

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current and previously issued FIRs are available on the NM Legislative Website ([www.nmlegis.gov](http://www.nmlegis.gov)) and may also be obtained from the LFC in Suite 101 of the State Capitol Building North.

## FISCAL IMPACT REPORT

SPONSOR HCPAC ORIGINAL DATE 03/09/17  
LAST UPDATED 03/13/17 HB 463/HCPACS

SHORT TITLE Child Abuse & Abandonment SB \_\_\_\_\_

ANALYST Daly

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		NFI	NFI			

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with HB 45 and SB 159

Relates to HB 13 and HB 54

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

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

### SUMMARY

#### Synopsis of Bill

The House Consumer and Public Affairs Committee Substitute for House Bill 463 updates existing law governing child abandonment and abuse. It creates, amends and distinguishes the definitions and penalties for abandonment, reckless abuse of a child, and intentional abuse of a child. It also makes abandonment a lesser included offense of reckless abuse of a child and intentional abuse of a child by endangerment.

Abandonment. A new Section 30-6-1.1 redefines and reclassifies the crime of abandonment of a child as knowingly or intentionally leaving or abandoning the child without intent to return with reasonable promptness and under circumstances whereby the child is at a foreseeable risk of

suffering neglect or does suffer neglect. (Section 2) “Intentionally” describes acts that are done purposefully and with a conscious objective to endanger or abuse a child, even if the person did not intend the resulting harm. (Section 1) Abandonment is a fourth degree felony, unless it results in great bodily harm (GBH) or death, then it is a second degree felony. Abandonment may be a lesser included offense of abuse of a child. (Section 2(C)) Penalties are shown in this chart:

<b>Abandonment</b>		
<b>Factor</b>	<b>HB 463 Penalty</b>	<b>Existing Penalty</b>
No GBH or death	Fourth degree felony	Misdemeanor
GBH or death	Second degree felony	Second degree felony

Reckless Abuse. A new Section 30-6-1.2 enacts the crime of reckless abuse of a child committed by a person who recklessly, and without justifiable cause, causing or permitting a child to be placed in a situation knowing that it may endanger the child’s life or health, thereby creating or disregarding a substantial and foreseeable risk of significant harm to the child. (Section 3) “Recklessly” replaces “negligently” (the term used in the existing statute), and is defined as referring to criminal negligence and describes acts that disregard a substantial, foreseeable risk, where the person knew of the danger involved and acted with a reckless disregard for the safety or health of the child. (Section 1(D)) Again, penalties are based upon any resulting injury or death, as reflected in this chart:

<b>Reckless Abuse</b>		
<b>Factor</b>	<b>HB 463 Penalty</b>	<b>Existing Penalty</b>
No physical injury	Misdemeanor	Third degree felony (1 <sup>st</sup> offense); Second degree felony (2 <sup>nd</sup> and Subsequent)
Physical injury- no GBH	Fourth degree felony	No comparable aggravating factor
GBH- child under 13	Second degree felony	First degree felony
GBH- child over 13	Third degree felony	First degree felony
Death- child under 13	First degree felony	First degree felony
Death- child over 13	Second degree felony resulting in death of a human being	First degree felony

Intentional Abuse of a Child. A new Section 30-6-1.3 redefines the crime of intentional abuse of a child committed by a person who knowingly and intentionally, and without justifiable cause, causes a child to be placed in a situation that endangers the child’s life or health intending the endangerment, or tortures, cruelly confines or cruelly punishes. (Section 4) Again, penalties are based on the child’s resulting injury or death, as shown in this chart:

**Intentional Abuse**

<b>Factor</b>	<b>HB 463 Penalty</b>	<b>Existing Penalty</b>
No physical injury	Fourth degree felony	Third degree felony (1 <sup>st</sup> offense); Second degree felony (2 <sup>nd</sup> and Sub.)
Physical injury-no GBH	Third degree felony	Third degree felony (1 <sup>st</sup> offense); Second degree felony (2 <sup>nd</sup> and Sub.)
GBH- child under 13	Second degree felony	First degree felony
GBH- child over 13	Third degree felony	First degree felony
Death- child under 13	First degree felony resulting in death of a child	First degree felony resulting in death of a child
Death- child over 13	First degree felony	First degree felony (including 12 year olds)
Death- intent to kill which results in death (any age)	First degree felony resulting in death of a child	No comparable aggravating factor

Prima Facie Evidence. A new Section 30-60-1.4 declares that exposing a child to weather or methamphetamines constitutes prima facie evidence of child abuse. (Section 5) It also reinstates the concept from existing statute that a parent, guardian or custodian who leaves an infant in compliance with the Safe Haven for Infants Act will not be prosecuted for abandonment of that child.

The effective date of CS/HB 463 is July 1, 2017.

**FISCAL IMPLICATIONS**

AOC, LOPD and AODA anticipate minimal fiscal impact under HB 463. LOPD notes that the added gradations of child abuse and inclusion of lower-degree felonies could provide more opportunities for plea bargaining, resulting in reduced trial costs. AODA also recognizes the increases and decreases in penalties in CS/HB 463 make it difficult to predict whether costs will increase or decrease. To the extent that penalties are increased, NMCD in its earlier analysis predicted minimal to moderate increases in prison population and probation/parole caseloads. LFC staff interprets these comments to mean agencies will be able to absorb any minimal increases within their existing operating budgets, as reflected in the “NFI” designation in the table above.

LFC staff also notes, to the extent applicable, 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 LOPD first advises, due to vagaries in the current statute that provide a very broad scope of the crimes as defined, decades of case law has attempted to draw lines to determine where particular conduct falls on the continuum of abandonment, negligence, and intentional conduct, creating piecemeal precedent that is confusing to reconcile in practice. A detailed restructuring of the current statute would provide guidance to individuals, lawyers, and judges. CA/HB 463 appears to be an effort to do just that: update existing criminal statutory law addressing child abandonment and abuse to conform to a line of court rulings that interpret these laws, including recognizing that what is currently labeled negligent child abuse by endangerment must in fact be committed recklessly, and requires actual knowledge of the risks. (A listing of those court holdings is included in the Other Substantive Issues section below.)

One change that may not have been intended by the bill drafters, however, is the punishment imposed under some circumstances for abandonment versus reckless child abuse, as shown in the tables above. While the bill expressly provides that abandonment is a lesser-included offense to reckless child abuse, the punishment for each does not universally reflect that characterization. Abandonment not resulting in great bodily harm or death is a fourth degree felony. Reckless child abuse not resulting in physical injury, on the other hand, is a misdemeanor, even though, as CYFD pointed out in its earlier analysis, the mens rea (criminal intent) is greater: recklessly and without justifiable cause ...creating or disregarding a *substantial and foreseeable risk* of significant harm (reckless child abuse), as opposed to knowingly or intentionally leaving or abandoning a child...under circumstances whereby a child is at a *foreseeable risk* of suffering or does suffer neglect (abandonment). Additionally, abandonment resulting in great bodily harm to a child of any age is a second degree felony, whereas reckless child abuse of a child over 13 resulting in great bodily harm is a third degree felony.

As reflected in the tables in the Synopsis section above, the penalties imposed in other instances are less than those in current law, but more gradations are included. LOPD comments HB 463's restructuring of penalties allows for greater variation in what is truly a continuum of conduct, rather than placing all child abuse crimes in the upper tier of New Mexico's sentencing scheme even when no injury occurs. LOPD asserts that CS/HB 463's changes:

properly recognize that many of the factual scenarios that fall within the scope of criminal child abuse do not result in harm and do not fall within the type of purposeful or cruel abuse that are now reserved only for the highest penalties in this bill. This restructuring of penalties is more rationally tied to culpability and harm, and would less often result in draconian punishments for lesser conduct.

On the other hand, CYFD commented as to the penalties imposed if reckless abuse results in great bodily harm or death:

Under current law, if a person recklessly abuses a child that results in death or great bodily harm, that person is guilty of a first degree felony. Thus, this bill proposes to reduce a sentence of eighteen years in prison, to three or nine years (no mandatory prison time) depending on the age of the child. It is worth noting here that “great bodily harm” has a specific meaning under the law. UJI 14-131 defines “great bodily harm” an injury that creates a high probability of death, results in serious disfigurement, loss of any member or organ of the body, or the permanent or prolonged impairment of the use of any member or organ of the body. So, under the proposals in this bill, a person who recklessly abuses a child and that child loses a limb or an internal organ, or is seriously disfigured as a result, could face up to three years of probation. Finally, in Section 3, this bill lowers the penalty for reckless child abuse resulting in the death of a child aged 13-18. Again, under current law, reckless child abuse resulting in death is a first degree felony. This bill reduces that punishment to a second degree felony resulting in the death of a human being which carries a fifteen year sentence with no mandatory prison time.

However, to the extent that CS/HB 463’s penalty alterations reduce punishment, LOPD advises:

the proposed modifications in HB 463 would not prevent the State from seeking strict penalties where appropriate. First, if the judge finds the circumstances warrant it, the judge may limit a defendant’s ability to earn “good time” for second-degree abandonment and first, second, and third-degree abuse, which can significantly impact the amount of time served in prison. Moreover, the criminal code contains other serious penalties for behavior that often overlap with child abuse (assault, battery, homicide, sex crimes, etc.) that can in some cases be charged along with child abuse, resulting in a longer total sentence...Finally, felony sentences are currently (already) subject to being increased by up to one-third the basic sentence due to aggravating circumstances, which can address those outlier situations where a defendant exhibits greater moral culpability, but a lesser harm results.

## **ADMINISTRATIVE IMPLICATIONS**

Existing uniform criminal jury instructions on abandonment and abuse will need to be revised.

## **CONFLICT, RELATIONSHIP**

CS/HB 463 conflicts with:

- HB 45, which increases the penalty for intentional abuse of a child twelve to eighteen years of age that results in the death of the child to a first degree felony resulting in the death of a child, and removes the distinction in the existing statute based on age. (See table above); and
- HB 463 also conflicts with SB159, which increases the penalties that apply to intentional abuse of a child that does not result in the child’s death, increasing the penalties if the abuse is intentional.

HB 463 relates to HB 13 and HB 54, each of which adds one or more of the crimes defined in HB 463 to the definition of “violent felony” in Section 31-18-23(E)(2) NMSA 1978.

## TECHNICAL ISSUES

AOC, CYFD and AODA suggest these technical corrections:

1. There is no definition of “knowingly,” although the word is used in two of the crimes set out in HB463. New Section 30-6-1.1, Abandonment of a Child, uses the phrase “knowingly or intentionally.” New Section 30-6-1.3, Intentional Abuse of a Child, uses the phrase “knowingly and intentionally.” The definition of “intentionally” appears to include a knowledge element, because it requires that the act be done purposefully and with a conscious objective to endanger or abuse a child, even if the person did not intend the resulting harm. If the definition of “intentionally” covers the knowledge requirement for the crime, the undefined word “knowingly” should be left out of the definition of the crime. If “knowingly” is an alternative to “intentionally,” or something required in addition to the requirement that the act be done “intentionally,” then the word “knowingly” should be defined.
2. The definition of “reckless” at page 2, line 14 refers to reckless disregard for a child’s safety or health, while the definition of the crime of reckless child abuse at page 5, line 12 speaks in terms of a child’s life or health.
3. The prima facie evidence provisions in Section 5 do not clearly state to which type of child abuse those legal presumptions apply.

## OTHER SUBSTANTIVE ISSUES

Section 3(C) creates an additional felony for “physical injury” within reckless child abuse, without defining that term. However, OAG advises the same term is used in the kidnapping statute (Section 30-4-1, NMSA 1978), and survived a vagueness challenge. *See State v. Parvilus*, 2013-NMCA-025, ¶¶ 37-38, 297 P.3d 1228, *overruled on other grounds*, 2014-NMSC-028, 332 P.3d 821 (holding that a person of ordinary intelligence could not fail to understand what physical injury means). To avoid any confusion on this issue, the bill could include the definition found in the misdemeanor aggravated battery statute: “inflicting an injury to the person which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment to the functions of any member or organ of the body.” See Section 30-3-5.

LOPD provides this summary of recent court decisions governing child abandonment and abuse which are codified in HB 463:

- (1) that endangerment requires a “substantial foreseeable risk” of a harm and is “reserved for the most serious occurrences, and not for minor or theoretical dangers, *State v. Chavez*, 2009-NMSC-035, ¶¶ 16, 26, 146 N.M. 434;
- (2) that intentional child abuse cannot include a failure to act that is inherent to “permitting” abuse, *State v. Cabezuela*, 2011-NMSC-041, ¶¶ 36-37, 150 N.M. 654;
- (3) that to fall within criminal law, negligent child abuse by endangerment must in fact be reckless child abuse, requiring actual knowledge of the risks, not just a civil negligence standard of “should have known,” *State v. Consaul*, 2014-

NMSC-030, 332 P.3d 850;

- (4) that negligent and intentional child abuse are in fact two separate and mutually exclusive crimes, not two tiers of the same crime, *see State v. Schoonmaker*, 2008-NMSC-010, ¶ 46 n.4, 143 N.M. 373;
- (5) that abandonment may be a lesser-included offense of abuse, *see State v. Garcia*, 2014-NMCA-006, ¶¶ 45-50 (Vigil, J., dissenting), *cert. quashed*;
- (6) that abandonment requires an intent not to return, *State v. Stephenson*, Slip op., N.M. Ct. App. No. 31,273, ¶ 22, 2014 WL 6454821 (Nov. 18, 2014); and
- (7) “that the *mens rea* for intentional child abuse by endangerment requires a conscious objective to achieve a result—endanger the child.” *State v. Granillo*, 2016-NMCA-094, ¶ 17, 384 P.3d 1121, *cert. denied*, No. S-1-SC-36095 (Nov. 15, 2016).

LOPD also points out that the civil system of custodial intervention (through CYFD) is in place to help protect children from lesser, non-criminal “bad parenting” and neglect not rising to the level of criminal abuse or abandonment.

AODA notes the provision of CS/HB 463 that leaving an infant younger than ninety days old in compliance with the Safe Haven for Infants Act is not abandonment. Although the existing statute refers to leaving the infant at a hospital, the Safe Haven for Infants Act is broader, defining a safe haven as a hospital, law enforcement agency or fire station that has staff on-site at the time an infant is left at the site. See Section 24-22-2(F) NMSA 1978.

In its earlier analysis, NMSC provided this breakdown of admissions to the NMCD for great bodily harm or death of a child under the section of law being amended in this bill for fiscal years 2012 through 2016. Available data does not differentiate between convictions for death of a child due to abuse or great bodily harm not resulting in death:

FY12: 9 admissions  
FY13: 8 admissions  
FY14: 10 admissions  
FY15: 5 admissions  
FY 16: 12 admissions

#### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

When acts constituting child abuse result in no physical harm and no harm was intended, the lowest possible sentence is a third degree felony (three years imprisonment).

MD/sb