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## FISCAL IMPACT REPORT

ORIGINAL DATE 01/23/13

SPONSOR Larrañaga LAST UPDATED \_\_\_\_\_ HB 84

SHORT TITLE Unborn Victims of Violence Act SB \_\_\_\_\_

ANALYST Jorgensen

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

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		Unknown*	Unknown*	Unknown*	Recurring	General

(Parenthesis ( ) Indicate Expenditure Decreases)  
 \*See Fiscal Implications

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General's Office (AGO)  
 Public Defender Department (PDD)  
 Administrative Office of the Courts (AOC)  
 New Mexico Sentencing Commission (NMSC)

### SUMMARY

#### Synopsis of Bill

House Bill 84, The Unborn Victims of Violence Act, would establish criminal penalties for the death or injury of an unborn child. The Act defines an unborn child as "a living fetus of twenty weeks or more who is a member of the species homo sapiens." Excluded from the Act are: legal abortions; acts committed by a pregnant woman with respect to her own unborn child; acts committed during diagnostic testing or therapeutic treatment; and acts involving the use of force in self defense or the defense of another. Sections 3, 4, and 5 of the Act define and establish penalties for the murder of an unborn child, manslaughter of an unborn child, and injury to an unborn child.

### FISCAL IMPLICATIONS

It is likely that the New Mexico Corrections Department's (NMCD) costs will increase due to a minimal to moderate increase in the inmate population and probation/parole caseloads. The bill seems unlikely to lead to a substantial number of new convictions, or to result in a substantial increase in the Department's inmate population or probation/parole caseloads. However, it is always difficult to predict or estimate the ultimate effect of any new crime bill with any certainty.

The NMCD notes the cost to incarcerate a male inmate ranges from an average of \$39,438 per year in a state owned/ operated prison to \$31,197 per year in a contract/private prison (where primarily only level III or medium custody inmates are housed).

The PDD states that although not likely to be a commonly indicted charge, any litigation under this statute would be time consuming and costly for the Department as well as for the prosecution. The seriousness and complexity of the issues suggest that many of these cases would proceed to trials and appeals, rather than be resolved through plea agreements.

The AGO notes this bill, if enacted, could result in an increase in criminal matters filed in courts of jurisdiction. Also, the bill could result in more usage of paid expert witnesses in criminal matters to prove (or call into doubt) the State's contention that criminal conduct resulted in the death of an unborn child. Additionally, the bill could result in additional investigative tasks for law enforcement personnel to determine whether specific criminal conduct caused the death of an unborn child.

## **SIGNIFICANT ISSUES**

The NMSC has noted that thirty-eight states have fetal homicide laws. Twenty-seven of those state laws apply to the earliest stages of pregnancy. Some state statutes use a definition found in the Federal Unborn Victims of Violence Act (UVVA), enacted April 1, 2004 (“a member of the species *Homo sapiens*, at any stage of development, who is carried in the womb”). Other states have defined “person” or “individual” to include an “unborn child” at every stage of gestation from fertilization to birth.

The PDD states:

Although not likely to be a commonly indicted charge, litigation under this statute would be time consuming as the bill raises serious constitutional issues due to the definition of "unborn child" and its tacit implication that an unborn child is a "person" or a "human being" as those terms are presently understood in the law.

The bill carries no provision that unborn child, the fetus, be viable. On its face, this bill applies from the moment of conception. *See generally Miller v. Kirk*, 120 N.M. 654 (1995), where under Wrongful Death Act, the Supreme Court reasoned that a nonviable fetus was not capable of living outside the mother's womb and could not be regarded as a separate entity capable of maintaining an independent action in its own right. No independent cause of action existed for the death of a nonviable fetus. *Compare People v. Davis* 7 Cal.4th 797, 872 P.2d 591 (1994) (California law criminalizing homicide of fetus does not require viability, but does require fetus to progress beyond embryonic stage of seven to eight weeks); Ind. Code 35-42-1-3 (Indiana homicide statute specifically includes killing of viable fetus.)

Under current law, New Mexico Courts have held that a fetus is not a child. In *State v. Martinez*, 2006-NMCA-068, 139 N.M. 741, *cert. quashed*, 2007-NMCERT-005, 141 N.M. 763, the Court of Appeals held that an unborn *viable* fetus is not a “child” for purposes of New Mexico’s child abuse statute.

Conversely, the AGO states that the bill is narrowly-drafted and includes clear definitions as well as exceptions to its enforcement. Bill generally tracks existing homicide statutes. The bill, as

drafted, should withstand attack on grounds of *scienter* of defendant as bill generally requires the same requisite intent as found in existing homicide statutes. The sole possible exception is Section 3A(2), which includes a provision for what is colloquially known as “felony murder”, which is a form of first degree murder. The classic felony murder scenario involves a defendant committing a felony that results in the death of another. For example, an armed robber frightens a storekeeper, who has a sudden and fatal heart attack. However, the armed robber has no more awareness of a storekeeper’s heart condition than an impaired driver does about the pregnancy of another motorist or passenger.

### **TECHNICAL ISSUES**

The PDD notes that House Bill 84 repeals NMSA section 30-3-7, Injury to pregnant woman, but does not do the same to NMSA section 66-8-101.1, injury to pregnant woman by vehicle.

The PDD comments with regard to specific sections:

**Section 6(B)** exempts all “acts committed by a pregnant woman with respect to her own unborn child” from criminal liability, which would include intentional and criminally negligent acts that harmed the unborn child.

CJ/bm