

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Time Limits for Commencing - SB74 enlarges the time limits within which certain crimes maybe prosecuted. It removes any time limit for human trafficking, which is variously a first- second- or third-degree felony (Section 1.I). SB74 changes the age limit for crimes of sexual exploitation of children from 16 to 18 and adds that in the crime of exploitation of children by prostitution, it shall not be a defense that the defendant's intended victim was a peace officer posing as a child under eighteen years of age (Section 2.D).

Human Trafficking - SB74 adds human trafficking (NMSA section 30-52-1 as one of the crimes that can be prosecuted under the racketeering statute (NMSA section 30-42-3) (Section 3.A(27)).

SB74 amends the human trafficking statute (NMSA section 30-52-1) by adding harboring, maintaining, patronizing, or providing to the ways of committing human trafficking “with the intent or knowledge that force, fraud or coercion will be used to subject the person to labor, services or commercial sexual activity” where the person benefitting knew or should have known that was the intended outcome (Section 4.A(1) – (3)).

SB74 adds a new way to commit human trafficking by using a person's services to compel the repayment of a financial debt or other obligation “when the person who holds or enforces the debt or obligation does not pay the laborer in accordance with state and local law and has actual or perceived control over the laborer, and the laborer has no reasonable means to terminate the labor arrangement” (Section 4.A(4)). SB74 also raises human trafficking from a third-degree to a second-degree felony, or a first-degree felony if the victim is under 18 (currently age 13) (Section 4.C).

SB74 states that in a prosecution for human trafficking each “violation of this section constitutes a separate offense and shall not merge with any other offense” and that a victim of human trafficking shall not be charged with prostitution (Sections 4.D; 4.E). The bill prohibits prosecution of a victim of human trafficking for prostitution and adds “restraint” as means of causing coercion which is an element of the crime of human trafficking (Section G).

SB74 defines “harm” which can be an element of human trafficking, as “any harm, whether physical or nonphysical, including psychological, financial or reputational harm, that is sufficiently serious under all of the surrounding circumstances to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing compelled labor, services or commercial sexual activity to avoid or attempt to avoid receiving harm” (Section G(3)). The bill also prohibits as evidence in defense of a human trafficking charge: the victim's sexual history or opinion evidence about the victim's sexual conduct; consent of a minor; mistake about the victim's age; and that the defendant's intended victim was a peace officer posing as a child under eighteen years of age (Section H). A person convicted of human trafficking pursuant is made subject to the Forfeiture Act (Section I).

SB74 adds human trafficking and sexual exploitation of children to the definition of

“criminal offense” in the Victims of Crime Act, making the victim of these crimes entitled to the rights provided in NMSA section 31-26-4 (Section 5.B(22) and (23)). SB74 also adds human trafficking to the list of serious violent offenses for which a person is ineligible to accrue earned meritorious deductions while serving a sentence. (Section 6.L(4)(o)16).

FISCAL IMPLICATIONS

Offices of the District Attorneys and the Corrections Department will have to amend practices relating to human trafficking. Courts will require training for judges and staff in the new provisions relating to human trafficking. The time and expense involved does not appear to be substantial.

SIGNIFICANT ISSUES

Eliminating Defense That “Victim” Was A Police Officer and Not A Child - A similar provision removing this defense for child solicitation has been approved. *State v Mendoza*, 2016-NMCA-002, ¶ 20. Eliminating the defense that the “victim” was a police officer posing as a child under the age of 18 for the crime of exploitation of children by prostitution (Section 2.D) appears to be permissible.

Increasing Time To Commence Prosecution – The extension or increase in the applicable statutes of limitation for crimes in SB74 should be enforceable for crimes alleged to be committed after the effective date of the statutory change, but not if applied retroactively to crimes for which the existing limitations period had run; “Although the extension of a statute of limitations cannot revive a previously time-barred prosecution, *Stogner v. California*, 539 U.S. 607 (2003), we conclude that it can extend an unexpired limitation period because such extension does not impair vested rights acquired under prior law, require new obligations, impose new duties, or affix new disabilities to past transactions.” *State v. Morales*, 2010-NMSC-026, ¶ 1.

Merger – SB74 in Section 4.D provides that each instance of human trafficking is punishable as a separate offense and “each violation of this section constitutes a separate offense and shall not merge with any other offense.” Regardless of legislative intent, the Double Jeopardy provisions of the federal and New Mexico constitutions prohibit two punishments for a single act. However, “if the defendant commits two discrete acts violative of the same statutory offense, but separated by sufficient indicia of distinctness, then a court may impose separate, consecutive punishments for each offense.” *Swafford v. State*, 1991-NMSC-043, ¶ 26. Indicia of distinctness may be found where “events are sufficiently separated by either time or space (in the sense of physical distance between the places where the acts occurred).” *Id.*, ¶ 28. *State v. Kersey*, 1995-NMSC-054, ¶ 19, citing and quoting *Swafford*, ¶ 23. While the statutory intent in SB74 appears to be punishment for separate acts, a challenge to the lawfulness of applying this provision can be expected.

Definition of “Harm” - SB74 defines the element of “harm” as an element of human trafficking by using the terms “any harm,” “psychological, financial or reputational harm,” and “to avoid or attempt to avoid receiving harm” (Section G(3)). A definition that uses the term being defined is a circular definition and is to be discouraged. Criminal practitioners and courts will be challenged by the definition in SB74. A better definition should be adopted for the statute. “Physical or other injury or damage” is one definition of “harm” from the *Cambridge Dictionary* that may be apt.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The existing provisions for elements of the crimes, the limitations for commencing prosecution, and the use of existing defenses will remain in effect.

AMENDMENTS

Define “harm” without using the word “harm” in Section G.3.