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FISCAL IMPACT REPORT

ORIGINAL DATE 1/23/15
LAST UPDATED 3/17/15 **HB** 101/a HJC/aSPAC

SPONSOR Gallegos, DM

SHORT TITLE Sexual Exploitation of Children Penalties **SB** _____

ANALYST Sánchez/Daly

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		
	NFI	NFI	NFI

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Department of Public Safety (DPS)
 New Mexico Sentencing Commission (NMSC)
 New Mexico Corrections Department (NMCD)
 Attorney General’s Office (AGO)
 Children, Youth and Families Department (CYFD)
 New Mexico Public Defender Department (PDD)
 Department of Health (DOH)
 Administrative Office of the District Attorneys (AODA)

SUMMARY

Synopsis of SPAC Amendment

The Senate Public Affairs Committee amendment to House Bill 101 strikes HJC amendment no. 2, which amends language in Subsection C, and then strikes Subsection C in its entirety (which made knowingly hiring or offering to hire a child 14 to 16 years of age to engage in any prohibited sexual act a second degree felony). It strikes the changes in Subsection A contained in the original bill, restoring the language of Subsection A to that contained in existing law. It also revises the age limitation in Subsection B so that knowingly hiring or offering to hire a child under the age of 16 to engage in any prohibited sexual act is a second degree felony (which activity involving a child 13 or younger was a first degree felony in the original version of the bill).

Synopsis of HJC Amendment

The House Judiciary Committee amendment to House Bill 101 inserts “knowingly” to the person hiring or offering to hire a child to engage in a prohibited sexual act.

Synopsis of Original Bill

House Bill 101 amends Section 30-6A-4 NMSA 1978 of the Sexual Exploitation of Children Act making hiring or offering to hire a child who is thirteen years of age or younger to engage in a prohibited sex act a first degree felony. It also amends subsection (C) to punish as a second degree felony any person hiring or offering to hire a child fourteen years of age to sixteen years of age to engage in prohibited sexual acts.

FISCAL IMPLICATIONS

The agencies responding do not anticipate a fiscal impact because there are few cases filed. However, should there be more cases the PDD indicates that it may increase the need for more indigent defense.

The NMCD reports that the incarceration costs to NMCD generally increases only when the number of offenders sentenced to prison exceeds the number released that year. The slight expansion in the range of the child victims and increase in criminal penalties in the above-described crimes does not appear likely to increase or substantially increase the number of new convictions for these crimes during the relevant three year period. Finally, probation costs would also not increase, as the bill does not require or authorize more probation than the current five years maximum (for all offenders but certain sex offenders).

SIGNIFICANT ISSUES

The AGO states that “in evaluating this proposed legislation is that this act, and its amendments in subsection (B), do not criminalize the act of performing a sex act on a minor. The proposed legislation makes it a crime to hire or offer to hire a minor to engage in a prohibited sex act. The crime is complete once a minor victim has been hired or offered to be hired. The severity of the crime is dictated by the age of the victim. In this regard, a person who hires a minor to perform a prohibited sex act, and then completes the prohibited sex act would be subject to the provisions of NMSA 30-9-11. For a child under 13 years of age, NMSA 30-9-11(D) would apply (Criminal sexual penetration in the first degree consists of all sexual penetration perpetrated on a child under thirteen years of age). For a child 13 years to 18 years old, NMSA 30-9-11(E)(1) would apply (Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated by the use of force or coercion on a child thirteen to eighteen years of age). In the latter instance, the basic sentence is 3-15 years.

Consideration should be given to harmonizing both the proposed legislation and NMSA 30-9-11. For instance, a situation could arise where a person hires or offers to hire a 13 year old, and subsequently completes a prohibited sex act on that 13 year old. Under the proposed legislation, that person would be exposed to a 1st degree felony for the hiring or offering to hire, but be exposed to a 2nd degree felony for engaging in the sex act. Because there is significant interplay between these two statutes, consideration should be given to having the age element track that of the current law in NMSA 30-9-11.

Additional consideration should be given to including language associated with those circumstances where a person hires or attempts to hire a minor, who in turn is law enforcement posing as a child. Many cases involving a person who hires or attempts to hire come out of those instances where local law enforcement are involved, such that they pose as a child, engage in conversation, and meet up with the person (who perceives they are meeting with a child). If the Legislature's intent is to punish those persons who believe they are hiring or offering to hire a child, irrespective if they are in fact negotiating with a child, then the legislation should include the language "or a child perceived to be [age element]."

According to the AOC, the statute as it stands today only criminalizes hiring or offering to hire a child 13 to 16 years old for prostitution. HB101 expands criminalizing this behavior for children aged 13 years old or younger. It also classifies this type of criminal behavior with children younger than 13 years old as being a first degree felony offense. This bill would also clarify that hiring or offering to hire a child 14 to 16 years old would be a second degree felony. Additionally, an individual who hires or offers to hire a child for prostitution that is less than 13 years old would not be subject to criminal prosecution. This amendment is needed to ensure the statute covers all possible criminal sexual exploitation of children (prostitution) charges for children under the age of 13 years.

According to the NMSC, as of June 30, 2014, there were no offenders committed to the custody of the NMCD who had a conviction pursuant to Section 30-6A-4 NMSA 1978 as their highest charge.

The AGO reports that the amendment to subsection (A) in HB101 punishes persons who profit from such victimization, making such criminal conduct a 2nd degree felony—unless the minor is 13 years or younger in which the basic sentence would be a 1st degree felony. And subsection (B) of the proposed amendment seeks to distinguish the penalties associated with the criminal conduct of hiring or attempting to hire a minor to perform a prohibited sex act based on the age of the minor.

According to DOH, Children who have experienced sexual assault are at elevated risk for many adverse health outcomes, including an increased risk of poor physical health, poor mental health, high medical costs, chronic health conditions, sexual or substance use risk behaviors, suicidal ideation, and suicide attempts.

In 2008, the enactment of the federal PROTECT Our Children Act of 2008 (Public Law 110-401) required that the U.S. Department of Justice conduct a threat assessment of the risks posed to children by child exploitation. The National Child Exploitation Threat Assessment 2010 is the first national assessment of the risks posed by child exploitation.

The Threat Assessment results reveal that since the 1990's there has been a dramatic increase in cases of sexual exploitation of children, including the possession, distribution, and manufacture of child pornography; the online enticement of children for sexual acts; commercial sexual exploitation of children; child sex tourism; and child sexual molestation. In 2006, U.S. Attorneys handled 82.8% more child pornography cases than in 1994. State and local law enforcement agencies involved in Internet Crimes Against Children (ICAC) Task Forces reported a 230% increase in the number of documented complaints of online enticement of children from 2004 to 2008. In the same time period ICAC Task Forces noted a more than 1000% increase in complaints of child prostitution (U.S. Dept. of Justice, A National Strategy for Child Exploitation and Interdiction, August 2010).

There are no state-level estimates for the prevalence of child prostitution in New Mexico. However, children in New Mexico are the most vulnerable to sexual assault of any of the age groups (SEX CRIMES IN NEW MEXICO V: An Analysis of Data from *The Survey of Violence Victimization in New Mexico* 2005).

PERFORMANCE IMPLICATIONS

The following DOH performance measure may be impacted by this bill: Improved Health Outcomes for the People of New Mexico.

OTHER SUBSTANTIVE ISSUES

According to the AGO, “one element that is lacking from the current statute, and the proposed legislation, is the mental state a person must possess to complete the crime. The current legislation does not emphasize this essential element, such that as it is drafted a person could violate the law by offering to hire a minor who they believe to be 17, but turns out to be 13. If the intent is to require evidence that a person knew they were hiring or attempting to hire a 13 year at the time of the criminal act, then including the intent element “knowingly” should be added. If the intent, however, is to create a strict liability crime, where one’s mental intent is immaterial, then the current draft of the legislation comports with such intent.”

The PDD reports that “one problem with the current statute and the amendment (HB101) is that proposed subsection B and subsection C do not require a knowledge element. Some culpable mens rea should be provided in the statute since the crime is heavily penalized. Including a specific mens rea will also serve to clarify the State’s burden of proof at trial and to guard against convictions in cases where children misrepresent their age or a defendant believes the child to be older. Subsection D also requires knowledge for the crime described in that subsection. In the absence of a specific mens rea, the crime is a strict liability crime or a general intent crime, requiring no proof of a culpable mental state or only that a defendant acted intentionally. However, that someone might act intentionally when he/she hires or offers to hire a child is different than someone *knowingly* doing so. The statute should punish a person who *knows* a child’s age and still proceeds to hire/offer to hire him/her.”

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

According to the AOC, the consequences of not enacting HB 101 would be a significant deficiency in the statute for children hired or offered to be hired under the age of 13 years old to engage in prohibited sexual activity.

According to CYFD, HB 101 closes the gap in the current law that does not make hiring or offering to hire a child who is age 13 and under is currently a criminal act.

ABS/bb/je