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## F I S C A L   I M P A C T   R E P O R T

SPONSOR Fajardo ORIGINAL DATE 2/5/19 LAST UPDATED \_\_\_\_\_ HB 307  
SHORT TITLE Criminal Sexual Contact With a Minor Penalty SB \_\_\_\_\_  
ANALYST Daly \_\_\_\_\_

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

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Initially Minimal*	Initially Minimal*	Initially Minimal*	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

\*Longer sentences result in significant budget impact increases in later years. See discussion in Fiscal Implications.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
Administrative Office of the District Attorneys (AODA)  
Children, Youth & Families Department (CYFD)  
Department of Public Safety (DPS)  
Law Offices of the Public Defender (LOPD)  
New Mexico Attorney General's Office (NMAG)  
New Mexico Corrections Department (NMCD)  
New Mexico Sentencing Commission (NMSC)

### SUMMARY

#### Synopsis of Bill

House Bill 307 amends existing law defining the felony crimes of criminal sexual penetration of a minor and criminal sexual contact of a minor, expanding the reach of those laws and increasing the penalties for these crimes. It also amends the Sex Offender Registration and Notification Act (SORNA).

Criminal Sexual Penetration.

First Degree: Section 1 (D) adds the new crime of first degree Criminal Sexual Penetration (CSP) of a child 13 to 18 years of age when perpetrated:

- (a) by the use of force or coercion;
- (b) when the perpetrator is in a position of authority over the child; or
- (c) when the perpetrator is armed with a deadly weapon.

The punishment is a minimum term of imprisonment of eighteen years (which shall not be suspended or deferred, hereinafter referred to as “mandatory”) Sentencing enhancements may be imposed. (AODA notes that under existing law, these acts consist a first degree felony only if the force or coercion results in great bodily harm or great mental anguish to the victim.)

Second Degree: Section 1(E) defines CSP in the second degree to be all other CSP perpetrated on a child 13 to 18 years of age (not otherwise specified in Section 1). It increases the mandatory minimum sentence from three to 15 years.

Third Degree: Section 1(F) increases the degree of felony from fourth to third and increases the penalty for CSP on a child 13 to 16 when the perpetrator is at least 18 and is at least four years older than the child (and not the spouse of the child), and CSP on a child 13 to 18 when the perpetrator is a school authority figure (as defined in subsection (3)). Both carry a higher penalty than the basic sentence for a third degree felony: the perpetrator shall be sentenced to a mandatory minimum term of imprisonment of six years, which also may be subject to sentence enhancements.

Criminal Sexual Contact.

First degree: Section 2 creates a new statutory structure for the crimes of criminal sexual contact of a minor (CSCM). Subsection (B) creates the crime of first degree CSCM, which consists of criminal sexual contact (as defined in existing statute):

- Of the unclothed intimate parts of a child under 13;
- On a child under 18 by a person in a position of authority who uses that authority to coerce; the perpetrator uses force or coercion that results in personal injury to the child; the perpetrator uses force or coercion and is aided or abetted by one or more persons; or the perpetrator is armed with a deadly weapon.

Previously a second degree felony, HB 307 recategorizes these actions as a first degree felony, and increases the penalty from a mandatory minimum term of imprisonment of 3 years to a mandatory term of imprisonment of 18 years.

Second degree: Subsection (2)(C) defines second degree CSCM to be criminal sexual contact of a child under 13. It is subject to a sentence of a mandatory minimum term of imprisonment of 15 years.

Third Degree: Subsection (2)(D) defines criminal sexual contact of a minor perpetrated by a school authority (as defined in existing statute) to be a third degree felony for a

sexual offense against a child, subject to a mandatory minimum sentence of six years. (Currently, these acts constitute a fourth degree felony, subject to an 18 month minimum term of imprisonment.)

**Two Violent Sexual Offense Convictions**

Section 3 of HB 307 also adds this crime to the definition of “violent sexual offense” in an existing “two strike” provision of the Criminal Sentencing Act, which upon conviction of a second violent sexual offense results in a life sentence of imprisonment.

**Sexual Offender Registration and Notification Act**

Sections 4 through 6 amend the Sex Offender Registration and Notification Act so that it conforms to the degrees of CSP and CSCM as defined in HB 307. Under current law, the county sheriff must contact every licensed daycare center, elementary school, middle school and high school within a one mile radius of the sex offender’s residence and provide them with the sex offender’s registration information. HB307 expands that radius to five miles.

The effective date of this bill if enacted is July 1, 2019.

**FISCAL IMPLICATIONS**

Enhanced sentences over time will increase the population of New Mexico’s prisons and long-term costs to the general fund. According to the New Mexico Corrections Department (NMCD), the cost per day to house an inmate in public state prisons in FY18 was an average of \$123.90 per day, or about \$45,224 per year. Increased length of stay would increase the cost to house the offender in prison. For example, under HB 307 a perpetrator convicted of first degree CSCM would serve 18 years in prison, as opposed to 3 years for second degree CSCM under current law. Using the average cost of \$45.2 thousand per year per inmate, the cost to the state for that one inmate who must serve an additional 15 years would be an additional \$678 thousand.

In addition, sentencing enhancements could contribute to overall population growth as increased sentence lengths decrease releases relative to the rate of admissions, pushing the overall prison population higher. NMCD’s general fund budget, not including supplemental appropriations, has grown by an average of two percent between FY15 and FY19 and the FY19 legislative budget recommendation is nine percent higher than FY15, closely mirroring the inmate population growth of 10 percent. The LFC reported in its FY19 budget recommendation that NMCD ended FY18 with a \$3.5 million budget shortfall.

In addition to these increased costs to incarcerate sexual offenders for longer periods of time, there will be increased costs to courts, district attorneys, and LOPD, as higher potential penalties likely will result in more cases going to trial, although pleas to lesser charges may also increase.

Societal benefits, particularly to potential victims, would also accrue through enhanced sentences if they reduce or delay re-offenses. LFC cost-benefit analysis of criminal justice interventions shows that avoiding victimization results in tangible benefits over a lifetime for all types of crime and higher amounts for serious violent offenses. These include tangible victim costs, such as health care expenses, property damage and losses in future earnings and intangible victim costs such as jury awards for pain, suffering and lost quality of life.

## SIGNIFICANT ISSUES

Generally, as noted by CYFD, increased penalties for criminal sexual penetration of a minor and criminal sexual contact of a minor may help better protect children. As AODA points out, deleting the requirement in existing law that in order to prove first degree CSP on a minor who is between 13 and 18 there must be great bodily harm or great mental anguish to the victim will make it easier for the prosecutor to prove first degree CSP, which offers greater protection to children within that age bracket. On the other hand, LOPD notes that mandatory minimum sentencing laws such as HB 307 adversely impact a court's traditional ability, when deciding on punishment, to account for the actual circumstances of the crime and the individual defendant, in addition to the increase in fiscal impact described above.

As to CSCM, AODA calls attention to the provisions of HB 307 that make all CSCM committed when the perpetrator is in a position of authority and uses that authority to coerce, uses force or coercion that results in personal injury, uses force or coercion and is aided or abetted, or is armed with a deadly weapon a first degree felony, regardless of whether the child is under 13 or between 13 and 18. By doing so, AODA asserts this bill corrects a gap in the existing statute.

Responding agencies, however, also report a number of specific provisions in HB 307 that are problematic. AODA calls attention to the provision regarding third degree CSP which is carried forward from existing law in Section 1(F) (2) concerning CSP committed by a school authority figure. That language can lead to interpretation issues and create problems for prosecutors in determining which crime to charge. AODA comments:

Consider a middle-school teacher who commits CSP on a child in his or her class. Is that a first degree CSP by a person “in a position of authority over a child,” punishable by a sentence of eighteen years, or is it only a third degree felony, punishable by six years, under the more specific provisions that apply to school personnel? Why is there such an extreme gap in potential sentences between the two crimes?

AODA further describes the difficulties that arise in attempting to apply these provisions:

Increasing the confusion is the change made by HB307 to subparagraph E(1) of the statute. Currently, it (existing statute) defines CSP in the second degree as all CSP perpetrated by the use of force or coercion on a child thirteen to eighteen years of age. (Under existing law, if the force or coercion resulted in great bodily harm or great mental anguish, the crime would be a first degree felony.) HB307 changes the provision, removing the language regarding force and coercion, and stating that CSP in the second degree is all CSP perpetrated “on a child thirteen to eighteen years of age not otherwise specified in Subsection D of this section.” (Emphasis added.) Subsection D defines first degree CSP. This suggests that CSP on a child 13 to 18 is either a first degree felony or a second degree felony. But paragraph F(3) sets out third degree CSP crimes against children 13 to 18. So, is CSP by a middle-school teacher a first degree felony under Subsection D (perpetrated by a person in a position of authority over the child), a second degree felony (if the proof on “position of authority” is not sufficient, because Subsection E covers all CSP on 13-18 year olds not specified in Subsection D), or does it fall to a third degree felony under the more specific provisions of Subsection F(3)?

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NMAG makes a similar comment, noting that under the rules of statutory construction which require application of the more specific provision over the more general, a school-employee perpetrator could argue that only the third degree CSP applies and prosecution under the first degree CSP statute is barred, citing State v. Santillanes, 2001-NMSC-018, paragraph 12.

Additionally, NMAG points out that clarification is needed regarding references to the age of a victim in the bill. Specifically, some references appear to include 18 year olds, see Section 1(D)(2), while others only apply to victims who are less than 18 years old, see Section 2(B)(2) and Section 5(E)(5). Legislative intent would be clearer if consistent language was used to specify whether “to 18” includes individuals who are 18 years old, or if it should only include victims who are “less than” 18 years old.

## **PERFORMANCE IMPLICATIONS**

CYFD reports it has performance measures related to the safety and well-being of children.

AOC reports that it is participating in performance-based budgeting, and this bill, which changes many penalty provisions, including making life imprisonment the punishment for more crimes than current law, may impact the measures for district court as to cases disposed of as a percent of cases filed, and percent change in case filings by case type.

## **ADMINISTRATIVE IMPLICATIONS**

AODA reports that uniform criminal jury instructions will need to be amended to reflect the changes in HB 307. It also notes that, as to the change to SORNA, county sheriffs will have a larger geographical area to address when providing notice of a sex offender’s residence and registration information.

## **OTHER SUBSTANTIVE ISSUES**

LOPD advises that there is often no physical evidence demonstrating criminal activity in CSCM cases, and defendants frequently allege the charges are false. Such allegations arise in discipline and in the context of divorce and child-custody battles. See Michael Robin, *Assessing Child Maltreatment Reports: The Problem of False Allegations*, 21-24, Haworth Press (1991). Trials for such cases generally require the use of expert witnesses and often take large amounts of court time.

NMSC provides these charts reflecting admissions in NMCD, First, when CSP is the highest charge:

Fiscal year	1st degree	2nd Degree	3rd Degree	4th Degree
2012	10	23	7	9
2013	15	18	4	13
2014	20	22	13	12
2015	18	23	6	10

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2016	23	30	6	9
2017	18	21	5	5
2018	18	13	3	5

Second, when criminal sexual contact of a minor is the highest charge:

Fiscal year	2nd degree	3rd degree	4th degree
2012	17	14	6
2013	11	18	2
2014	33	11	1
2015	19	19	5
2016	24	23	2
2017	14	23	4
2018	17	15	5

As to the changes to SORNA, NMSC reports that, according to the DPS's web-based sex offender registry portal, there are 3,278 registered sex offenders in New Mexico as of January 23, 2019. Thus, the increase in school notification radius from one to five miles would likely require significant expenditure of time and resources by county sheriff departments.

MD/gb