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FISCAL IMPACT REPORT

ORIGINAL DATE 3/04/19
LAST UPDATED 3/06/19

SPONSOR Thomson HB 135/aHCPAC/aHJC/aHF1#1

SHORT TITLE Sexual Assault Survivor’s Bill of Rights SB _____

ANALYST Glenn

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Indeterminate/ Substantial	Indeterminate/ Substantial		Recurring	See Fiscal Implications

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
Law Offices of the Public Defender (LOPD)
Department of Public Safety (DPS)

Responses Not Received From

New Mexico Attorney General (NMAG)

SUMMARY

Synopsis of HF1#1 Amendment

The House Floor #1 amendment to House Bill 135:

- Changes the HCPAC amendment requiring a law enforcement agency or crime laboratory that receives a sexual assault examination kit to inform the survivor of the right to have the kit tested “within 90 days” to “within 180 days.”

- Changes the requirement for notification to the survivor when an alleged sexual assault offender has not been identified from at least sixty days before destruction of a kit to at least 180 days.

- Changes the time for completing the processing of a sexual assault examination kit from sixty days to 180 days.

- Strikes the HCPAC amendment requiring a crime laboratory to preserve a kit for specified time periods.

Synopsis of HJC Amendment

The House Judiciary Committee amendments to House Bill 135 remove a defense attorney from the list of persons who must provide specified information to a sexual assault survivor before interviewing the survivor; and delete a provision making a violation of the rights enumerated in the bill by persons with a responsibility to sexual assault survivors a tortious act.

Synopsis of HCPAC Amendment

The House Consumer & Public Affairs amendments to House Bill 135:

- require a law enforcement agency or crime laboratory that receives a sexual assault examination kit to inform the survivor of the right to have the kit tested within 90 days;
- require a law enforcement agency or crime laboratory to inform survivors, upon completion of the law enforcement investigation, whether a DNA profile was developed and whether a DNA profile match was identified;
- require a crime laboratory to preserve a kit for 24 months if the survivor has not reported the crime or, if reported, until the time within which the accused person may be prosecuted, tried or punished has expired;
- provide survivors with the right to be interviewed by a different officer if the survivors believe the officer to be unsupportive or inadequately trained; and
- provide survivors with the right to have an advocate present during all stages of examination, interview, investigation or other interaction with representatives of the legal or criminal justice systems

Synopsis of Original Bill

House Bill 135 amends the Criminal Code to add a sexual assault survivor's bill of rights.

The proposed bill of rights requires a health care provider to, among other things, provide a survivor with a consent form authorizing the release of a sexual assault examination kit to a law enforcement agency and to contact law enforcement if the survivor consents.

The obligations of a law enforcement agency that receives an examination kit include providing the survivor with test results and information related to any DNA profile obtained; and, with the survivor's consent, entering information from the kit into the DPS statewide sexual assault examination kit tracking system.

The bill of rights proposed by HB135 requires a crime laboratory to complete the processing of an examination kit within 60 days of receiving the kit.

The effective date of HB 135 is July 1, 2019.

FISCAL IMPLICATIONS

According to DPS, HB135 would have a substantial fiscal impact. There is neither an

appropriation nor the budget for the DPS Forensic Laboratory to process sexual assault cases within sixty days.

DPS states that the laboratory faces staffing issues. Hiring, training and retaining forensic DNA scientists is a challenge. To meet a sixty day turn-around time for sexual assault cases, DPS anticipates that the laboratory would, at a minimum, require another six full-time forensic scientist positions. Six Forensic Scientist 2 (FS2) positions cost approximately \$607,000.00 annually for salaries and benefits (approximately one full time FS2 costs \$101,139.00, including salary and benefits). In addition to the forensic scientist positions, DPS states that an additional Forensic Scientist Supervisor would be necessary to manage the increased staff in the DNA Section. That position would cost approximately \$133,000.00 annually for salary and benefits. Proficiency tests for the scientists would cost \$1,920.00 annually (\$320.00 per scientist annually for each of the six scientists). Required internal and external training for an additional six FS2 positions and one Forensic Scientist Supervisor position would cost approximately \$21,000.00 annually.

DPS states HB 135 also would require the agency to add positions for a District Attorney Liaison and a Management Analyst to assist with business functions and business process improvements. Assuming both positions were hired as a Management Analyst-O at a pay band 60, the cost would be \$112,578.00 (\$56,289.00 annually per position), including salary and benefits.

DPS believes that the bill's requirements would necessitate another shift at the laboratory. Shift differentials would need to be factored in at a cost of \$13,104.00 annually (\$.90 per hour at 2,080 hours per year per scientist). Increasing other laboratory processes to ensure a sixty day turn-around would have fiscal implications for the entire laboratory system. More instrumentation and equipment would need to be purchased to expedite the turn-around time and allow for additional staff use. Specific DNA equipment and instrumentation is expensive to purchase, operate, validate and maintain, and having additional personnel would cause stresses on current instrumentation.

DPS notes that any attempt to meet a sixty day turnaround time for processing examination kits would likely require a significant amount of overtime.

SIGNIFICANT ISSUES

HCPAC Amendments

DPS states that its comments regarding the 60-day turnaround time in the original bill apply equally to the 90-day turnaround time proposed by the HCPAC amendments. In particular, DPS notes that the DPS Forensic Laboratory wholeheartedly supports a Sexual Survivor's Bill of Rights, and that a collaborative, multi-disciplinary approach is best to achieve the goal of speedy and scientifically sound case completion with victim's rights, preservation of chain of custody and preservation of biological evidence being considered throughout. Nevertheless, DPS states that a 90-day turnaround time for sexual assault kits submitted to the Forensic Laboratory in Santa Fe is not realistic, even with the current staff working overtime. The laboratory lacks the space and staff to ensure a ninety (90) day turn-around time is met.

Original Bill

LOPD states that because HB 135 requires processing of sexual examination kits within sixty days, such kits would take priority over the processing of other evidence brought to the state lab.

This could result in additional delays, and, therefore, speedy trial issues, with respect to other cases that require laboratory testing, including narcotics and homicide cases.

DPS states that, even under the best of circumstances, the DPS Forensic Laboratory in Santa Fe is not currently large enough, does not have the space requirements and is not designed to accommodate additional forensic scientists specializing in DNA. According to DPS, a new forensic laboratory that is planned to be built in Santa Fe is in the programming phase at this time. DPS notes that, even with overtime (see Fiscal Implications above), it may not be possible to attain the 60-day turnaround time required by HB135 for processing examination kits.

AOC notes that Subsection G in Section 1 of HB135 delineates certain rights available to sexual assault survivors in civil and criminal cases. It provides:

In a civil or criminal case relating to a sexual assault, a sexual assault survivor has the right to:

- (1) be reasonably protected from the defendant and persons acting on behalf of the defendant;
- (2) not be required to submit to a polygraph examination as a prerequisite to filing an accusatory pleading or participating in any part of the criminal justice system;
- (3) be heard through a survivor impact statement at any proceeding relevant to the sexual assault; and
- (4) provide a sentencing recommendation to the official conducting a pre-sentence investigation.

AOC believes this provision raises several issues. First, HB135 does not identify who must protect sexual assault survivors or define what constitutes reasonable protection. Is the court, law enforcement or the prosecutor responsible for protecting the sexual assault survivor? What constitutes “reasonable” protection? Is the protection only required in a judicial hearing or does it extend to other matters? Who is a “person acting on behalf” of the defendant?

Second, AOC notes that HB 135 affords the sexual assault survivor with the right to provide a “survivor impact statement at *any* proceeding relevant to the sexual assault”. While the intent of HB 135 may be to ensure that a victim (survivor) to a crime has the ability to provide the court with an impact statement, extending that right to “any proceeding” is overly broad and may unduly burden the judiciary. While it is important to afford a sexual assault survivor the opportunity to share an impact state with the court, limiting this statement at the sentencing phase of a criminal case or at the conclusion of a civil case would be a better alternative. In criminal cases, the district attorney’s recommendations on pre-trial detention, bond and other conditions of release are usually influenced by information provided by the victim, so allowing a victim impact statement at these proceedings may not be necessary.

Third, with regard to a sexual assault survivor’s right under Subsection G(2) not to be required to submit to a polygraph examination, AOC indicates that the meaning of the phrase “participating in any part of the criminal justice system” is unclear. At what point does an individual participate in the criminal justice system? AOC notes that, in general, while New Mexico is one of only a few states to permit the results of a polygraph examination to be admitted into evidence, an individual cannot be forced to take a polygraph examination.

Finally, AOC states that Section G(4) provides a sexual assault survivor the right to be heard

through a survivor impact statement at any proceeding relevant to the sexual assault. There is no definition provided for “any proceeding relevant to the sexual assault.” Consequently, HB 135 might be interpreted to extend to every single court hearing, including pre-trial detention hearings, motion hearings and other pre-adjudication hearings. AOC also notes that the purpose of the survivor impact statement in criminal proceedings is to inform the judge of a survivor’s crime-related physical, psychological, and financial harms. It is unclear how survivor impact statements would apply in civil cases, where those statements typically are not provided to the judge for consideration.

AOC states that the rights afforded sexual assault survivors under HB 135 overlap with the victim’s bill of rights in Article II, Section 24 of the state constitution, as implemented by the Victims of Crimes Act, Sections 31-26-1 to -16 NMSA 1978.

ADMINISTRATIVE IMPLICATIONS

DPS states that HB 135, if enacted, would include the need for more personnel to assume administrative tasks, such as assisting with duties or tasks that are now assumed by the forensic scientist, such as arranging for court testimony, pre-trial conferences and fulfilling discovery requests.

AOC believes that HB 135 might require the judiciary to expend additional resources to protect sexual assault survivors who are present in the courthouse for both criminal and civil cases. AOC states that typically, law enforcement is not present in civil cases and having to provide additional security personnel at every hearing would place a tremendous burden on existing resources.

TECHNICAL ISSUES

HCPAC Amendments

Section 1(D)(2) of the bill, as amended by HCPAC, provides that a kit shall be preserved “until the time within which the person who committed the crime may be prosecuted, tried or punished has expired.” The term “committed” might be changed to “accused of committing” or something similar since, as a legal matter, a person is not considered guilty of committing a crime until after the person has been tried and convicted.

Section 1(H) of the original bill provided a sexual assault survivor with the right to have legal counsel present during interactions with the state’s legal or criminal justice systems. The HCPAC Amendments changed the term “legal counsel” to “an advocate.” To avoid confusion and make the section consistent, the word “counsel” in the second sentence of Section 1(H) should be changed to “an advocate.”

ALTERNATIVES

DPS suggests the following alternatives:

- Outsourcing sexual assault kits; however, it is costly and there is no guarantee that any company will be able to meet a sixty day turnaround time, and testimony from out of state forensic scientists presents challenges. Many cases require additional testing of more items as a case progresses.

- Enact the bill with an initial recommendation of a 180-day turnaround time and decrease the turnaround time as new forensic scientists are trained to fully perform the work required to process a sexual assault kit.

AMENDMENTS

AOC suggests that Section G(4) in Section 1 of HB 135, which provides a sexual assault survivor the right “to be heard through a survivor impact statement at any proceeding relevant to the sexual assault” be changed to the following: “to be heard through a survivor impact statement at any proceeding involving a post-arrest release decision, plea, sentencing, post-conviction release decision or any other proceeding where a right of the survivor is at issue.” AOC believes this change would ensure a survivor’s impact statement is provided when a judge is making key decisions in the case.

BG/gb/al/sb