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FISCAL IMPACT REPORT

ORIGINAL DATE 2/4/15

SPONSOR Pacheco LAST UPDATED 2/24/15 HB 207/aHSCAC

SHORT TITLE Enticement of a Child Penalty SB _____

ANALYST Chenier

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		TBD				

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Children Youth and Families Department (CYFD)
 Public Defender Department (PDD)
 Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)

SUMMARY

Synopsis of HSCAC Amendment

The House and Civil Affairs Committee amendment to House Bill 207 would clarify that the crime of enticement of a child is a fourth degree felony if the child is thirteen to sixteen year of age when the perpetrator is at least eighteen years of age and is at least four years older than the child and not the spouse of that child.

Synopsis of Original Bill

House Bill 207 would make it a fourth degree felony to commit enticement of a child age 13 to 16, and a third degree felony if the child is under age 13. Currently, the penalty is a misdemeanor for all ages. The bill makes other minor changes in this law.

FISCAL IMPLICATIONS

PDD provided the following:

Creating new felonies for enticement would likely lead to increased felony prosecutions, significantly more time-consuming and costly than prosecutions of misdemeanors. This is particularly true when the crime, such as the one here, does not clearly define the culpable conduct in a manner that differentiates it from other crimes. As such, the anticipated increase in prosecutions—and potential for lengthy felony prosecutions—would bring a concomitant need for an increase in indigent defense funding.

AODA stated that “this bill would likely cost DAs and the Courts an additional, undetermined amount in prosecution and trial costs, but in return would provide an increased benefit in punishment and, hopefully, deterrence.”

Criminal sentences longer than one year require incarceration in a State Prison. The average cost to house an NMCD inmate in 2013 was \$97.62 per day or \$35.6 thousand annually. The cost to house inmates varies depending on custody level and whether the inmate is housed in a private or public facility. The average annual probation and parole cost is \$2,783 for standard supervision, \$2,563 for Intensive Supervision programs, and \$3,664 for community corrections.

SIGNIFICANT ISSUES

PDD provided the following:

Per the statute and jury instruction for enticement, a defendant can be punished either for enticing a child or possessing a child with the intent to commit a “substantive sexual offense” on a child 16 or younger. Currently the law doesn’t distinguish between the different age groups listed in this proposed amendment.

Depending on the facts of a case, similar conduct is already punishable by crimes that already exist as felonies. For example, conduct constituting attempt to commit a sexual crime (such as criminal sexual contact/penetration of a minor, hereinafter “CSPM” or “CSCM”) could be indistinguishable from conduct constituting enticement. The crime of attempt, Section 30-28-1 NMSA 1978 already felonizes similar conduct—committing an overt act constituting “a substantial part” of the sex crime yet ultimately failing to effect is commission. An attempted sex crime is more culpable since it requires an overt act, making felony punishment appropriate. Because enticement requires no such overt act, misdemeanor punishment may be appropriate.

The law may lead to double jeopardy issues. Without clear guidance on what the crime of enticement involves, the State could seek to punish a defendant’s singular course of culpable conduct with multiple charges. Given that the crime of enticement includes the possibility a defendant can be punished for possession with intent to commit a sexual crime, in instances where a defendant actually commits the sexual crime, separate conviction for CSPM/CSCM and enticement by possession would likely offend principles of double jeopardy.

The misdemeanor crime of enticement offers the State a vehicle to efficiently manage high caseloads while securing convictions for culpable conduct. The State often prefers the crime to which a defendant pleads to be somewhat representative of the conduct the defendant is alleged to have committed. Leaving enticement as a misdemeanor crime would allow the State an avenue to effectively bargain with defendants who are willing to

plead guilty to some culpable conduct. It also provides an avenue for conviction in trials where a jury is not fully convinced of a felonious act such as CSPM/CSCM, but believes a defendant is guilty of something.

AODA provided the following:

Enticement of a child can occur randomly, but it is also is a predatory, “grooming” offense committed by sex offenders, which is why individuals convicted of this crime are required to register as Sex Offenders under SORNA. This offense is also often an early clue that someone may be about to develop into a sex offender, and it may be the only offense that can be charged when an offender is caught before something more has occurred, or when the child is very young and unable to verbalize what else may have occurred.

AGO provided the following:

The House Safety and Civil Affairs Committee amendment to the bill made changes to the text of Section 30-9-1(B) NMSA 1978 so that it would read “a child 13 to 16” from the previous text “a child at least 13 but under 16.” This amendment is consistent with language in other parts of the criminal code.

The amendment also adds language to Section 30-9-1(B)(2) NMSA 1978 that to be charged with Enticement of a Child as a 4th degree felony when the child is 13 to 16 years of age, the statute is only triggered “when the perpetrator is at least eighteen years of age and is at least four years older than the child and not the spouse of the child.” This language tracks the language of Criminal Sexual Penetration in the 4th Degree, 30-9-11(G).

EC/bb