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## FISCAL IMPACT REPORT

Thomson/Ferrary/  
Rubio/Roybal  
SPONSOR Caballero ORIGINAL DATE 2/9/18  
LAST UPDATED \_\_\_\_\_ HB 231  
SHORT TITLE Sexual Assault Survivor's Rights SB \_\_\_\_\_  
ANALYST Sánchez

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

	FY18	FY19	FY20	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		Minimal	Minimal	Minimal	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB203, HB281, HB300, SB123, SB153, SM61

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the District Attorneys (AODA)

Administrative Office of the Courts (AOC)

Public Defender Department (PDD)

### SUMMARY

#### Synopsis of Bill

House Bill 231 proposes to amend the sexual offenses section of Chapter 30 to add a sexual assault survivor's bill of rights requiring a health care provider to

- obtain from and provide to the survivor particular information,
- contact law enforcement if the survivor consents,
- not directly or indirectly charge the survivor for the collection of a rape kit.

Law enforcement to

- confirm the survivor's contact information,
- inform the survivor of the status of the testing, if it was able to develop a DNA profile and matches obtained through comparisons,
- notify the survivor if the kit will not be tested and of the kit's impending destructions.

The bill also requires a law enforcement officer, district attorney or defense attorney to inform the victim of sexual assault of the survivor's rights, including consult with a sexual assault

counselor, have a support person of the survivor's choosing, be interviewed by a law enforcement of the gender of the survivor's choosing, and have legal counsel present during medical examination, or law enforcement interview or investigation.

## **SIGNIFICANT ISSUES**

The Administrative Office of the Courts (AOC) points out that HB231 does not identify who must undertake the protection, whether it be the court or a law enforcement agency, what that protection might entail, and whether the protection currently provided in a courtroom will suffice. With regard to the Section 1(F)(2) right to not be required to submit to a polygraph examination, while New Mexico is one of only a few states to permit the results of a polygraph examination to be admitted into evidence, one cannot be forced to take the examination.

The Public Defender Department (PDD) states the requirement that defense counsel inform a "survivor" of an alleged sexual assault of the "survivor's" rights is unconstitutional, would be challenged as violative of every defendant's federal Sixth Amendment and state Article II, Section 14 rights to unconflicted and effective counsel, and would be stricken down. This particular proposal might also violate the state and federal constitutional rights of defendants to confront the witnesses against them.

The Administrative Office of the District Attorneys (AODA) opines that some of the provisions in the bill are general and if the intent is have HB231 apply only in situations in which a sexual assault examination kit is collected, that should be made clear. However, if the bill is intended to apply only to specific crimes within Article 9 of Chapter 30, such as criminal sexual penetration and criminal sexual contact, that should be made clear. Additionally there are some sexual crimes that do not appear in Article 9, such as sexual exploitation of a child by requiring a child to engage in a sex act (see NMSA 1978, Section 30-6A-3) and human trafficking (see NMSA 1978, Section 30-52-1), which can involve forced prostitution. If HB231 is intended to apply to victims of those crimes, that should also be made clear.

AODA suggests that health care providers, prosecutors and law enforcement will face some practical challenges in carrying out the requirements of HB231. Health care providers will have increased administrative duties, and will need to obtain consent. Because a survivor "retains the right to have legal counsel present during all stages of any medical examination," health care providers may need to delay examinations until counsel can be present, although HB231 requires that "treatment of the survivor should not be affected or altered in any way as a result of the survivor's decision to exercise the survivor's right to have counsel present." All participants in the criminal justice system will have to adjust their interview procedures to keep survivors informed on the progress of the sexual assault kit examination.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Relates to  
HB203 Crime Victim Fund to Sexual Assault Providers  
HB281 Sex Offense Permanent No Contact Orders  
HB300 Sex Offender Permanent No Contact Orders  
SB123 Sexual Assault Exam Kit Processing  
SB153 Sexual Assault Service Provider Funding  
SM61 Sexual Assault on Disabled Task Force

## TECHNICAL ISSUES

PDD suggests taking out all duties for a “defense attorney” to address the issue noted under Significant Issues, and replacing “survivor” with “alleged victim” to likely to cure challenges based on violation of the constitutional presumptions of innocence. It also points out that “Survivor” is not defined in the bill.

AODA states that “sexual assault” is not defined in the bill.

## OTHER SUBSTANTIVE ISSUES

AODA notes that the bill duplicates some of the existing provisions in the constitution at Article 2, Section 24 and the Victims of Crimes Act at NMSA 1978, Section 31-26-1 through 31-26-16, which is a general victims bill of rights. However, unlike the constitutional provision and the Victims of Crimes Act, this bill provides a remedy for violations of its provisions: a sexual assault survivor may file a civil suit, and seek attorney fees (presumably in addition to civil damages). This provision appears to grant survivors a right to sue the state, because state actors, including law enforcement officers, prosecutors, public defenders, and judges are given most of the responsibilities under HB231. These duplications may cause confusion.

AODA also points out that HB231 provides that a survivor may have a support person present during an interview by a law enforcement officer, prosecutor or defense attorney, unless the law enforcement officer, prosecutor or defense attorney determines in good faith professional judgment that the presence of that individual would be detrimental to the purpose of the interview. Apparently any one individual could “determine in good faith professional judgment” that a support person would be detrimental. This appears to defeat the protection provided in the bill. Protection would be better served if the courts could resolve a difference of opinion, say between the prosecutor and the defense counsel, on whether a support person should be present.

In October 2016, President Obama signed a federal “Survivors’ Bill of Rights Act of 2016” into law. The federal law contains similar provisions to the proposals of HB231 but does not include requirement of defense counsel.

ABS/jle/al