

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

FISCAL IMPACT REPORT

SPONSOR <u>Thomson/Herrera</u>	LAST UPDATED <u>3/3/23</u>	ORIGINAL DATE <u>2/23/23</u>
SHORT TITLE <u>Human Trafficking & Sex Offenders</u>	BILL NUMBER <u>House Bill 445</u>	ANALYST <u>Daly</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY25	FY37	FY45	25 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Costs to NMCD	At least \$79.8	At least \$822.7	At least \$1,397.5	\$21,235.9	Recurring	General Fund

Parentheses () indicate expenditure decreases.
 *Amounts reflect most recent version of this legislation.

Conflicts with HB234, HB225, SB82, SB215

Sources of Information

LFC Files

Responses Received From

- Administrative Office of the Courts (AOC0)
- Administrative Office of the District Attorneys (AODA)
- Department of Public Safety (DPS)
- Law Offices of the Public Defender (LOPD)
- New Mexico Attorney General (NMAG)
- New Mexico Corrections Department (NMCD)
- New Mexico Crime Victims Reparation Commission (NMCVRC)
- New Mexico Sentencing Commission (NMSC)

SUMMARY

Synopsis of House Bill 445

House Bill 445 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. HB445 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), 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, HB445 raises the age of a “child” for purposes of statute relating to the sexual exploitation of children by prostitution from 16 to 18.

HB445 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, the bill removes the limitation period for prosecuting for human trafficking and includes human trafficking as a crime that can constitute racketeering.

HB445 increases the penalty for human trafficking from a third degree penalty (under current law) to a second degree felony for victims age 18 and older and increases the penalty for human trafficking of victims between under the age of 18 to a first degree felony (under current law, trafficking of victims under the age of 16 is a second degree felony and trafficking victims under the age of 13 is a first degree felony). The bill also provides that persons convicted of human trafficking shall be subject to the Forfeiture Act. It classifies human trafficking as a serious violent offense for purposes of the Eligibility for Earned Meritorious Deductions Act, limiting the amount of good time an offender can receive.

HB445 amends the Sex Offender Registration and Notification Act (SORNA) to include human trafficking as a registrable sex offense and extends New Mexico’s registration requirements to sex offenders who do not have an established residence in New Mexico, but own residential property in New Mexico. The bill changes the definition of “conviction” for purposes of SORNA so that it encompasses a “conviction ... resulting in a sanction” and deletes language in the existing definition that excludes conditional discharges. 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. Those who have been convicted of sex offenses and registered as a sex offender outside the state are required to register for 10 years, with the 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.

HB445 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.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

Incarceration drives costs in the criminal justice system, so any changes in the number of individuals in prison and jail and the length of time served in prison and jail that might result from this bill could have moderate fiscal impacts. The creation of any new crime, increase of felony degree, or increase of sentencing penalties will likely increase the population of New Mexico's prisons and jails, consequently increasing long-term costs to state and county general funds. The Corrections Department (NMCD) reports the average cost to incarcerate a single inmate in FY22 was \$54.9 thousand; however, due to the high fixed costs of the state's prison facilities and administrative overhead, LFC estimates a marginal cost (the cost per each additional inmate) of \$26.6 thousand per year across all facilities. HB445 is anticipated to increase the number of incarcerated individuals and increase the time they spend incarcerated.

Overall, this analysis estimates HB445 will result in increased annual incarceration costs of \$1.9 million to the state. Because this bill impacts sentences that are already quite lengthy (up to first-degree felonies) and potentially increases the length of stay for those crimes, the bill's full cost impacts will not be felt for many years. Costs to the state are estimated to be at least \$79.8 in FY25 and will rise to \$1.4 million in FY45 and future fiscal years. More detailed cost calculations are provided below.

Additional system costs beyond incarceration, such as additional costs to the judicial branch for increased trials or increased costs to law enforcement to investigate and arrest individuals for the new and expanded crimes under HB445 are not included in this analysis, but could be significant.

This analysis does not include potential benefits of crime deterrence due to increased punishment, as research shows sentence length has little to no deterrent effect. Certainty of being caught is a significantly more effective deterrent to criminal behavior than the severity of punishment if convicted.

Detail of Incarceration Cost Calculations. Changes to the crime of sexual exploitation of children by prostitution: HB445 increases the scope of the current charges regarding sexual exploitation of children by prostitution to include acts involving individuals between 16 and 18 years of age; previously, only acts involving individuals under 16 were included in these charges. This expands the scope of:

- (1) Knowingly receiving pecuniary profit as a result of a child engaging in a prohibited sexual act with another, a second-degree felony;
- (2) Knowingly hiring or offering to hire a child to engage in any prohibited sexual act, a second-degree felony; and
- (3) A parent, legal guardian, or person having custody or control of a child knowingly permitting that child to engage in or to assist any other person to engage in any prohibited sexual act or simulation of such an act for the purpose of producing any visual or print medium depicting such an act, a third-degree felony.

Without additional information, it is not possible to estimate how many individuals would engage in acts covered by the expanded scope of these penalties and consequently be arrested or serve time in prison as a result. For purposes of this analysis, it is estimated one additional individual will be admitted to prison each year for each of the three types of prohibited acts.

Based on average time served for the existing crimes or second- and third-degree felonies generally, this will result in total increased annual costs per additional individual admitted to prison for each penalty of:

- (1) \$85.8 thousand;
- (2) \$105.8 thousand; and
- (3) \$66.4 thousand.

Overall, this analysis estimates the changes to this crime will result in additional costs to the state of at least \$258 thousand, rising from \$79.8 thousand in FY25 to \$258 thousand in FY28.

Changes to the crime of human trafficking: The changes to the penalties for the crime of human trafficking proposed by HB445 are as follows:

- (1) The penalty for engaging in human trafficking of a person under the age of 13 is changed from a regular offense to a serious violent offense (impacting the offender’s ability to earn “good-time credit” and, as a result, increasing sentence length);
- (2) The penalty for engaging in human trafficking of a person at least 13 but less than 16 years of age is changed from a regular second-degree felony to a serious violent offense first-degree felony
- (3) The penalty for engaging in human trafficking of a person at least 16 but less than 18 years of age is changed from a regular third-degree felony to a serious violent offense first-degree felony; and
- (4) The penalty for engaging in human trafficking of a person over the age of 18 is changed from a regular third-degree felony to a serious violent offense second-degree felony.

The Sentencing Commission (NMSC) reports no offenders were admitted to prison in FY22 with their most serious offense being human trafficking. It appears this offense is rarely *an offender’s* most serious offense, and therefore the impact of these changes may not be significant. However, it is also possible individuals are charged with these offenses and other, more serious, offenses, and these changes could impact such individuals. Without additional information, it is estimated one addition individual will be impacted by these changes each year, with the following results:

- (1) Individuals incarcerated for engaging in human trafficking of a person under the age of 13 will face an additional 6.9 years in prison for the offense, with the first cost impacts felt in FY38 (a cost of \$15.4 thousand), when an individual incarcerated for this offense in FY25 would have otherwise been released under the prior penalty (estimated time served of \$13.4 years), and rising to \$184.2 thousand in FY45 and future fiscal years;
- (2) Individuals incarcerated for engaging in human trafficking of a person at least 13 but less than 16 years of age will serve an additional 16.7 years in prison for the offense, with the first cost impacts FY25 felt in FY28 (a cost of \$9,353), when an individual incarcerated for this offense in FY25 would have otherwise been released under the prior penalty (estimated time served of 3.6 years), and rising to \$443.9 thousand in FY45 and future fiscal years;
- (3) Individuals incarcerated for engaging in human trafficking of a person at least 16 but less than 18 years of age will serve an additional 18.1 years in prison for the offense, with the first cost impacts felt in FY27 (a cost of \$18.8 thousand), when an individual incarcerated for this offense in FY25 would have otherwise been released under the prior penalty (estimated time served of 2.3 years), and rising to \$443.9 thousand in FY45 and future fiscal years;
- (4) Individuals incarcerated for engaging in human trafficking of a person over the age of 18 will serve an additional 1.2 years in prison for the offense, with the first cost impacts felt

in FY27 (a cost of \$18.8 thousand), when an individual incarcerated for this offense in FY25 would have otherwise been released under the prior penalty (estimated time served of 2.3 years), and rising to \$31.4 thousand in FY28 and future fiscal years.

SIGNIFICANT ISSUES

Changes to the crime of human trafficking proposed by this bill increase penalties for the existing crime. Research shows the certainty of being caught is a more powerful deterrent to crime than severity of punishment, and although laws and policies designed to deter crime focus mainly on increasing the severity of the punishment, this does little to deter criminals because most know little about sanctions for specific crimes. These findings suggest increasing penalties for crimes is unlikely to produce a significant impact on crimes committed. Incarceration (and length of incarceration) has also been shown to have a criminogenic effect, meaning time in jail or prison may make people more likely to commit crimes in the future.

Prioritizing solving crimes and securing convictions, particularly for serious offenses, could be much more impactful than increasing penalties. In New Mexico, however, punishment has grown less certain as crime has increased, with fewer violent crimes solved and more violent felony cases dismissed. LFC’s evaluation team has found in the 2nd Judicial District (Bernalillo County) specifically, neither arrests, convictions, nor prison admissions have tracked fluctuations in felony crime, and in 2020, when felonies began to rise, accountability for those crimes fell. Improving policing and increasing cooperation and coordination among criminal justice partners could help increase the certainty of punishment for the most violent offenses and provide a stronger deterrent to serious crime than heightened penalties.

Agency analyses raises other issues concerning HB445.

Personal Jurisdiction of Sex Offenders. NMAG expresses concern that Section 1’s expanded definition of sex offender includes any person who owns residential property in New Mexico, whether or not that is an established residence may not be sufficient to establish criminal jurisdiction over the owner. It advises:

There is a significant question as to whether owning property in New Mexico, without ever entering the state, constitutes enough for the State to assert criminal jurisdiction. *See State v. Mirabal*, 1989–NMCA–057, ¶ 12, 108 N.M. 749, 779 P.2d 126 (recognizing that “the record must establish that a defendant committed the crime in New Mexico” to satisfy jurisdictional requirements). This may be a violation of a defendant’s due process rights. *See* N.M. Const. art. II, § 18; U.S. Const. amend. XIV.

[T]here can be no territorial jurisdiction where conduct and its results both occur outside the state’s territory. *See* 4 Wayne R. LaFare, *Criminal Procedure* § 16.4(c), at 838–39 (3d ed.2007); *see also* Rollin M. Perkins, *The Territorial Principle in Criminal Law*, 22 *Hastings L.J.* 1155, 1165 (1970–71) (noting that a state may not “punish what is done within the exclusive territorial jurisdiction of another state”). The United States Supreme Court early in our nation’s history expounded on this principle stating, “We answer [whether a state can prosecute a defendant for acts committed outside its borders], without hesitation, the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power.” *See United States v. Bevans*, 16 U.S. 336, 386–87, 3 *Wheat.* 336, 4 *L.Ed.* 404 (1818).” *State v. Allen*, 2014–NMCA–111, ¶ 12, 336 P.3d 1007, 1011

It goes on to comment:

New Mexico case law requires that “a crime has a detrimental effect” to have “territorial jurisdiction to prosecute the perpetrator notwithstanding that the acts were committed entirely within another state.” *State v. Allen*, 2014-NMCA-111, ¶ 16, 336 P.3d 1007, 1013. It could be argued that an out state of defendant living outside New Mexico would not have enough of a detrimental effect for the state to assert criminal jurisdiction. Jurisdiction would not be an issue if the definition were to include the requirement that the offender enter the state.

NMCD also notes that under an existing provision of SORNA, an out-of-state offender taking on-line-only classes from a New Mexico school or university could be required to register. See Section 1(I)(4)(b).

Changes to Sex Offender Registration Requirements. DPS calls attention to the new subsection (15) including a conviction rendered by a court outside of New Mexico that requires registration as a sex offender in that jurisdiction. It comments that HB445 closes a loophole in the current law for individuals convicted of sex offenses that move to New Mexico. As the law stands now it is possible that an individual who is required to register as a sex offender in another state will be able to move to New Mexico and not have to register. DPS also notes that it will no longer have to determine if a sex offense conviction from another jurisdiction is equivalent to one of the enumerated sex offenses in SORNA. See Section 1, Subsection J.

LOPD points out 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 previous conditional discharges and are available only at the court’s discretion. A court is likely to agree to a conditional discharge rarely in rare sex crimes cases. Currently, LOPD states that a conditional discharge can benefit a defendant. If a defendant successfully complies with all conditions, which require commitment to the rehabilitation process, they can receive no prison time, no registration, and no formal conviction. The proposed change in the law would tie the district court’s hands and require sex offender registration—which is onerous, stigmatizing, and can last for ten years or life—even in the most sympathetic cases. A defendant facing registration may choose to risk trial rather than take a plea bargain with a conditional discharge.

LOPD raises further concerns that the bill would require people convicted of offenses that are registrable in another jurisdiction to register as sex offenders in New Mexico for ten years, unless they petition a court for an exemption. 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 HB445, 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. LOPD advises this may impose registration for conduct that was not registrable or even illegal in New Mexico. Some states require sex offender registration for prostitution-related offenses (not involving children), streaking, or public urination. Other states impose statutory rape penalties, including registration, for consensual sex that would be legal in New Mexico. Still others require sex offender registration for crimes, such as kidnapping or false imprisonment, that lack any sexual component. For more information on these issues, see Human Rights Watch, *No Easy Answers: Sex Offender Laws in the US* (2007),

available at <https://www.hrw.org/report/2007/09/11/no-easy-answers/sex-offender-laws-us>; see also Ofer Raban, Be They Fish or Not Fish: The Fishy Registration of Nonsexual Offenders, 16 Wm. & Mary Bill Rts. J. 497 (2007).

LOPD goes on to comment that, in contrast to current law, the bill's exemption provision would require an affected person to proactively petition a court for an order exempting him from registration. If, due to lack of resources, initiative or other reasons, a person did not petition the court and obtain such an order, the person could still be criminally prosecuted for failure to register under SORNA. Additionally, exemption is allowed only if a court finds both that the person would not have been required to register in New Mexico and that there is "good cause to exempt the individual from registering." Therefore, even if there was no dispute that an individual's out-of-state offense would not have been registrable in New Mexico, the person would still be required to register if the judge did not make an additional finding of "good cause."

Changes to Human Trafficking Statutes. As amended, the 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, and 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 qualify as human trafficking under HB445.

LOPD also raises concerns about Section 6(H), which provides that the factors of a victim's history of commercial sexual activity, consent of a minor, and mistake about a victim's age shall not provide a defense to prosecution. According to LOPD, this prohibition has the potential to limit effective representation of a defendant in court because the factors could be relevant to the element of coercion in a prosecution for human trafficking. Even if those factors do not constitute a defense by themselves, LOPD asserts 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. NMAG presents another view on this point, observing that Rule 11-412 of the Rules of Evidence provides rape shield protections in "crimes involving alleged sexual misconduct" and the bill appears to reflect that protection by specifically excluding use of a victim's sexual history or history of commercial sexual activity and reputation evidence of sexual conduct as a defense. However, NMAG goes on to point out that Subsection (B) of that rule permits the admission of evidence of the victim's past sexual conduct that is "material and relevant to the case when the inflammatory or prejudicial nature does not outweigh its probative value." Further, it directs attention to NMRA Rule 11-404, which it asserts may further conflict with this language in HB445 as the rules allows the admission of otherwise inadmissible character evidence to demonstrate "knowledge, identity, absence of mistake, or lack of accident."

AODA stated in its earlier analysis of HB56 that the elimination of the limitations period for prosecuting human trafficking crimes means the cases can be brought at any time. This can be very beneficial to victims of human trafficking and the community at large as human trafficking is not static. Those who engage in human trafficking are constantly on the move and frequently have false identification. It notes in its analysis of H445 that human trafficking is a serious and

all too common crime, and this bill targets it in a more aggressive manner, including providing more tool for prosecution of these crimes.

NMCD points out that the addition in Section 8(L) of human trafficking in the definition of serious violent offense reduces any meritorious deductions to a maximum of four days per month of time served, as compared to nonviolent offenses which earn up to a maximum of 30 days per month of time served.

AODA calls attention to cases of human trafficking involving multiple victims, and notes language in the bill that clarifies that human trafficking is a separate offense as to each victim, which prevents the application of the single intent doctrine under which arguments that there is only one incident of human trafficking could otherwise be made. See Section 6 (D). On the other hand, LOPD contends this language is ambiguous. Under current law, it advises, what constitutes a “violation” depends on the six-factor test courts use to determine distinctness of a defendant’s actions. *State v. Carson*, 2020-NMCA-015, ¶ 34. Under this analysis, it is very likely that every victim warrants a separate charge; depending on the circumstances, there might be more than one charge for a particular victim. *See id.* ¶ 38. LOPD contends the new language does not provide a different definition of what constitutes a “violation,” and it does not add anything to the current analysis. Further, LOPD notes, since penalties may be stacked, the language concerning merger is likely redundant.

ADMINISTRATIVE IMPLICATIONS

NMCVRC notes that it currently provides compensation and administers funding to agencies that provide services to all human trafficking victims and victims of child abandonment or abuse, as well as victims of child exploitation in the state.

CONFLICT

AOC notes that HB445 conflicts with:
SB215 (also amending Sections 29-11A-3 and 29-11A-5 NMSA 1978);
SB82 (also amending Section 30-1-8 NMSA 1978);
HB234 (also amending Section 30-42-3 NMSA 1978); and
HB225 (also amending Section 31-26-3 NMSA 1978).

TECHNICAL ISSUES

On page 2, line 2, forfeiture is misspelled “forefeiture”.

The bill’s change to the definition of “conviction” for purposes of SORNA, Section 1(B), may be ambiguous. Under current law, the definition expressly includes a deferred sentence as a conviction and excludes a conditional discharge. The bill deletes the exclusion for a conditional discharge. It is not clear whether the drafters deleted the exclusion so that conditional discharges would be included within the definition of “conviction” or to make the definition consistent with New Mexico case law, which holds that a conditional discharge is not treated as a conviction, unless expressly included in a particular statute. *See, e.g., State v. Harris*, 2013-NMCA-031, ¶ 3 (citing cases). To avoid any question regarding the bill’s intent, language might be added to the definition of “conviction” that expressly includes or excludes a conditional discharge

NMAG notes that on pages 3-4, the phrase “pursuant to state, federal, tribal or military law” is deleted in Section 1(H) (1), (2), and (3), but not in (4).

OTHER SUBSTANTIVE ISSUES

NMSC reports that, as of 2018, the latest 50-state survey available, 23 states have eliminated the statute of limitations for human trafficking. See “National State Law Survey: Statute of Limitations” published by Shared Hope International, available at: http://sharedhope.org/PICframe8/statesurveycharts/NSL_Survey_StatuteofLimitations.pdf. There is also no statute of limitations on the federal offense of human trafficking. See the “Victims of Trafficking and Violence Protection Act of 2000”, Pub. L. 106-386 (2000), available at: <https://www.govinfo.gov/content/pkg/PLAW-106publ386/pdf/PLAW-106publ386.pdf>.

MD/al/ne