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FISCAL IMPACT REPORT

SPONSOR Louis/Thomson ORIGINAL DATE 01/25/21
LAST UPDATED 02/17/21 HB 56/aHJC
SHORT TITLE Sex Offender & Human Trafficking Changes SB _____
ANALYST Glenn

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	SEE FISCAL IMPLICATIONS					

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with HB62

Relates to HB73

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the District Attorneys (AODA)

Administrative Office of the Courts (AOC)

Legal Offices of the Public Defender (PDD)

Office of the Attorney General (NMAG)

Crime Victims Reparation Commission (CVRC)

New Mexico Corrections Department (NMCD)

Children, Youth and Families Department (CYFD)

No Response Received

New Mexico Sentencing Commission (NMSC)

Children, Youth and Families Department (CYFD)

SUMMARY

Synopsis of HJC Amendment

The House Judiciary Committee amendment to House Bill 56:

- adds a provision allowing sex offenders to petition the district court for an order excepting them from continued registration (ten years or life) under Sex Offender Registration and

Notification Act (SORNA) if they complete all the requirements for a conditional discharge; and

- amends the exception from continued registration for individuals with a conviction requiring them to register as a sex offender in a jurisdiction outside New Mexico by requiring the court to find “good cause that their registration will not advance public safety.”

The amendment addresses concerns raised in agency analyses regarding the application of SORNA registration requirements to individuals who receive a conditional discharge on a sex offense.

Synopsis of Original Bill

House Bill 56 makes several changes to laws related to human trafficking and sexual exploitation of children by prostitution, including expanding the definition of the crime of human trafficking, clarifying the tactics law enforcement may use to identify and apprehend individuals engaged in those crimes, increasing the consequences to those who commit those crimes, and expanding the protections available to victims of those crimes.

Current law defines human trafficking as “recruiting, soliciting, enticing, transporting, or obtaining by any means” anyone “with the intent or knowledge that force, fraud or coercion will be used to subject the person to labor, services or commercial sexual activity” or a child “with the intent or knowledge that the person will be caused to engage in commercial sexual activity,” or knowingly benefiting from such actions. HB56 expands that definition to include harboring, maintaining, patronizing, and providing people for such purposes. The bill also expands the definition of coercion to include physical restraint (or threats thereof), which it defines to include serious physical, nonphysical, psychological, financial, or reputational harm. Finally, the bill clarifies that each violation of this human trafficking law constitutes a separate offense. Separately, HB56 raises the age of a “child” for purposes of statute relating to the sexual exploitation of children by prostitution from sixteen to eighteen.

HB56 precludes defendants whose intended victim of human trafficking or sexual exploitation of a child by prostitution was an undercover police officer posing as a minor from using that fact as a component of their defense. For purposes of prosecuting those who engage in human trafficking, HB56 removes the limitation period for prosecuting for human trafficking and includes human trafficking as a crime that can constitute racketeering.

HB56 increases the penalty for human trafficking from a third degree penalty (under current law) to a second degree felony for victims age eighteen and older and increases the penalty for human trafficking of victims between under the age of eighteen to a first degree felony (under current law, trafficking of victims under the age of sixteen is a second degree felony and trafficking victims under the age of thirteen is a first degree felony). The bill also provides that persons convicted of human trafficking shall be subject to the Forfeiture Act. HB56 classifies human trafficking as a serious violent offense for purposes of the Eligibility for Earned Meritorious Deductions Act, limiting the amount of good time an offender can receive.

HB56 amends the Sex Offender Registration and Notification Act (SORNA) to include human trafficking as a registrable sex offense and extends New Mexico’s registration requirements to sex offenders who do not have an established residence in New Mexico, but own residential

property in New Mexico. The bill changes the definition of “conviction” for purposes of SORNA so that it encompasses a “conviction ... resulting in a sanction” and deletes language in the existing definition that excludes conditional discharges. The bill expands the list of sex offenders who must register for life to include individuals who have been sanctioned for human trafficking or sexual exploitation of children by prostitution. Those who have been convicted of sex offenses and registered as a sex offender outside the state are required to register for ten years, with the caveat that the offender may petition a New Mexico court to be exempt from registration if the offender would not have been required to register in New Mexico and the court finds “good cause” to exempt the individual from registration requirements.

HB56 expands the protections offered to human trafficking victims by expanding the safe-harbor provision for trafficking victim so victims compelled to prostitute will not be charged with prostitution or as accessories to human trafficking, establishes minimum restitution to human trafficking victims of the value taken from them by their trafficker under state and federal labor laws, and prohibits a victim’s sexual history or history of commercial activity, a minor victim’s consent, or mistake as to a victim’s age from being used as a defense against human trafficking charges. The bill also extends the protections of the Victims of Crime Act to include victims of human trafficking or sexual exploitation of children.

There is no effective date of this bill. It is assumed that the effective date is 90 days following adjournment of the Legislature.

FISCAL IMPLICATIONS

PDD notes it is difficult to estimate the fiscal impact of expansions to sex offender registration and to the human trafficking and sexual exploitation of children. PDD cannot determine how many additional individuals would be required to register under the provisions of HB56 because, for example, it lacks information such as how many nonresident sex offenders own residential property in New Mexico. PDD states it sees fewer human trafficking and sexual exploitation of children by prostitution cases compared to cases under other criminal statutes, but that the changes made by the bill may encourage prosecutors to bring more of them.

According to AOC, any additional fiscal impact on the judiciary would be proportional to the enforcement of the laws and commenced prosecutions, as well as petitions for orders excepting an individual from registration as a sex offender.

NMCD states the major potential impact on NMCD would come from the changes in meritorious deductions as a result of the bill. Currently, human trafficking is listed as a nonviolent offense, allowing individuals convicted of human trafficking to earn up to a maximum of thirty days per month of time served. The bill would change human trafficking from nonviolent to violent, which would decrease the meritorious deductions for individuals convicted of human trafficking and increase the amount of time they spent incarcerated. Increased incarceration time, in turn, would lead to a moderate increase in NMCD population. Additionally, NMCD notes that increasing the penalties for human trafficking from a third to second degree felony could result in longer prison sentences, depending on convictions, as second degree felonies have heavier penalties.

SIGNIFICANT ISSUES

Changes to Sex Offender Registration Requirements

PDD notes that requiring individuals who receive a conditional discharge on a sex offense to register as sex offenders would limit district courts' discretion to use conditional discharges to resolve cases and would make defendants less likely to accept a conditional discharge. Conditional discharges are only available to defendants with no prior felony convictions or previous conditional discharges and are available only at the court's discretion. A court is likely to agree to a conditional discharge rarely in rare sex crimes cases. Currently, PDD states that a conditional discharge can benefit a defendant. If a defendant successfully complies with all conditions, which require commitment to the rehabilitation process, they can receive no prison time, no registration, and no formal conviction. The proposed change in the law would tie the district court's hands and require sex offender registration—which is onerous, stigmatizing, and can last for ten years or life—even in the most sympathetic cases. A defendant facing registration may choose to risk trial rather than take a plea bargain with a conditional discharge.

PDD raises further concerns that the bill would require people convicted of offenses that are registrable in another jurisdiction to register as sex offenders in New Mexico for ten years, unless they petition a court for an exemption. Currently, individuals convicted in another jurisdiction must register if their actual conduct would have constituted a registrable offense if it had occurred in New Mexico. Under the provisions of HB56, any registrable offense in another state would become a registrable offense in New Mexico, even if the underlying conduct would not be registrable or even illegal in New Mexico. In contrast to current law, the bill's exemption provision would require an affected person to proactively petition a court for an order exempting him from registration. If, due to lack of resources, initiative or other reasons, a person did not petition the court and obtain such an order, the person could still be criminally prosecuted for failure to register under SORNA. Additionally, exemption is allowed only if a court finds both that the person would not have been required to register in New Mexico and that there is "good cause to except the individual from registering." Therefore, even if there was no dispute that an individual's out-of-state offense would not have been registrable in New Mexico, the person would still be required to register if the judge did not make an additional finding of "good cause."

Changes to Human Trafficking Statutes

As amended, the human trafficking statutes would cover a broad range of conduct. PDD notes that in addition to the fourth-degree felony of promoting prostitution (pimping), a pimp who used any degree of physical restraint would also be guilty of second-degree human trafficking. PDD raises concerns that "physical restraint" is not defined, and it is not clear how much would be required under the proposed legislation. But it is included in the bill as an alternative to physical force, and presumably applies to non-forceful restraint. Thus, closing a door, placing someone in a car, or grabbing someone's arm non-forcefully during the course of promoting prostitution could qualify as human trafficking under HB56.

PDD raises concerns about Section 6 of HB56, which provides that the factors of a victim's history of commercial sexual activity, consent of a minor, and mistake about a victim's age shall not provide a defense to prosecution. According to PDD, this prohibition has the potential to limit effective representation of a defendant in court because the factors could be relevant to the element of coercion in a prosecution for human trafficking. Even if those factors do not constitute a defense by themselves, PDD claims that evidence of them may still be relevant for a jury to hear, and that making such evidence inadmissible could violate a defendant's constitutional right to present a defense. NMAG presents another view on this point, observing

that Rule 11-412 of the Rules of Evidence provides rape shield protections in “crimes involving alleged sexual misconduct” and the bill appears to reflect that protection by specifically excluding use of a victim’s sexual history or history of commercial sexual activity and reputation evidence of sexual conduct as a defense.

AODA states that the elimination of the limitations period for prosecuting human trafficking crimes means the cases can be brought at any time. This can be very beneficial to victims of human trafficking and the community at large as human trafficking is not static. Those who engage in human trafficking are constantly on the move and frequently have false identification.

PERFORMANCE IMPLICATIONS

AOC notes 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

PDD notes that by expanding the scope of criminal offenses and increasing penalties, the bill may increase PDD’s caseload and create a strain on PDD’s personnel and other resources.

According to AOC, increased penalties are likely to result in more defendants invoking their right to trials, including jury trials. More trials and more jury trials will require additional judge time, courtroom staff time, courtroom availability and jury fees.

CONFLICT, RELATIONSHIP

Conflicts with HB62 (also amending Section 30-1-8 NMSA 1978) and relates to HB73 (enacting the Human Trafficking and Child Exploitation Act).

TECHNICAL ISSUES

AOC identifies the following issue:

The human trafficking specific statutes, Section 30-52-1 NMSA 1978 et seq., do not define “conviction.” The Forfeiture Act, Section 30-27-1 NMSA 1978 et. seq., defines “conviction” or “convicted” to mean that a person has been found guilty of a crime in a trial court by a plea of guilty or nolo contendere or otherwise and whether the sentence is deferred or suspended. HB 237 amends Section 29-11A-3 NMSA 1978, within the Sex Offender Registration and Notification Act, to define “conviction” to mean a conviction in any jurisdiction resulting in a sanction, regardless of whether adjudication is withheld. Within that same statute, “sex offense” is defined to include human trafficking for commercial sexual activity, as provided in Section 30-52-1 NMSA 1978. It is unclear whether a conviction for human trafficking meeting the threshold under the Sex Offender Registration and Notification Act, but not under the Forfeiture Act, would trigger the forfeiture requirements and specifically the application of the provisions of the Forfeiture Act that apply to the seizure, forfeiture and disposal of the property and interest

specified as subject to forfeiture in Section 30-52-1 NMSA 1978.

This issue may be adequately addressed by Section 7 of the bill, which expressly makes a person convicted of human trafficking subject to the Forfeiture Act.

OTHER SUBSTANTIVE ISSUES

NMAG notes that:

- Section 6 of the bill adds the verbs “harboring, maintaining, patronizing, providing” to the human trafficking statute to update the conduct covered by NMSA 30-52-1 and to reflect the federal Trafficking Victims Protection Act and its reauthorizations.

- Several other states contain “reciprocity” provisions like HB56’s amendment to SORNA requiring those who own residential property in New Mexico to register in New Mexico if they otherwise are required to register in another jurisdiction.

- HB56 seeks to clarify the unit of prosecution for human trafficking by adding the language that “[e]ach violation of this section constitutes a separate offense and shall not merge with any other offense.” *See generally State v. Carson*, 2019 WL 5799911 (N.M. Ct. App. Nov. 5, 2019). In *Carson*, the Court of Appeals held that two convictions for trafficking the same victim violated double jeopardy because the statute did not specify a unit of prosecution and because there was insufficient distinctness between the two convictions to justify multiple punishments. This new language attempts to remedy the issue.

POSSIBLE QUESTIONS

The bill’s change to the definition of “conviction” for purposes of SORNA may be ambiguous. Under current law, the definition expressly includes a deferred sentence as a conviction and excludes a conditional discharge. The bill deletes the exclusion for a conditional discharge. It is not clear whether the drafters deleted the exclusion so that conditional discharges would be included within the definition of “conviction” or to make the definition consistent with New Mexico case law, which holds that a conditional discharge is not treated as a conviction, unless expressly included in a particular statute. *See, e.g., State v. Harris*, 2013-NMCA-031, ¶ 3(citing cases). To avoid any question regarding the bill’s intent, language might be added to the definition of “conviction” that expressly includes or excludes a conditional discharge.

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