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## FISCAL IMPACT REPORT

**SPONSOR** Louis/Thomson      **ORIGINAL DATE** 1/30/2020  
**LAST UPDATED** 2/15/2020      **HB** 237/aHJC

**SHORT TITLE** Human Trafficking & Sex Offender Changes      **SB** \_\_\_\_\_

**ANALYST** Rabin

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

	FY20	FY21	FY22	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	See fiscal implications				Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to Senate Bill 66, House Bill 101; Conflicts with Senate Bill 97, House Bill 36, House Bill 43, House Bill 232

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Administrative Office of the District Attorneys (AODA)  
 Public Defender Department (PDD)  
 New Mexico Attorney General (NMAG)  
 New Mexico Sentencing Commission (NMSC)  
 Crime Victims Reparation Commission (CVRC)  
 New Mexico Corrections Department (NMCD)  
 Children, Youth and Families Department (CYFD)

#### No Response Received

Department of Public Safety (DPS)  
 Department of Homeland Security and Emergency Management (DHSEM)

### SUMMARY

#### Synopsis of HJC Amendment

The House Judiciary Committee amendment to House Bill 237 makes the following changes:

- Removes the original proposal that would have required any person convicted of sex offenses and registered as a sex offender in any other jurisdiction to register as a sex offender for life in New Mexico, and instead requires them to register for 10 years,

adding a caveat that the offender may petition a New Mexico court to be exempt from registration if the offender would not have been required to register in New Mexico and the court finds “good cause” to exempt the individual from registration requirements;

- Removes the mandatory minimum sentence of three years of imprisonment for human trafficking when the victim is under 16, but increases the penalty for human trafficking of victims between the ages of 13 and 18 from a third degree felony (under current law) to a first degree felony (trafficking of victims under the age of 13 is a first degree felony under current law); and,
- Removes the original proposal that would have allowed for forfeiture of the fruits of human trafficking after conviction, replacing that proposal with language specifying that persons convicted of human trafficking shall be subject to the Forfeiture Act.

The amendment also makes other minor technical changes that do not materially affect the substance of the bill.

### Synopsis of Original Bill

House Bill 237 makes several changes to laws related to human trafficking and sexual exploitation of children by prostitution, including expanding the definition of the crime of human trafficking, clarifying the tactics law enforcement may use to identify and apprehend individuals engaged in those crimes, increasing the consequences to those who commit those crimes, and expanding the protections available to victims of those crimes.

Current law defines human trafficking as “recruiting, soliciting, enticing, transporting, or obtaining by any means” anyone “with the intent or knowledge that force, fraud or coercion will be used to subject the person to labor, services or commercial sexual activity” or a child “with the intent or knowledge that the person will be caused to engage in commercial sexual activity,” or knowingly benefiting from such actions. HB237 expands that definition to include harboring, maintaining, patronizing, and providing people for such purposes. The bill also expands the definition of coercion to include physical restraint (or threats thereof) in addition to harm (which is not defined in current statute), which it defines to include serious physical, nonphysical, psychological, financial, or reputational harm. Finally, the bill clarifies that each violation of this human trafficking law constitutes a separate offense. Separately, HB237 raises the age of a “child” for purposes of statute relating to the sexual exploitation of children by prostitution from 16 to 18.

HB237 precludes defendants whose intended victim of human trafficking or sexual exploitation of a child by prostitution was an undercover police officer posing as a minor from using that fact as a component of their defense. For purposes of prosecuting those who engage in human trafficking, HB237 removes the statute of limitations for human trafficking and includes it as a crime that can constitute racketeering.

HB237 increases the penalty for human trafficking to a second-degree felony and imposes a mandatory minimum sentence of three years of imprisonment when a human trafficking victim is under 16. The bill also allows for the forfeiture of the fruits of human trafficking after conviction. Additionally, HB237 classifies human trafficking as a crime a court can judge to be a

serious violent offense for purposes of the Eligibility for Earned Meritorious Deductions Act, limiting the amount of good time an offender can receive.

HB237 amends the Sex Offender Registration and Notification Act to include human trafficking as a registrable sex offense and extends New Mexico's registration requirements to sex offenders who have been sanctioned for a sex offense (including those who have been granted conditional discharge), who have been convicted of sex offenses and registered as a sex offender in any other jurisdiction (but who reside or spend significant time in New Mexico), or who own a residential property in New Mexico. The bill expands the list of sex offenders who must register for life to include individuals who have been sanctioned for human trafficking or sexual exploitation of children by prostitution and those who have been convicted of sex offenses and registered as a sex offender in any other jurisdiction.

HB237 expands the protections offered to human trafficking victims by expanding the safe-harbor provision for trafficking victim so victims compelled to prostitute will not be charged with prostitution or as accessories to human trafficking, establishes minimum restitution to human trafficking victims of the value taken from them by their trafficker under state and federal labor laws, and prohibits a victim's sexual history or history of commercial activity, a minor victim's consent, or mistake as to a victim's age from being used as a defense against human trafficking charges. The bill also extends the protections of the Victims of Crime Act to include victims of human trafficking or sexual exploitation of children.

There is no effective date of this bill. It is assumed that the effective date is 90 days following adjournment of the Legislature.

### **FISCAL IMPLICATIONS**

The Administrative Office of the Courts (AOC) notes that increased penalties are likely to result in more defendants invoking their right to trials, as well as to jury trials, and adds that indigent offenders are entitled to public defender services.

More trials and more jury trials will require additional judge time, courtroom staff time, courtroom availability and jury fees; however, AOC could not quantify this cost.

The Public Defender Department (PDD) notes that any increase in criminal offenses or penalties increases the strain on its offices, and that some provisions of HB237 may make it less appealing for defendants to take plea bargains, requiring more resources from PDD and the court system generally. Specifically, PDD notes that the expansions to sex offender registration requirements will likely increase caseloads, as individuals who violate their responsibility to register can be charged criminally; as a result, expanding who must register can increase criminal cases for failure to register. If there is no way to plea bargain out of sex offender registration, more defendants are likely to choose to go to trial, increasing resource demands on PDD.

PDD notes it is difficult to estimate the fiscal impact of expansions to sex offender registration or to the human trafficking and sexual exploitation of children by prostitution laws. PDD cannot determine how many additional individuals would be required to register under the provisions of HB237, as it lacks information such as how many nonresident sex offenders own residential property in New Mexico. PDD states it sees fewer human trafficking and sexual exploitation of children by prostitution cases than other criminal statutes, and notes that trafficking and

racketeering offenses are often charged by federal prosecutors rather than the state.

The Sentencing Commission (NMSC) is unable to estimate the impact of HB237 on state prison populations, but anticipates it would result in some increase in incarcerated offenders. NMSC notes the average cost per day to incarcerate someone in the state's prison system is \$110.74, about \$40,420 annually (including public and private facilities). The Administrative Office of the District Attorneys (AODA) adds that offenders who are found to have committed serious violent offenses under the expanded provisions in this bill would remain incarcerated longer, requiring more resources from the state's prison system.

AODA adds that recent changes to the Forfeiture Act have led to decreased seizure, forfeiture, and disposal of property illegally gained as a result of criminal contact. As a result, it is not clear if the proceedings for forfeiture contained in HB237 will be pursued. If they are pursued, AODA notes additional resources will be needed.

## SIGNIFICANT ISSUES

***Changes to Sex Offender Registration Requirements.*** PDD notes that requiring individuals who receive a conditional discharge on a sex offense to register as sex offenders would limit district courts' discretion to use conditional discharges to resolve cases and would make defendants less likely to accept a conditional discharge. Conditional discharges are only available to defendants with no prior felony convictions or other conditional discharges and are available only at the court's discretion; a court is likely to agree to a conditional discharge only in very rare sex crimes cases. Currently, PDD states that a conditional discharge can benefit a defendant; if a defendant successfully complies with all conditions, which requires commitment to the rehabilitation process, they can receive no prison time, no registration, and no formal conviction. This change would tie the district court's hands and require sex offender registration—which is onerous, stigmatizing, and can last for either ten years or life—even in the most sympathetic cases.

AODA adds that the provisions of HB237 require a person who is subject to a conditional release, control release, or incarceration to register as a sex offender. AODA states it appears this language would require a person who is on conditions of release, but who has not yet been tried, to register as a sex offender. AODA states this will probably be challenged on the grounds that a person should not be required to register if they have not been convicted.

Additionally, PDD raises concerns that the original version of the bill's alteration of part of the definition of "conviction" for purposes of the Sex Offender Registration and Notification Act from "a conviction in any court of competent jurisdiction" to "a conviction in any jurisdiction resulting in a sanction" could result in sex offender registration for convictions imposed in other jurisdictions, even if they violate New Mexico's principles of due process. The provisions of the HJC amendment that allow an offender to petition a New Mexico court to exempt them from such requirements may resolve this issue; however, analysis on the amendment from PDD was not received in time to be included in this report.

PDD raises further concerns that the original version of HB237 requires lifetime registration for any out-of-state conviction requiring the defendant to register as a sex offender in that jurisdiction. Currently, individuals convicted in another jurisdiction must register if their actual conduct would have constituted a registrable offense if it had occurred in New Mexico. Under

the provisions of the original version of HB237, any registrable offense in another state would become a registrable offense in New Mexico, even if the underlying conduct would not be registrable or even illegal in New Mexico. PDD notes that some states require sex offender registration for prostitution-related offenses that do not involve children, streaking, or public urination, while others impose statutory rape penalties, including registration, for consensual sex that would be legal in New Mexico. The HJC amendment may resolve this issue by allowing an offender to petition the court to exempt them from registration requirements if they would not have been required to register in New Mexico.

***Changes to Human Trafficking Statutes.*** NMSC writes that the removal of the statute of limitations for human trafficking places human trafficking in the same category of crime as capital felonies or first degree violent felonies, despite the underlying crimes in the human trafficking statute ranging from second to first degree felonies. NMSC states that this may create an imbalance in the state’s system of statutes of limitations for prosecuting crimes. On the other hand, AODA notes that because human trafficking is a crime that is highly mobile, traffickers rarely stay in one place and have developed many ways to hide themselves and their activities. As a result, subjecting human traffickers to prosecution without limitation may have a deterrent effect and may also give victims increased assurance that offenders may eventually be held accountable.

As amended, human trafficking statutes would cover a broad range of conduct. PDD notes that in addition to the fourth-degree felony of promoting prostitution (pimping), a pimp who used any degree of physical restraint would also be guilty of second-degree human trafficking. PDD raises concerns that “physical restraint” is not defined, and it is not clear how much would be required under the proposed legislation, but it is included in the bill as an alternative to physical force, it presumably applies to non-forceful restraint. Thus, closing a door, placing someone in a car, or grabbing someone’s arm non-forcefully during the course of promoting prostitution could satisfy the qualify as human trafficking provided under HB237.

The Attorney General’s Office (NMAG) notes that in *State v. Carson*, the Court of Appeals held that two convictions for trafficking the same victim violated double jeopardy because the statute did not specify a unit of prosecution and because there was insufficient distinctness between the two convictions to justify multiple punishments. NMAG explains that the new provisions of HB237 that state that each violation of the human trafficking statute constitutes a separate offense is an attempt to remedy this issue. On the other hand, PDD states this provision may be redundant, as Section 30-52-1(D) NMSA 1978 already permits prosecution for human trafficking in addition to any related offenses, and the penalties can stack. PDD also notes that the wording of this provision is ambiguous, as it states that “Each violation of this section constitutes a separate offense,” but the term “violation” is not defined in this bill. Under current law, a violation is determined by a six-factor test courts use to determine the distinctness of a defendant’s actions; under this analysis, it is very likely that every victim warrants a separate charge, and potentially multiple charges per victim. PDD states that, without a separate definition of “violation,” this provision is redundant.

HB237 proposes several factors that would not constitute a defense to human trafficking or sexual exploitation of children by prostitution: the victim’s sexual history or history of commercial sexual activity, specific instances, opinion evidence, or reputation evidence regarding the victim’s sexual conduct, the consent of a minor, mistaking a victim’s age, and that the intended victim was a police officer posing as a minor. Both AODA and NMAG note that

existing rules of evidence include a “Rape Shield” (Rule 11-412 NMRA), which precludes evidence of a victim’s prior sexual history from being admitted in trial for “crimes involving alleged sexual misconduct.” However, AODA adds that there are some exceptions to this rule, and a judge may allow some or all of a victim’s sexual history to be admitted into evidence. AODA notes that this statutory provision may limit a judge’s discretion in admitting evidence of a victim’s sexual history in prosecutions for human trafficking or sexual exploitation of a child.

PDD raises concerns that excluding the factors of a victim’s history of commercial sexual activity, consent of a minor, and mistake about a victim’s age have the potential to limit effective representation of a defendant in court. According to PDD, in a prosecution for human trafficking those factors could be relevant to the element of coercion. Even if those factors do not constitute a defense alone, PDD claims that evidence of them may still be relevant for a jury to hear, and that making such evidence inadmissible could violate a defendant’s constitutional right to present a defense. PDD suggests HB237 could avoid this constitutional issue by clarifying that evidence of these factors may still be admissible in court.

NMAG notes that HB237’s exclusion of consent by a minor reflects the law that minors are incapable of consent, as New Mexico case law states that “the intentional exploitation of a person under the age of eighteen for commercial sexual activity amounts to a violation of Section 30-52-1(A)(2), regardless of a defendant’s actual awareness of that person’s age.” However, NMAG also notes that existing statute has been held to be clear and unambiguous as written, so it is not clear that the statute needs to be explicitly amended regarding knowledge of the victim’s age.

In its analysis of the original version of HB237, PDD raises concerns that it is not clear how the property forfeiture provision proposed in the bill would interact with the Forfeiture Act. The HJC amendment appears to resolve any ambiguity by simply referencing the Forfeiture Act as applicable to individuals convicted of human trafficking under this law.

## **PERFORMANCE IMPLICATIONS**

HB237 may impact the performance of law enforcement, prosecutors, public defenders, courts, and corrections, as workloads may increase.

## **CONFLICT, RELATIONSHIP**

HB237 conflicts with House Bill 36, which adds second degree murder to the list of crimes for which there is no statute of limitations. Both HB237 and HB36 make changes to Section 30-1-8(I) NMSA 1978.

HB237 conflicts with House Bill 232, which also amends human trafficking law. HB232 makes human trafficking of anyone under 18 a first degree felony and makes all other human trafficking a second degree felony.

HB237 conflicts with House Bill 43, which also amends the Sex Offender Registration and Notification Act by applying the Act to residents of other states who have been convicted of a sex offense and are physically present in New Mexico for more than ten consecutive days or for a total of more than twenty days during any calendar year. Both HB43 and HB237 require any individual who would be required to register as a sex offender in another jurisdiction to register

in New Mexico by adding such an offense to the definition of “sex offense” in Section 29-11A-3 NMSA 1978, but use slightly different wording to describe the offense:

HB43: “any other conviction that would cause an individual to be registered as a sex offender in the jurisdiction where the offense was committed” (Page 5, lines 8-10)

HB237: “any conviction entered by a court of a jurisdiction outside of the state and requiring the individual to register as a sex offender in that jurisdiction” (Page 6, lines 8-10)

HB237 relates to Senate Bill 97, which also makes changes to the statute of limitations; however, the changes proposed by SB97 do not conflict with those contained in HB237.

HB237 relates to Senate Bill 66 and House Bill 101, which make appropriations of \$250 thousand and \$350 thousand, respectively, to the Crime Victims Reparation Commission to fund services for victims of human trafficking.

## **TECHNICAL ISSUES**

AOC identifies the following issue:

The human trafficking specific statutes, Section 30-52-1 NMSA 1978 et. seq., do not define “conviction.” The Forfeiture Act, Section 30-27-1 NMSA 1978 et. seq., defines “conviction” or “convicted” to mean that a person has been found guilty of a crime in a trial court by a plea of guilty or nolo contendere or otherwise and whether the sentence is deferred or suspended. HB 237 amends Section 29-11A-3 NMSA 1978, within the Sex Offender Registration and Notification Act, to define “conviction” to mean a conviction in any jurisdiction resulting in a sanction, regardless of whether adjudication is withheld. Within that same statute, “sex offense” is defined to include human trafficking for commercial sexual activity, as provided in Section 30-52-1 NMSA 1978. It is unclear whether a conviction for human trafficking meeting the threshold under the Sex Offender Registration and Notification Act, but not under the Forfeiture Act, would trigger the forfeiture requirements and specifically the application of the provisions of the Forfeiture Act that apply to the seizure, forfeiture and disposal of the property and interest specified as subject to forfeiture in Section 30-52-1 NMSA 1978.

## **OTHER SUBSTANTIVE ISSUES**

NMAG notes that several other states have enacted “reciprocity” provisions that require individuals to register as sex offenders in that state if they are required to register in another jurisdiction. NMAG also notes that New Mexico has held that the Sex Offender Registration and Notification Act is a regulatory, rather than a punitive, measure.

PDD notes that adding the verbs of “harboring, maintaining, patronizing, providing” to the human trafficking statute reflects the federal Trafficking Victims Protection Act and its reauthorizations.

AODA notes that limitations on judicial discretion, such as those contained in HB237, are likely to be opposed by district court judges.

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

PDD states that human trafficking is currently illegal and punishable in addition to other crimes committed during the course of the trafficking conduct, and many crimes associated with human trafficking (including kidnapping, rape, and false imprisonment) already require offenders to register as sex offenders. Crimes committed in other jurisdictions would continue to require registration if they are equivalent to registrable New Mexico offenses.

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