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FISCAL IMPACT REPORT

SPONSOR HJC ORIGINAL DATE 2/28 /17
 LAST UPDATED _____ HB 43/HJCS

SHORT TITLE Sexual Offense Definitions SB _____

ANALYST Daly/Chabot

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		≈\$44.8- \$134.4	≈\$44.8- \$134.4	≈\$89.6- \$268.8	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Administrative Office of the Courts (AOC)
- Administrative Office of the District Attorneys (AODA)
- Office of the Attorney General (OAG)
- Children, Youth & Families Department (CYFD)
- Law Offices of the Public Defender (LOPD)
- New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of Bill

The House Judiciary Committee substitute for House Bill 43 amends New Mexico’s criminal sexual penetration statute to increase the degree of offense (and thus punishment) and expand the scope of the offense when that crime is committed against a child 13 or older, and the perpetrator is in a position of authority over the child and uses that authority to coerce the child to submit.

The effective date of CS/HB 43 is July 1, 2017.

FISCAL IMPLICATIONS

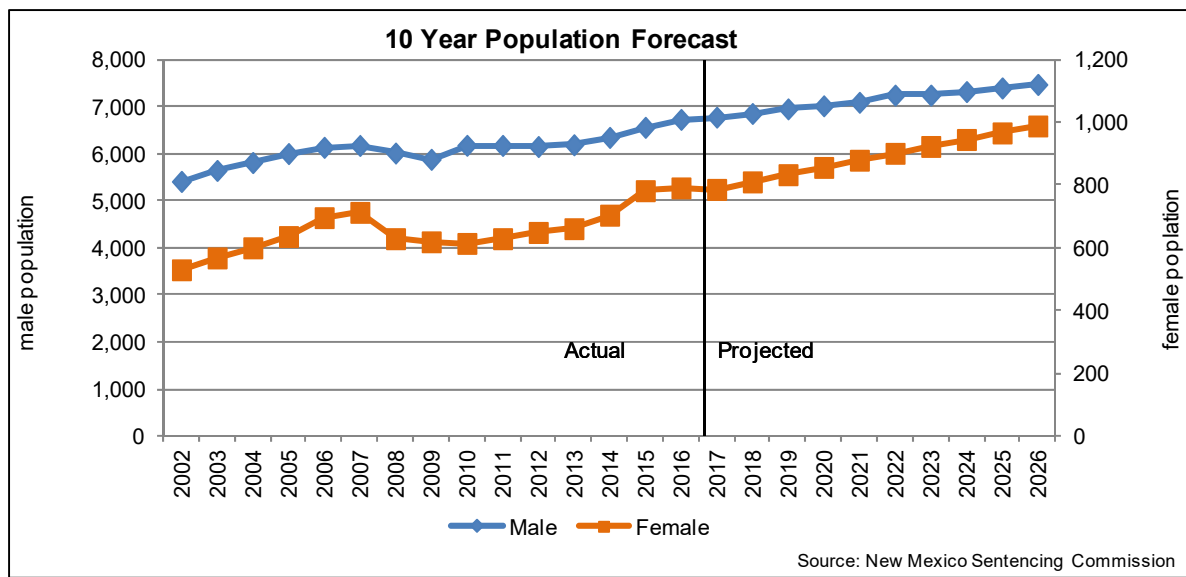
NMCD anticipates that CS/HB 43 may result in at least a minimal number of new sex offense convictions and thus result in a minimal increase to its prison population and probation/parole caseloads.

Based upon NMCD input of a minimal increase in prison population, LFC staff used 1 to 3

additional prisoners to estimate cost. NMCD estimates the annual cost per inmate of \$44.8 thousand. The LFC staff estimate for new inmates is \$44.8 thousand to \$134.4 thousand per year. The variable of new convictions and inmates is impossible to precisely predict.

LFC staff notes that enhanced sentences over time will increase the population of New Mexico’s prisons and long- term costs to the general fund. An increased length of stay would increase the cost to house the offender in prison. In addition, sentencing enhancements could contribute to overall population growth as increased sentence lengths decrease releases relative to the rate of admissions, pushing the overall prison population higher. NMCD’s general fund base budget has grown by an average \$9.5 million per year, or 3 percent, since FY14 as a result of growing prison population and inmates’ needs.

Societal benefits, particularly to potential victims, would also accrue through enhanced sentences if they reduce or delay re-offenses. LFC cost-benefit analysis of criminal justice interventions shows that avoiding victimization results in tangible benefits over a lifetime for all types of crime and higher amounts for serious violent offenses. These include tangible victim costs, such as health care expenses, property damage, losses in future earnings, and intangible victim costs such as jury awards for pain, suffering, and lost quality of life.



SIGNIFICANT ISSUES

As AOC notes, in the new second degree felony defined under this bill, the perpetrator must be in a position of authority over and must use that authority to coerce the child to submit. The use of force is not required in this instance.

The Element of Coercion

AODA points out, however, the element of coercion may render this bill meaningless, given the definition of coercion in existing statute, which statute also already makes criminal sexual penetration of a minor by the use of coercion a second degree felony. See Section 1(E)(1). Thus, AODA asserts:

If CS/HB43 is attempting to recognize that sex between a child and person in a position of authority over that child is by its very nature coercive, it should change the definition of “coercion” to include that situation. The current definition is narrow and does not recognize that type of inherent coercion. Instead, “coercion” refers to the use of force or physical violence, or threats to the victim or another, or attacking the victim when the victim is asleep or physically helpless.

See Section 30-9-11(A) NMSA 1978.

In light of that definition, AODA recommends a different approach be taken if the intent of the bill is to punish criminal sexual penetration of a child by a person in position of authority who uses that authority to obtain sex with a child (without using force or threats). (“Position of authority” is defined in existing law as “a position occupied by a parent, relative, household member, teacher, employer or other person who, by reason of that position, is able to exercise undue influence over a child.” Section 309-910(E).)

First, AODA suggests the definition of coercion could be changed. That is how the statute addresses the issue of sex between a patient and a psychotherapist – that situation is included in the definition of coercive, so the relationship itself is treated as inherently coercive. See Section 30-9-11(A)(5). (“Psychotherapist” is defined to include licensed social workers, counselors, religious functionaries acting as pastoral counselors, and others.) A second approach is more similar to that taken in CS/HB43: add a new crime in the statute setting out what constitutes a second degree criminal penetration. But instead of referring to “coercion,” make all sexual intercourse between a person in position of authority and a child a second degree felony.

Potential Conflict with Fourth Degree Criminal Sexual Penetration

Both OAG and AODA draw attention to the existing statutory provision that already provides that sex between a child and certain persons in positions of authority is a fourth degree felony, without requiring proof of coercion. See Section 1(G). That fourth degree felony, however, is very limited in its application: it encompasses criminal sexual penetration not defined in the other subsections perpetrated on a child thirteen to sixteen years of age when the perpetrator, who is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider or a school volunteer, who is at least eighteen years of age and is at least four years older than the child and not the spouse of that child, learns while performing services in or for a school that the child is a student in a school.

As AODA advises:

It is difficult to read the existing statute and CS/HB43 together. Is all sex between a child and a person in a position of authority a second degree felony, or only when there is “coercion” as defined in the statute? Or are teachers and other school employees not considered persons in a position of authority and therefore guilty only of a fourth degree felony if they have sex with a child? Is there a distinction between teachers who use their position of authority to obtain sex with a child (a second degree felony) and teachers who do not use their position of authority to obtain sex with a child (a fourth degree felony)?

CYFD commented in its analysis of an earlier version of this bill that not requiring that the child suffer injury when criminal sexual penetration is committed using coercion against a child 13 to 18 years of age, as is true here, benefits the safety and well-being of children, especially given that children often do not promptly report criminal sexual penetration. The likelihood of immediate reporting diminishes when the perpetrator is in a position of authority, which results in any evidence of injury typically being healed by the time of disclosure.

TECHNICAL ISSUE

AODA notes a spouse of a minor is a “household member” under the existing definition of position of authority and likely exercises undue influence over the minor. If CS/HB43 is read to include coercion by use of a position of authority, it would criminalize consensual sexual contact between a husband and wife if one is under eighteen.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AODA comments New Mexico’s criminal statutes will continue to have a very limited recognition of the use of force or coercion by persons in a position of authority in sexual crimes against children. Sexual crimes against children committed by persons in positions of authority will continue to have low penalties.

MD/jle/al/sb