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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/09/07  
 SPONSOR SPAC LAST UPDATED 2/27/07 HB \_\_\_\_\_  
 SHORT TITLE Lack of Consent in Certain Sex Offenses SB 734/SPACS  
 ANALYST C. Sanchez

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates HB 880

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

- Administrative Office of the Courts (AOC)
- Attorney General's Office (AGO)
- Commission on Higher Education (CHE)
- Public Education Department (PED)

### SUMMARY

#### Synopsis of Bill

The Senate Public Affairs substitute for Senate Bill 734 amends NMSA 1978, § 30-9-10, which defines terms, used in various sex crime statutes. The substitute specifies that "Lack of consent by the victim ... is not an element of force or coercion". In 1975, the Legislature rewrote the sex crime laws to delete lack of consent as an element, in order to abolish the "promiscuity defense" by which the prior sex lives of victims became the chief focus of rape trials. Instead, various acts were made unlawful if perpetrated by force or coercion. In 2006, a Supreme Court committee rewrote the jury instructions for sex crimes to make lack of consent an element of force or coercion, thus resurrecting the "promiscuity defense" in New Mexico. This substitute will clarify that the Legislature's intent has not changed since 1975, and that criminal trials should be focused on the perpetrator's actions and intent, not the victim's.

The substitute also states that physical or verbal resistance by the victim or lack of consent by the victim is not an element of force or coercion.

According to the substitute proof of force or coercion beyond a reasonable doubt is sufficient to prove unlawfulness.

The SPAC substitute also replaces two male pronouns in the same statute with gender-neutral language, without changing the meaning of the amended definitions.

### **SIGNIFICANT ISSUES**

This substitute clarifies that sexual assault can occur even if a victim consents, which occurs frequently as the victim is attempting to avoid injury or death and merely complies with the attackers demands.

30-9-10 NMSA 1978 has served as a model for other state statutes on violent crimes. According to an article in the Journal of Criminal Law and Criminology (1973- ) entitled, Rape Reform and a Statutory Consent Defense, rape has been defined as sexual intercourse by force and against the victim's will. The essential element distinguishing rape from non-criminal sexual intercourse was the victim's lack of consent. In order to convict a defendant of rape, the prosecutor has been required to prove the subjective element of lack of consent through a number of objective criteria, including proof that the victim resisted the assailant to the utmost, and that the victim cried out while being attacked. In opposition to this common perception of the crime, Section 30-9-10 NMSA states that lack of consent by the victim or physical or verbal resistance of the victim is not an element of force or coercion for purposes of certain sex offenses. Subsection (5) has been amended to read as follows:

(5) the perpetration of criminal sexual penetration or criminal sexual contact by a psychotherapist on [his] the psychotherapist's patient, with or without the patient's consent, during the course of psychotherapy or within a period of one year following the termination of psychotherapy.

In addition, the sentence, physical or verbal resistance of the victim is not an element of force or coercion is amended to read, lack of consent by the victim or physical or verbal resistance of the victim is not an element of force or coercion.

### **ADMINISTRATIVE IMPLICATIONS**

There may be an administrative impact on the courts as the result of an increase in caseload and/or in the amount of time necessary to dispose of cases.

### **OTHER SUBSTANTIVE ISSUES**

According to the Attorney General's Office, if this bill is not enacted trials for sex offenses will continue to be devoted in large part to the victim's sexual activity, alleged willingness and state of mind, etc.

According to 2005 FBI Uniform Crime Reports, New Mexico has the second highest rate of forcible rape in the nation. Not enacting this bill will discourage victims from coming forward and prosecutors from bringing charges, and would likely increase the incidence of rape in New Mexico still further.

The Legislature will have acquiesced in a Supreme Court committee’s rewriting of statutes, establishing a precedent.

**DUPLICATES**

HB 880

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

The definition of “force or coercion” as used in Sections 30-9-10 through 30-9-16 of the Criminal Code will not be amended to clarify that “lack of consent” is not an element of force or coercion for the enumerated sex offenses to which these terms apply.

CS/mt