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FISCAL IMPACT REPORT

ORIGINAL DATE 03/08/11

SPONSOR HJC LAST UPDATED _____ HB 30/HJCS

SHORT TITLE Unborn Victims of Violence Act SB _____

ANALYST Haug

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY11 | FY12 | FY13 | 3 Year Total Cost | Recurring or Non-Rec | Fund Affected |
|--------------|------|----------------|----------------|----------------------|-------------------------|------------------|
| Total | | \$31.2- \$49.3 | \$31.2- \$49.3 | \$62.4- \$98.6 | Recurring | General Fund |

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Corrections Department (NMCD)
 Administrative Office of the District Attorneys (AODA)
 Attorney General (AGO)
 Public Defender Department (PDD)
 Administrative Office of the Courts (AOC)
 State Parole Board (PB)

SUMMARY

Synopsis of Original Bill

House Judiciary Committee Substitute for House Bill 30, 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

The NMCD states that the additional felony convictions resulting from this bill would increase the Department’s costs by leading to minimal to moderate increases to 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 \$49,347 per year in a state owned/ operated prison to \$31,239 per year in a contract/private prison (where primarily only level III or medium custody inmates are housed). The cost to house a female inmate at a privately owned/operated facility is \$33,258 per year. Because the capacities of medium and higher custody state owned prisons are essentially at capacity, any net increase in inmate population will likely have to be housed at a contract/private facility.

The estimate in the table above reflects the range of NMCD's cost for one inmate in the variety of prison settings noted above.

SIGNIFICANT ISSUES

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.

The AODA asserts that the addition of "unborn child" as a victim of a crime will result in appeals by defendants to seek judicial interpretation of the law. In the past, an "unborn child" has not been considered a "person" for the purposes of criminal prosecution.

According to the AGO, some people believe that the unborn child can only be considered a "child" at a certain stage of development. Further, it still leaves open the loophole of a pregnant mother who does drugs and ends up overdosing the unborn fetus. At what point do we draw the line of when a woman can do what she wants to her body when she is carrying another human being? Also, since knowledge about whether a woman is pregnant or not can be an issue if a woman has a miscarriage early on during the pregnancy which happens to 1 in 4 pregnancies how will someone know whether it was a normal miscarriage or caused by someone's actions.

The AGO notes further that many state and national domestic violence groups, including the National Network to End Domestic Violence, oppose fetal homicide laws because such laws detract focus from the cause of the death of the fetus, which is the violence directed at and perpetrated against women. There is also concern that pregnant victims of domestic violence will be prosecuted under these laws based on a theory of failing to protect their unborn children when the violence results in the death of the fetus.

According to the NMCD, if numerous new crime bills such as this one are passed, NMCD will eventually reach its rated capacity for its prison population. At that point, NMCD and/or the State will have three options: house inmates out of state, consider early release of inmates in accordance with the Corrections Population Control Act or other applicable state laws, or build more prisons or add space to existing prisons.

TECHNICAL ISSUES

The AODA and PDD note that HB 30 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.

GH/svb:bym:mew