

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 and previously issued FIRs are available on the NM Legislative Website ([www.nmlegis.gov](http://www.nmlegis.gov)).

## FISCAL IMPACT REPORT

**SPONSOR** Barreras **ORIGINAL DATE** 02/02/21 **LAST UPDATED** 03/02/21 **HB** 156/aHJC  
**SHORT TITLE** Sex Crimes by Peace Officers **SB** \_\_\_\_\_  
**ANALYST** Glenn

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	See Fiscal Implications					

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with House Bill 140

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Law Offices of the Public Defender (LOPD)  
 Administrative Office of the District Attorneys (AODA)  
 Administrative Office of the Courts (AOC)  
 Office of the Attorney General (NMAG)  
 New Mexico Corrections Department (NMCD)  
 New Mexico Sentencing Commission (NMSC)

### SUMMARY

#### Synopsis of HJC Amendment

The House Judiciary Committee amendment to House Bill 156 revises the description of the second degree felony so that it covers criminal sexual penetration perpetrated by a peace officer, “probation officer or parole officer on a person under the real or apparent authority of” that officer. The amendment clarifies that the crime may be perpetrated by officers whose duties include authority over suspects and other persons in the criminal justice system but who are not technically included in the term “peace officer” and that the victim must be under the authority of the officer who commits the crime.

#### Synopsis of Original Bill

House Bill 156 amends the Criminal Code’s provisions governing criminal sexual penetration in

the second degree to add criminal sexual penetration perpetrated by a peace officer on a suspect, victim, witness or detained person in the care or custody of any peace officer.

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**

According to LOPD, HB156 should have no fiscal impact on LOPD. The bill increases the penalty faced by a small number of defendants, but does not create criminal liability where none existed before.

AOC states that the fiscal impact of HB156 would depend on the number of prosecutions, trials and incarcerations involving officers accused of criminal sexual penetration against one of the individuals covered by the bill. AOC was able to find little data on the prevalence of criminal sexual penetration among peace officers.

NMSC and NMCD state that while it is difficult to determine the effect of HB156 on the state's prison population, the creation of any new crime will likely increase the population of New Mexico's prisons and long-term costs to the general fund. NMSC notes that the average length of incarceration for second degree criminal sexual penetration is 2,011 days. NMCD reports the average cost to incarcerate a single inmate in FY20 was \$44.8 thousand; however, due to the high fixed costs of the state's public prison facilities, LFC estimates a marginal cost (the cost per each additional inmate) of \$27.8 thousand per inmate per year across all facilities. According to NMCD, the cost per client in Probation and Parole averages out to \$3,776 annually.

### **SIGNIFICANT ISSUES**

LOPD notes that the bill is similar to the existing second-degree felony for criminal sexual penetration against an inmate when the perpetrator is a corrections officer or other person in a position of authority over the inmate. *See* NMSA 1978, 30-9-11(E)(2). Both provisions focus primarily on the imbalance of power between the perpetrator and victims, and do not require additional evidence of personal injury, force or coercion or use of a deadly weapon. *See Spurlock v. Townes*, 2016-NMSC-014, ¶ 19 (recognizing that the power disparity between inmates and corrections officers "makes meaningful voluntary consent to sexual intercourse an unrealistic inquiry").

Similarly, AOC explains that sexual activity between a person operating under the color of law, including peace officers and corrections officers, and any person within their sphere of control raises issues as to whether consent is possible or if it can be used as a defense by a person with legitimate authority over another. The reasoning is that individuals interacting with a person in a position of control and authority do so with some measure of diminished consent. Peace officers are provided substantial authority to fulfill their role, which results in a significant differential of power over persons under their power and control. Starting from this position, the rationale underlying legislation like HB156 is that consent cannot be used as a defense by peace officers because consent of those in their care or custody cannot be presumed.

AOC notes that most states have taken steps to close what has been called a "loophole" in criminal sex offense statutes by criminalizing sexual activity between peace officers and those in their custody.

**CONFLICT,**

HB156 conflicts with HB140, which also amends Section 30-9-11 NMSA 1978.

**TECHNICAL ISSUES**

LOPD notes that the bill applies to peace officers who commit criminal sexual penetration on “a suspect, victim, witness or detained person *in the care or custody of any peace officer.*” LOPD states that it is not clear whether the italicized language is meant to apply only to “detained persons” or includes all the preceding persons. To clearly include all the listed persons, LOPD suggests the language might be changed to read: “a suspect, victim, witness or detained person, when they are in the care or custody of any peace officer.”

BG/sb/al/rl