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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/04/21

SPONSOR Lane LAST UPDATED \_\_\_\_\_ HB 161

SHORT TITLE Human Trafficking Victim Prostitution Defense SB \_\_\_\_\_

ANALYST Glenn

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

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	See Fiscal Implications					

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB73  
Conflicts with HB56

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Law Offices of the Public Defender (LOPD)  
Office of the Attorney General (NMAG)  
Administrative Office of the Courts (AOC)  
Crime Victims Reparation Commission (CVRC)  
Administrative Office of the District Attorneys (AODA)  
New Mexico Sentencing Commission (NMSC)  
New Mexico Corrections Department (NMCD)  
Department of Public Safety (DPS)

### SUMMARY

#### Synopsis of Bill

House Bill 161 amends the Criminal Code’s provisions related to human trafficking by allowing a person charged with prostitution to assert an affirmative defense that the defendant is a victim of human trafficking when the prostitution was a direct result of the actions of a person charged with human trafficking. The defendant must prove by a preponderance of the evidence that the defendant was a victim of human trafficking at the time of the offense. Official documentation from a government agency demonstrating that the defendant was a victim of human trafficking at the time of the offense creates a presumption that the defense applied.

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**

AOC states that HB161 has the potential to increase litigation in prostitution cases if defendants are asserting human trafficking as a defense. However, a review of court data indicates that only four prostitution cases were filed in 2020, so this would not create a huge impact on court time. This bill could also result in prosecutors not filing cases or dismissing cases where a defendant raises human trafficking as a defense, resulting in fewer cases for courts to process. There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes.

NMCD states that because the crime of prostitution under New Mexico law is punishable as a misdemeanor, this bill will have no fiscal impact on NMCD as it will not have an effect on prison populations or caseloads for probation and parole officers.

CVRC believes that HB161, if enacted, likely would bring additional human trafficking victimization to light. These new disclosures of victimization are related to offenses which are associated with comprehensive needs such as housing, temporary income support, mental health treatment, and medical needs. Expenses associated with these victim compensation needs are typically \$20 thousand per individual crime victim.

## **SIGNIFICANT ISSUES**

According to AOC, thirty-one states currently have legislation that allows a person charged with prostitution to assert their status as a human trafficking survivor as an affirmative defense to the charge. See [www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws.aspx](http://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws.aspx). AOC also states that the National Human Trafficking Hotline identified 123 victims of trafficking in New Mexico in 2019. See <https://polarisproject.org/wp-content/uploads/2020/11/2019-New-Mexico-State-Report.pdf>. NMAG investigated 25 cases of sex trafficking in 2018 and provided 82 victims with resources in the same year. See <https://www.stopnmtrafficking.org/home>. NMAG's 505-GET-FREE Hotline received over 1,700 trafficking related calls between 2015-2018. These numbers may not represent the full scope of trafficking in New Mexico as accurate numbers about trafficking are difficult to obtain due to underreporting. See <https://polarisproject.org/myths-facts-and-statistics/>.

LOPD states that the defense created by the bill would not apply to all victims of human trafficking. It would apply only if the trafficker were charged with human trafficking. The availability of the defense would thus depend on unrelated charging decisions of the prosecutor. The defense would not be available if police and prosecutors were unaware that there was human trafficking going on, if the victim were simply arrested before her trafficker, or the trafficker were charged with other applicable crimes (like kidnapping or rape) instead of human trafficking.

LOPD also notes that the bill would require the defendant to prove the affirmative defense by a preponderance of the evidence. This is not how affirmative defenses generally work in New Mexico criminal cases. Usually, the burden is on the prosecution to *disprove* the affirmative defense beyond a reasonable doubt. For examples, look at Chapter 51 of the New Mexico

Uniform Jury Instructions for criminal cases, which lists the uniform instructions for defenses including insanity, mistake, duress, entrapment, and self-defense. For all of these defenses, once they are raised by the defendant, the state must disprove the defense beyond a reasonable doubt. *See State v. Duarte*, 1996-NMCA-038, ¶ 3 (holding that self-defense instruction “should be given if there is any evidence, even slight evidence, to support the claim”).

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Relates to HB73 (Human Trafficking and Child Exploitation Act) and HB 56 (Sex Offender and Human Trafficking Changes) both of which address human trafficking offenses. HB56 specifically provides that a victim of human trafficking shall not be charged with prostitution, which may create a conflict with HB161’s provisions allowing a person to be charged but to raise human trafficking as a defense.

### **TECHNICAL ISSUES**

LOPD notes that, under the bill, official government documentation that a defendant was a victim of human trafficking at the time of the offense would create a presumption that the defense applied. LOPD suggests that, to avoid issues regarding what constitutes “official documentation,” it would help to spell out some examples of the types of documentation that would suffice.

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