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FISCAL IMPACT REPORT

ORIGINAL DATE 1/29/17
SPONSOR Gould **LAST UPDATED** _____ **HB** _____

SHORT TITLE Enticement of Children Penalties **SB** 160

ANALYST Klundt

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$45.3 per inmate for each additional in custody	\$45.3 per inmate for each additional in custody	\$135.9 per inmate for 3 additional years in custody	Recurring	Corrections Department operating budget
		Indeterminate	Indeterminate	Indeterminate	Recurring	DA, PDD, Courts operating budgets

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Children, Youth and Families Department (CYFD)

Administrative Office of the Court (AOC)

Attorney General’s Office (AGO)

Corrections Department (NMCD)

Law Office of the Public Defender (LOPD)

SUMMARY

Synopsis of Bill

SB 160 amends Section 30-9-1 NMSA 1978 to increase the penalty for the crime of enticement of a child from a misdemeanor to a fourth degree felony if the child is at least 13 but under 18, and to a third degree felony if the child is under 13. SB 160 also increases the maximum age of the child who can be a victim of the crime of enticement from 16 to 18.

FISCAL IMPLICATIONS

Enhanced sentences over time will increase the population of New Mexico's prisons and long-term costs to the general fund. According to the New Mexico Corrections Department (NMCD), the average cost per day to house an inmate in a state prison is \$123, or about \$45,250 per year. A longer 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.

NMCD stated currently, the crime of enticement of a child is currently a misdemeanor, and NMCD does not normally incarcerate misdemeanor offenders nor supervise a large number of misdemeanor offenders on probation. NMCD does not have reliable statistics regarding the number of offenders in its custody convicted of child enticement. NMCD estimated that there is likely to be a minimal number of additional felony convictions resulting from this bill. The Department therefore estimated that the bill will result in a minimal increase in the number of offenders sentenced to incarceration or placed on probation with the NMCD.

The AOC reported there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase. An increase in the number of jury trials and appeals may result, given the increase in the penalties for the crime, from a misdemeanor to a third or fourth degree felony, depending upon the age of the victim.

There is no appropriation included in this bill; no additional impact on the operating budgets for The Children, Youth and Families Department (CYFD) were reported.

The AODA previously reported a possibility of fiscal impact for District Attorney's Offices statewide for additional prosecutorial resources.

Implication for the LOPD depends directly on the number of prosecutions initiated by the State. It is this reviewer's understanding that not many prosecutions occur for conduct currently prohibited by NMSA 1978, Section 30-90-1. However the LOPD believes, felonizing the conduct contained in the enticement statute would likely lead to increased prosecutions in this area. Prosecutions of felony offenses are 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.

SIGNIFICANT ISSUES

AOC reported under SB 160, the penalty for the crime would increase from a misdemeanor to a felony. As penalties increase, more people invoke their right to a jury trial, requiring additional resources.

CYFD stated this bill makes enticing a child a felony regardless of the child's age. The bill also brings NMSA 1978 §30-9-1 more in alignment with §30-37-3.2 which relates specifically to child solicitation through electronic means.

LOPD reported conduct constituting enticement is not clearly defined sufficiently to distinguish it from already-existing crimes and included the following analysis:

“Per the statute and jury instruction for enticement, UJI 14-971, 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. UJI 14-971 NMRA; *see also* Committee Commentary Section 30-9-1. Currently the UJI doesn't distinguish between the different age groups listed in this proposed amendment. Conduct that constitutes “possessing a child” is not defined in the enticement statute or elsewhere in Chapter 30, Article 9. *See State v. Perea*, 2008-NMCA-147, ¶ 14, 145 N.M. 123 (noting that the courts have not considered the meaning of possession in this statute)

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, NMSA 1978, 30-28-1 already felonizes similar conduct—committing an overt act constituting “a substantial part” of the sex crime yet ultimately failing to effect its commission. *See also* UJI 14-941 NMRA (providing jury instruction for attempt to commit a felony) If anything, 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 is appropriate.

As another example—particularly when the State proceeds under an enticement by possession theory—the line blurs between what constitutes kidnapping (a felony) or attempt to commit kidnapping and enticement. If anything, mere “possession of a child” should be considered less culpable than the “force or intimidation” required for kidnapping, since there could be legitimate reasons an adult “possesses” a child. This reduced culpability supports leaving punishment for enticement as a misdemeanor. *See Perea*, 2008-NMCA-147, ¶ 17 (“possession is control, not forcible abduction”)

The concerns listed above also highlight the potential for double jeopardy violations. 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. *Cf. State v. Montoya*, 2011-NMCA-074 (evaluating double jeopardy violation in a case involving CSP and kidnapping convictions); *State v. Duran*, COA No. 31, 833 (July 29, 2013) (unpublished) (holding attempt to commit CSP subsumed in kidnapping offense). “

LOPD also stated misdemeanor crime of enticement offers the State a vehicle to efficiently manage high caseloads while securing convictions for culpable conduct stating the following:

“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. *See State v. Andrade*, 1998-NMCA-031, ¶ 11, 124 N.M. 690. Although a 1983 case suggests the crime of enticement is not a lesser-included offense of criminal sexual penetration, that case was decided prior to *State v. Meadors* 1995-NMSC-073—a case that changed how crimes may be established as lesser offenses. It is likely that under the facts of many cases, applying *Meadors* would render enticement a lesser-included offense of CSPM or CSCM crimes.”

PERFORMANCE IMPLICATIONS

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percentage change in case filings by case type

OTHER SUBSTANTIVE ISSUES

AGO stated Enticement of a Child as listed under Section 29-11A-5 currently requires a defendant convicted of the crime to register as a sex offender for a period of 10 years. SB 160 increases the penalties for Enticement of a Child but does not increase the period of registration from 10 years to lifetime registration. Attempt to commit criminal sexual penetration in the first or second degree; criminal sexual contact in the second, third or fourth degree; kidnapping in the first degree; and criminal sexual contact in the fourth degree; if charged as attempt under 30-28-1 would result in lifetime registration under 29-11A-5(D) (6), whereas enticement of a child to commit an act which would constitute a crime under Article 9 of the Criminal Code would only cause an offender to be subject to 10 year sex offender registration period.

Also, SB 160 reads “a child at least thirteen but under eighteen years of age” at Section 30-9-1(B)(1). AGO stated if SB 160 read “a child 13 to 17” it may be more consistent with language in other parts of the criminal code.

KK/sb/al