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FISCAL IMPACT REPORT

SPONSOR Cook ORIGINAL DATE 02/27/15
 LAST UPDATED 03/02/15 HB 528

SHORT TITLE Sex Crime Victim Rights & Reparations SB _____

ANALYST Cerny

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

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

(Parenthesis () Indicate Expenditure Decreases)

Duplicates SB 645 Conflicts with SB 510

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Administrative Office of the Courts (AOC)
- Office of the Attorney General (AGO)
- Public Defender Department (PDD)
- NM Corrections Department (NMCD)
- Crime Victims Reparation Commission (CVRC)
- Administrative Office of the District Attorneys (AODA)
- Department of Public Safety (DPS)
- Department of Health (DOH)

SUMMARY

Synopsis of Bill

House Bill 528 would amend NMSA 1978, Section 29-11-1, the Sexual Crimes Prosecution and Treatment Act, by adding definitions distinguishing between “active” and “cold cases” and, for persons against whom a sexual assault is committed, by expanding the list of persons who have a right to notification to include the parents/guardians of minor victims or, if the victim is killed or incapacitated, the victim’s spouse, parent, adult child, grandparent, sibling, or other persons related to the victim within the second degree or a lawful representative of the victim. The “accused” is excluded from the list of people owed a duty of notification.

HB 528 would also require law enforcement to assist the victim in obtaining medical treatment and require the sexual assault coalition and law enforcement to develop standards regarding

consenting to the collection and release of test results. Law enforcement agencies would also be required to follow fairly strict standards of notification as to the progression of the case.

The bill contemplates the creation of a “victims’ rights task force for sexual assault cold cases” comprised of directors or designees of a variety of law enforcement and other agencies, including the chief public defender or chief’s designee and a representative of the New Mexico criminal defense lawyers association. The task force will be required to establish, implement and complete a process for inventorying sexual assault cold case exam kits and forensic evidence and other procedures and standards related to the storing and disposal of exam kits.

Finally, HB 528 would specifically add aggravated assault and aggravated battery against a household member to the list of crimes for which reparation may be made. Aggravated assault and aggravated battery in general are already enumerated crimes.

FISCAL IMPLICATIONS

HB 528 carries no appropriation. Its fiscal impact upon the agencies affected is unknown.

DPS analysis indicates that the fiscal impact of HB 528 will likely be significant:

It is difficult to predict fiscal impacts at this point since the Victims’ Rights Task Force created by the bill has until July 2016 to promulgate standards affecting investigation of and evidentiary procedures related to sexual crimes. However, there will be some fiscal impacts because the Task Force will create time frames for when evidence must be submitted, analyzed, and compared to DNA databases; will create standards for what evidence must be submitted to crime laboratories; will create recommendations for maintenance of sexual assault examination kits; and will implement processes for inventory of cold case exam kits by law enforcement agencies. Police agencies may therefore be forced to modify a range of evidentiary and inventory procedures, and in some cases, to implement entirely new ones, which could, particularly on the front end, impose additional costs.

For the Department of Public Safety’s DPS Forensic Laboratory, the imposition of time frames to complete the analysis and comparison to DNA databases could have a significant fiscal impact. It is foreseeable that of the 235 law enforcement agencies served by the DPS Forensic Laboratory Bureau most will have untested sexual assault cases in their custody. In the past decade the Bureau has tested over 2800 kits, an average of 280 per year. Last year more than double this number was submitted. In 2014, 390 kits were tested. Estimates could range from a couple of thousand to tens of thousands of untested kits.

If the Task Force imposes unrealistic time frames for analysis, the Laboratories will be forced to hire additional staff and/or outsource testing at substantial cost. The average turn-around time for a sexual assault case assigned to the DNA section and completed by DPS’ Forensic Laboratory was about 50 days in 2014. The current backlog is approximately 300 with more than 200 over 60 days old. This time frame will continue to expand without additional support.

The current DPS Forensic Laboratory staff of seven DNA scientists is able to handle

between 350 to 400 sexual assault cases per year with extensive overtime. The maximum space capacity of the current laboratory is twelve DNA scientists. The section has nine authorized FTE, one of which is unfunded. With twelve personnel and funding the Bureau would be able to test approximately 700 sexual assault cases per year. Salaries and benefits for four additional staff members to increase the section from eight to 12 would cost approximately \$380.0 thousand per year (\$95.0 thousand x 4).

The DNA section has had a grant funded Technician that has been extremely helpful in processing cases. This funding is set to expire at the end of September 2015. This position has proved valuable to case management and flow. The addition of a funded technician would cost approximately \$50.0 thousand per year.

In addition to funding for full staffing, funding for supplies would also require a substantial increase. DNA kits cost the general fund on average between \$200.0 and \$250.0 thousand per year; however, this is insufficient as grant funds are utilized to supplement the costs. This cost would need to be doubled, to at least \$500.0 thousand per year for DNA supplies, to meet the demands of this Act.

If outsourcing is a consideration, based on prior outsourcing experience the cost would be at least \$400.0 thousand per year and might be required annually for three to four years. Total cost could reach \$1.6 million to handle the potential influx of untested kits. Based on past outsourcing contracts \$400.0 thousand would yield approximately 250 to 300 cases.

Compliance with the law may necessitate hiring additional staff both within DPS and local law enforcement agencies in order to timely process evidence and deal with cold case inventory and other evidentiary requirements. It is unclear if there will also be increased costs associated with additional notice and administrative requirements generally; primarily, any additional costs would likely flow from compliance with new evidentiary and inventory standards.

The bill does not set forth any penalties for non-compliance. However, unlike the Victims of Crime Act at NMSA 31-26-13, the Sexual Crimes Prosecution and Treatment Act contains no disclaimer barring lawsuits for failure of compliance (see additional discussion in Amendments below), which could potentially result in increased liability and costs of litigation.

PDD states that it will likely be able to absorb the costs of having a representative on the task force without requiring additional funds. It is difficult to say what effect, if any, the implementation of the cold case inventory plan will have on workloads. However, any increase in the number of cases will require a corresponding increase in public defender funding to ensure compliance with the constitutional mandate to provide effective representation for indigent defendants.

NMCD analysis states that the bill has no apparent fiscal or operational impact on the NMCD at this time. It is possible that the bill if passed may encourage more victims to come forward and report the sex crimes against them, and this may ultimately result in more sex crime convictions. More convictions would likely result in increases to NMCD's prison population or probation/parole caseloads. However, any impact of the bill on the NMCD is speculative at this

point.

AOC analysis states:

It is unclear how many untested sexual assault examination kits there are statewide. If the victims' rights task force establishes new testing guidelines, there could be a significant fiscal impact to cover the additional personnel and costs necessary to have all of these kits tested. Also, if a significant number of kits are tested, this could also result in a higher number of sexual assault cases being filed, which in turn could result in a significant financial impact on the judiciary, prosecutors, defense attorneys and law enforcement.

AODA analysis states:

The district attorneys will have additional costs. The director or designee from the New Mexico Association of District Attorneys must participate in the "Victims' Rights Task Force for Sexual Assault Cold Cases." It appears that district attorneys are also responsible for providing notification to the victim under Sections 4, 5 and 6 of the act, although that is not clear.

HB 528 provides no appropriation to cover costs for the district attorneys or for any of the other agencies that will have additional responsibilities under HB 528.

SIGNIFICANT ISSUES

House Bill 528 would create a distinction between active and cold cases. This distinction is necessary to deal with the potential backlog of sexual assault examination kits that were collected but have not been processed. This has been a significant problem identified throughout the United States, most notably in Detroit, Michigan where a backlog of thousands of untested rape kits going back decades was discovered. Currently, there is no reliable data on how many untested rape kits there are in New Mexico.

This legislation attempts to remedy this problem by establishing a victims' rights task force for sexual assault cold cases to "establish, implement, and complete a process for conducting an inventory of all sexual assault cold case exam kits and forensic evidence" by July 1, 2016. The victim's rights task force would also create standards and time frames for when such evidence should be submitted for testing, analyzed and submitted to DNA databases.

This bill would require that victims of sexual assault be given a notice of their rights and provides that the "statewide sexual assault coalition shall work with law enforcement to develop standards" for active cases. No lead agency has been identified to establish or lead the Victims' Task Force. Similarly, the bill does not identify the agency that will be responsible for ensuring the compilation and ultimate distribution of the various consent forms, victims' rights and standards that are referenced in the legislation.

A major concern expressed by responding agencies is a potentially unintended consequence of the bill, arising out of Section 6, that is a moratorium on prosecuting cold case sexual assaults.

In this regard, DPS analysis states:

Section 6 provides for the creation of a Victims' Rights Task Force. The task force could be extremely useful in helping standardize best practices and ensuring all stakeholders participate in the process.

Of concern, however, is language included in subsection A stating, "no law enforcement agency or crime lab responsible for processing sexual assault exam kits shall process cold case kits or forensic evidence *until the following steps have been taken.*" Enumerated "steps" include formation of the task force no later than January 1, 2016, and promulgation of standards and procedures no later than July 1, 2016.

This suggests that if the bill becomes law in July 2015, at a minimum for the next year until July 2016 (and probably longer because it will take some time for agencies to achieve compliance; compliance with new standards is mandated by January 1, 2017), law enforcement agencies and investigators will face limitations in working sexual assault cold case files for up to a *year and a half* throughout the state. Even if this is not what the bill intends, this is what the language suggests, and could have the practical effect of placing a lengthy moratorium on cold case sexual assault investigations.

Such a moratorium obviously impacts any ongoing cold case investigations, and could potentially jeopardize the success of some, all while slowing down the process of justice for victims. Requiring agencies and investigators to comply with new/additional standards in 2017 should not prevent investigators from continuing existing cold case work in the interim.

AODA analysis also references the deadline dates and also questions their impact:

Section 6 shuts down processing of cold case kits or forensic evidence until certain goals are met, and sets a deadline of January 1, 2016 for some of those goals and July 1, 2016 for other goals. It is not clear whether HB 528 intends to halt the processing of all forensic evidence until the goals are met, or just forensic evidence associated with cold cases.

DPS analysis also states that this bill could have significant, positive impacts for the victims of sexual crimes. However, from the perspective of law enforcement, DPS states there are several concerns which the agency feels must be addressed:

- This bill seeks to provide victims with a wide range of additional rights. Ensuring victims are sufficiently informed and that investigations of sexual crimes are timely conducted with appropriate professionalism and sensitivity is extremely important.

However, providing victims with broad "rights" to additional notice and informed consent throughout active and cold case investigations, and requiring agencies to comply with a host of new standards to be promulgated by the proposed Victims' Rights Task Force, without also including a disclaimer like that found in the Victims of Crime Act at NMSA § 31-26-13 potentially opens agencies to liability. The bill does not contain any mechanism for enforcing compliance, nor sets forth any penalties for non-compliance, but significantly expanding both the requirements imposed on agencies and the rights of private citizens with respect to those agencies, without setting forth any protections is a

recipe for litigation against law enforcement.

Similarly, the bill proposes detailed processes for consent of victims, addressing who may give or withdraw consent, when, how, to whom and for what purposes test results may be released, etc. The level of detail and extent of consent requirements will require the utmost care by law enforcement agencies and will provide another avenue for litigation.

Section 6C allows that failure to comply with standards shall not affect the “admissibility of the evidence in any court.” This is helpful, but will not prevent enterprising criminal defense attorneys from attempting to use standards established by the Task Force and required by the Act as offensive weapons to benefit their clients.

- In Section 3B1, the bill requires law enforcement to assist “active case” victims in obtaining medical treatment, including obtaining transportation. The definition of “active case” in Section 2A of the bill includes crimes reported to law enforcement that have remained unsolved for less than two years. Normally, such treatment assistance would be rendered immediately or very soon after a sexual crime has been committed, but B1 is drafted so broadly that law enforcement may be imputed these duties at *any* time within the two year period following, and ongoing assistance could be required.

“Medical treatment necessitated by the sexual crime” is also overbroad and vague. This language could encompass even psychological counseling or therapy many months after the crime, with attendant duties for law enforcement. “Providing assistance” with “obtaining” medical treatment and transportation is similarly subject to broad interpretation and may result in officers/investigators being asked or required to perform functions beyond the scope of law enforcement and more suited to experienced social workers and victims’ advocates.

- Section 4A requires that at “the time of initial contact [with...] a law enforcement agency, the agency shall provide the victim notice of the victim’s rights under the [Act].” This language and notice requirement is problematic. The range of rights provided for in the Act is quite extensive and it is unclear what rights the victim must be given notice of at the outset. It doesn’t make sense during an “initial contact” for investigators to explain rights that, for example, apply only to cold case investigations more than two years in the future. Drafters included this particular language in the section dealing with active cases suggesting investigators need only provide notice of rights associated with active investigations at that time, but the language of the bill itself provides no such limitations.

Further confusing the matter is language incorporated immediately after in subsection 4B, requiring the agency to provide victims with “written notice of the victim’s rights *pursuant to this section.*” (Emphasis added). Reading subsections A and B together, subsection A appears to envision notice of a broader range of rights; otherwise why later specify written notice of rights “pursuant to this section” only. In short, in order for a law enforcement agency to know how to comply with this provision and provide appropriate notice to victims at the appropriate times, more guidance and specificity is required.

- Section 6 requires the Task Force to “complete a process for conducting an inventory of all sexual assault cold case exam kits and forensic evidence” by July 2016. It is unclear if this means that the actual inventory of *all* cold case evidence for *all* agencies throughout

the entire state must be completed by that deadline, or something else. Since this inventory requirement is key to various cold case provisions throughout the legislation, and given that the Task Force will also be promulgating standards regarding cold case evidence, this language and applicable deadlines should be clarified.

PERFORMANCE IMPLICATIONS

Given the range of new procedures and standards for officers investigating sexual crimes, significant training/re-training will be required, according to DPS. Officers handling investigations of sexual crimes must comply with additional requirements and will be evaluated, at least in part, based on their compliance. There may be a learning curve for investigators/agencies given the breadth of new notification and consent requirements.

DPS analysis points out that the notification and consent requirements mandated by the Act are voluminous, and could become administratively difficult to manage for investigators/agencies where a number of victims wish to be notified to the fullest extent. Investigators who are trying to comply with the notification requirements in good faith, and keep a victim apprised of important developments, may nonetheless inadvertently fail to disclose some event or particular information mandated by the Act.

Further, DPS analysis states:

Section 5(C), included “to ensure objectivity of forensic personnel”, requires that all requests by victims for information “be made in writing through the law enforcement agency’s investigating officers.” Bottom line, in trying to ensure meaningful communication and notification (of rights, of DNA and forensic evidence, of case status, regarding informed consent at each step, etc.) drafters may have gone too far and overly burdened investigators/agencies already struggling to maintain caseloads and solve crimes. It may be wise to trim at least some of the less essential notice and administrative requirements so as not to dilute or undermine the thrust or effectiveness of the Act.

AOC analysis states that the deadline of July 1, 2016 for the taskforce’s work may be “overly ambitious considering the massive task they are charged with accomplishing in a relatively short period of time.”

DUPLICATION, CONFLICT

HB 528 duplicates SB 645. SB 510 conflicts with this bill because it also changes the list of crimes enumerated by Section 31-22-8, NMSA 1978 of the Crime Victims Reparation Act and they are different than the changes proposed in HB 528. CVRC states that SB 510 includes their agency’s recommended changes to the enumerated crimes.

TECHNICAL ISSUES

“Cold case kits” is not defined in the bill but is referenced in section 2 of the bill. Also defined in Section 2 are “Unreported sexual assault examination kits,” however the term “sexual assault examination kit” is used to define “cold case” in the same section, but is not itself defined.

AODA analysis states that:

Section 1 defines “active case” to mean a felony sexual assault crime that includes as evidence a sexual assault examination kit, has remained unsolved for less than two years, or is requested by the law enforcement investigating agency or is requested by a prosecutor for a pending prosecution. Because “or” is used in the definition, any case that has a sexual assault examination kit is an “active” case, regardless of how long it has remained unsolved.

Both Sections 5 and 6 are titled “RIGHT TO NOTICE IN COLD CASES”. Section 5 clearly encompasses that topic. Section 6 concerns itself with the creation of the Victims’ Rights Task Force and should be titled accordingly.

Section 6 gives the cold case task force the duty of setting standards for consent, which presumably would apply to active cases, however Section 3C2 gives that duty to the “Statewide Sexual Assault Coalition.” Further, a search of New Mexico statutes found no such coalition referenced in existing statutes.

Section 6 specifies that “a chief of police, or the chief’s designee, from a rural area of the state” is included in the task force, but does not specify who chooses that chief of police.

OTHER SUBSTANTIVE ISSUES

DOH analysis points out the frequency of sex crimes in New Mexico and how under-reported they are:

According to Sex Crimes In New Mexico XII: An Analysis of 2013 Data from The New Mexico Interpersonal Violence Data Central Repository (Caponera 2014), there were 4,058 sex crimes involving 4,220 survivors that came to the attention of statewide law enforcement agencies in 2013. The rate of law-enforcement reported criminal sexual penetration for New Mexico in 2013 was 0.77 per 1000 persons.

However, self-report data indicates that 21% of women in New Mexico, and 4% of men, have been raped during her or his lifetime (Caponera, SEX CRIMES IN NEW MEXICO V: An Analysis of Data from The Survey of Violence Victimization in New Mexico, 2005.) This indicates that sexual assault is a drastically underreported crime. Under-reporting of sexual assault fosters the belief that sexual assault is not a substantial issue in New Mexico.

Of women who reported their sexual assault to law enforcement in 2013, only 33% were referred to services (victim assistance, medical clinic, legal aid or shelter). Forty-nine percent of female rape victims reported being dissatisfied with the police response to their reported rape, and one-third of those, very dissatisfied (Caponera, 2013).

Male victims who reported their sexual assault to law enforcement in 2013 were half as likely as female victims to be referred to services, such as victim assistance, a medical clinic, legal aid or a shelter. Three quarters (74%) of male rape victims reported being dissatisfied with police response to their reported rapes and two-thirds of these, very dissatisfied. Six times more males than females report that they want the police to take their complaint more seriously.

AOC analysis states:

The definition of a “victim” includes a list of individuals that can act on behalf of the victim if the victim is killed or incapacitated. This legislation states the list should be considered “in order of priority listed” but this list could cause problems because it is different than the priority list under Section 45-2-103, NMSA 1978 of the Probate Code for intestate estates. This list is also different than the Guardianship statute priority for appointment, Section 45-5-311, NMSA 1978 for incapacitated adults.

AMENDMENTS

DPS strongly recommends that a disclaimer similar to the aforementioned Victims of Crime Act disclaimer be inserted into this bill. The omission of such language in the bill will likely be viewed by courts as intentional, since the Act references the Victims of Crime Act, which explicitly includes a disclaimer, but no disclaimer is included here, so the legislature must not have meant to bar actions against public employees, agencies, etc.

DPS states:

Omitting any immunizing language while mandating that law enforcement “*shall adhere* to the standards established”; “*shall not*, for any reason, discourage a victim...”; “*shall comply with...*”, etc. (See, e.g., Sections 3(D) and (E), and 6(E) of the Act—emphasis added) will further suggest to potential litigants and courts seeking to discern legislative intent that the legislature didn’t intend to exclude civil lawsuits or compensatory damages for victims in the event of real or perceived noncompliance.

DPS also recommends:

Section 5(A) requires an investigating agency to inform a cold case victim concerning any change in case status, unless disclosure “would unreasonably interfere with the investigation.” Presumably such determination would be made by the investigators/agency, but this isn’t specified. “Law enforcement agency” and/or “investigators” should be inserted after “unless” to make explicit where this authority resides.

AGO analysis states:

Section 6 mandates that no cold case kits or forensic evidence shall be processed until a victims’ rights task force is formed and after specific procedures and protocols have been implemented. This prohibition could cause a statute of limitations problem in certain cases and/or interfere with the timely disposition of a case depending on the circumstances.

Perhaps this section should include exceptions to the rule such as: (1) unless the case is indicted; (2) unless testing is necessary due to the statute of limitations; (3) or unless the State must comply with a court rule or deadline.

CAC/je