should be able to absorb this additional administrative duty with current staffing levels.

The bill will likely require NMCD probation and parole staff to more closely supervise and monitor convicted human traffickers on probation or parole, just like NMCD already generally more closely supervises and monitors those sex offenders under its supervision. However, the bill does not place human traffickers on the indeterminate parole and probation terms to which sex offenders must conform, meaning that the human traffickers will only serve at most a two year parole term.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

The AOC reports HB 437 conflicts with HB 48, 121 and 304 and SB 149.

This bill relates to HB 121, HB 195, and HB 304. AODA notes that HB 304 also relates to human trafficking, and includes proposed amendments to NMSA 1978, Section 30-52-1(E), protecting victims from prosecution. The AODA adds that HB 437's amendment is narrowly drawn, exempting homicide crimes, describing the level of coercion or duress that will trigger protection from prosecution, and applying a reasonable person standard. In contrast, HB 304's proposed amendment is much broader: "nor shall the victim be charged with crimes committed due to coercion by a person committing human trafficking."

The AGO notes that HB 446 has been introduced in previous sessions as an attempt to bring New Mexico's Sex Offender Registration and Notification Act, Chapter 29, Article 11A NMSA, into further compliance with the federal Adam Walsh Child Protection and Safety Act of 2006, which also addresses sex offender registration and requirements. HB 437 conflicts with HB 446 in significant ways.

HB 437 and HB 446 conflict in connection with the term "sex offender". HB 437 creates a new "human trafficker" definition by borrowing heavily from and mirroring the language of the "sex offender" definition of current 29-11A-3(D). HB 446 seeks to make significant modifications to that same definition of "sex offender" in current 29-11A-3(D).

HB 437 approaches human trafficking by creating a new "human trafficking" definition in new 29-11A-3(D), as "human trafficking involving commercial sexual activity, as provided in Section 30-52-1 NMSA 1978", and then creates registration requirements for "human traffickers" that are exactly the same and parallel to registration requirements for "sex offenders." HB 446 takes a very different approach. HB 446 adds human trafficking "as provided in Section 30-52-1 NMSA 1978, for a sexual purpose, when the victim is under sixteen years of age" in the 29-11A-3 "sex offense" laundry list definition, which enumerates the convicted offenses that trigger registration. HB 446 then seeks to implement the "tier I sex offense", "tier II sex offense" and "tier III sex offense" framework of the Adam Walsh Act to denote registration requirements. So, the bills define human trafficking in different ways, and also use different mechanisms to impose the registration requirements on covered convicted human traffickers.

HB 446 is attempting to reconcile the New Mexico Sex Offender Registration and Notification Act with the Adam Walsh Act, for consistency, but also for federal funding purposes.

Furthermore, HB 446 has already been subjected to the legislative committee process.

TECHNICAL ISSUES

AODA indicates New Mexico already has a criminal statute governing attempts to commit felonies. See NMSA 19878, Section 30-28-1. Because human trafficking is a felony, an attempt to commit human trafficking would be covered by this statute, even without HB 437's amendment to Section 30-52-1. For purposes of the registration statute, attempt could be addressed by adding attempt to commit human trafficking, as provided in Section 30-28-1. That is how attempt is handled with regard to sex crimes. See NMSA 1978, Section 29-11A-3(F).

AODA additionally states that adding attempted crimes to the existing crime of human trafficking, instead of relying on Section 30-28-1, could cause some confusion. For example, under the current human trafficking statute, the crime includes recruiting, soliciting, or enticing someone with the intent that force, fraud or coercion will be used to subject the person to labor, services or commercial sexual activity. In other words, the crime is complete when the person is solicited, if the solicitation is done with criminal intent. (The solicitation is a crime, even if it is not a successful solicitation that leads to the person being exploited.) "Obtaining" a person with the described criminal intent is also part of the current statutory description of the crime of human trafficking. Adding "or attempting to obtain" may seem to suggest that "obtaining" is the operative word, and unless the recruitment, solicitation or enticement goes far enough to actually "obtain" someone, the crime is only an attempt crime.

The AOC reports that Section 13(E) provides that a human trafficking victim shall not "be charged with nonhomicide *crimes committed* due to coercion caused by a person committing human trafficking or by duress when the victim feared immediate great bodily harm to the victim's self or another *if the victim did not commit the crime* and if a reasonable person would have acted in the same way under the circumstances." [Emphasis added.] This language seems to absolve the victim from prosecution for the commission of certain crimes, but only if the victim did not commit the crime.

OTHER SUBSTANTIVE ISSUES

NMCD states the definition of human trafficking in this bill is equivalent to the definition of sex trafficking in 22 USC Section 7102.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The penalty levels for human trafficking will remain the same and no human traffickers will fall under the SORNA requirements. Human traffickers whose offense involves commercial sexual activity will not be required to register or be subject to a DNA identification system. Attempted human trafficking offenses will continue to be subject to prosecution under Section 30-28-1. Current penalties will apply to human trafficking offenses.

TT/blm