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FISCAL IMPACT REPORT

SPONSOR Padilla/Wirth LAST UPDATED _____
ORIGINAL DATE 1/29/2023
BILL _____
SHORT TITLE Financial Crimes Against Vulnerable Adults NUMBER Senate Bill 118
ANALYST Gray/Rabin

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY25	FY26	FY27	FY28	4 Year Total Cost	Recurring or Nonrecurring	Fund Affected
NMCD	\$398.8	\$797.6	\$1,063.0	\$1,052.2	\$3,452.4	Recurring	General Fund

Relates to Senate Bill 119

Sources of Information

LFC Files

Responses Received From

New Mexico Attorney General (NMAG)
Administrative Office of the Court (AOC)
Public Defender Department (PDD)
Administrative Office of the District Attorneys (AODA)
Department of Public Safety (DPS)
New Mexico Corrections Department (NMCD)
New Mexico Sentencing Commission (NMSC)
Aging and Long-Term Services Department (ALTSD)
Department of Health (DOH)

SUMMARY

Synopsis of Senate Bill 118

Senate Bill 118 creates two new crimes and provides for the associated penalties to protect adults who are disabled or vulnerable.

The new criminal offenses created would involve intentional acts by a person with and without a fiduciary relationship with an adult who is vulnerable or disabled that results in the profit or advantage of another.

The first offense involves a person with a fiduciary relationship to a vulnerable or disabled adult who takes the property or financial resources of an adult who is vulnerable or disabled.

The second offense involves a person with a nonfiduciary relationship to a vulnerable or disabled adult and consists of actions by a person who uses undue influence to acquire property of a vulnerable adult, induce a vulnerable adult, against their will, to perform services for the profit of another, or establish a fiduciary relationship that gives the person the property of financial resources of a vulnerable adult.

Under both sections which create new criminal offenses:

- The same penalties are laid out to be a third degree felony for a first offense and a second degree penalty for a second or subsequent offense;
- There is language that the ‘consent’ of an adult who is disabled or vulnerable is not a valid defense if the perpetrator knew or had reason to know that the person lacked the ability to reasonably comprehend the financial consequences of the action;
- A ‘good faith effort’ defense is established, which removes from criminal liability good faith efforts to provide financial management or care for the adult who is disabled or vulnerable, but the person fails or is unable to do so through no fault of their own; and
- Restitution is required to be paid to the victim for any loss sustained by the victim arising from the crime.

Both state law enforcement agencies – including the New Mexico Attorney General’s office – and local law enforcement agencies have concurrent jurisdiction to investigate either of the newly created criminal offenses.

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. SB118 is anticipated to increase the number of incarcerated individuals.

Overall, this analysis estimates SB118 will result in increased annual incarceration costs of \$1.2 million to the state. Costs to the state are estimated to be at least \$398.8 thousand in FY25 and will rise to \$1.2 million in FY28 and future fiscal years. More detailed information on these calculations is provided below.

Additional increased system costs beyond incarceration, such as costs to the judicial branch for increased trials or to law enforcement to investigate and arrest individuals for the new crimes under SB118, are not included in this analysis, but could be moderate.

Detailed Incarceration Cost Calculations. Adult Protective Services (APS) reports it substantiated a total of 56 allegations of exploitation in FY22. It is estimated that about 27 percent of cases referred for prosecution ultimately result in cases being disposed by trial or plea agreement. If it is assumed that all cases in which exploitation occurred were prosecuted under the new crime of financial exploitation of an adult who is vulnerable or disabled and all individuals whose cases are disposed by trial or plea agreement are admitted to prison as a result (likely an overestimate), this would result in about 15 people being admitted to prison each year under the provisions of SB118. To estimate the impact, it is assumed 10 people are admitted to prison under the less severe penalty for a first offense (a third-degree felony) and the remaining five are admitted under the more severe penalty for a second or subsequent (a second-degree felony). These are rough assumptions and may be revised as additional data becomes available. Data for the number of people who might be sent to prison due to the new crime of unlawful use of a power of attorney were not possible at the time of this writing.

Based on estimates of actual time served for third-degree felonies for individuals released from prison in FY21 provided by the Sentencing Commission (NMSC), 10 of the individuals admitted to prison under the provisions of this bill will spend 912 days in prison each, a cost of \$66.4 thousand per offender and \$664.3 thousand overall. These additional costs will begin to be realized in FY25, increasing over the following two years (as more individuals are incarcerated for this crime) and leveling out in FY28 (as offenders begin to be released from prison) and future fiscal years.

Based on estimates of actual time served for second-degree felonies for individuals released from prison in FY21 provided by NMSC, five of the individuals admitted to prison under the provisions of this bill will spend 1,452 days in prison each, a cost of \$105.8 thousand per offender and \$528.8 thousand overall. These additional costs will begin to be realized in FY25, increasing over the following two years (as more individuals are incarcerated for this crime) and leveling out in FY28 (as offenders begin to be released from prison) and future fiscal years.

SIGNIFICANT ISSUES

In FY22, APS substantiated a total of 56 allegations of exploitation and has contracted with a forensic accountant to assist with complex financial exploitation cases. Financial exploitation causes large economic losses for businesses, families, elders, and government programs, and increases reliance on federal health care programs such as Medicaid. Research indicates that those with cognitive incapacities suffer 100 percent greater economic losses than those without such incapacities.

The Division of Health Improvement, Incident Management Bureau (DHI-IMB) has authority to investigate exploitation of all individuals receiving developmental disability funds through waivers and other means. For substantiated cases, DHI-IMB requires waiver providers to create a corrective and preventive action plan which includes reimbursement of the victim and other actions taken to prevent future instances of exploitation. DHI-IMB refers egregious cases to law enforcement, the Human Services Department, Attorney General's Medicaid Fraud Units for investigation and action.

To the extent that SB118 intends to create harsher punishments for crimes against disabled or vulnerable persons, penalty enhancements for crimes against the disabled are currently available under the hate crimes statutes (*See* Section 31-18B-2, *et seq.* NMSA 1978).

Although SB118 would increase the penalty for a repeat offender, the Habitual Offender Act, Section 31-18-17 NMSA 1978, currently provides enhancements of felony sentences for persons convicted of prior felonies. The self-enhancing punishment proposed by SB118 would add six additional years to the basic sentence on a second conviction for these crimes. Without further clarification, those to enhancements could be applied in the aggregate resulting in upwards of a 17-year penalty (9 years plus an 8-year enhancement) for a repeat offense under the proposed act if the person had three prior felonies and even one of them arose from the act.

Agency analysis from the NMAG and AOC raise concerns, including:

- Section 3(C) notes that ‘evidence that a person took control, title, use or management of a property of an adult who is vulnerable or disabled *without adequate consideration* shall be deemed prima facie evidence that the person intended to deprive the adult who is vulnerable or disabled of the property.’ Note that it may be difficult in practice to determine what constitutes ‘adequate consideration.’ For example, the transaction of property between family members or close friends below fair market value may lead to an analysis of whether that amount is ‘adequate consideration.’ Further, there is a possible conflict with Section F(3), which provides a defense to criminal liability if the alleged perpetrator carries out a lawful request of an adult who is competent to make decisions on the adult’s own behalf.
- There is an existing law, Protecting Vulnerable Adults from Financial Exploitation, NMSA 1978, Section 58-13D-1 et seq., which covers financial advisors who must report unusual financial transactions involving vulnerable adults. SB119 use many of the same terms from this law, and it may clarify the proposed language if language utilized the same terms and same definitions as found in Section 58-13D-2. The same issues are present with respect to Section 30-47-6, which protects residents in care facilities from exploitation and in doing so uses a different definition of exploitation than used in SB119.
- SB119 may also overlap with the criminal fraud statute, which defines fraud as the “intentional misappropriation or taking of anything of value that belongs to another by means of fraudulent conduct, practices or representations”. The penalties for a fraud conviction are based upon the value: \$500 to \$2,500 is a fourth degree felony, \$2,500 to \$20,000 is a third degree felony and over \$20,000 is a second degree felony.

SB118 differs from Senate Bill 221 that was introduced during the 2021 legislative session by omitting a person who is elderly. Removing the term “elderly” from SB118 may have the unintended consequence of failing to protect older adults who are often exploited financially by family, friends, acquaintances, service providers, and care givers.

TECHNICAL ISSUES

In Section 3, paragraph A of SB118, the phrase “without providing adequate consideration to the adult” may need further clarification that “the adult” is the adult who is vulnerable or disabled. In addition, “adequate consideration” is a rather vague term that may cause issues when prosecuting this new crime.