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FISCAL IMPACT REPORT

SPONSOR Lord LAST UPDATED _____
ORIGINAL DATE 2/13/23
BILL
SHORT TITLE Permanent Protective Orders in Some Cases NUMBER House Bill 282
ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT*

(dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Costs to County Jails	Indeterminate but minimal	At least \$9.6 to \$19.2	At least \$9.6 to \$19.2	At least \$19.2 to \$38.4	Recurring	County General Funds

Parentheses () indicate expenditure decreases.

*Amounts reflect most recent version of this legislation.

Conflicts with SB 18

Sources of Information

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Administrative Office of the District Attorneys (AODA)

Department of Public Safety (DPS)

Law Offices of the Public Defender (LOPD)

New Mexico Attorney General (NMAG)

SUMMARY

Synopsis of House Bill 282

House Bill 282 (HB282) authorizes permanent protection orders to benefit the victims of these felony offenses: assault; attempted murder; kidnapping; and sexual offenses (including the sexual exploitation of children). The bill sets forth the procedures to be followed in petitioning a court for and securing such orders, including allowing a victim who is an unemancipated minor to petition for a permanent order. Permanent orders of protection remain in force until the death of the petitioner or respondent if the petitioner proves he or she was the victim of an offender convicted of one of the enumerated crimes. Upon reasonable cause, an arrest for violation of a permanent order of protection may be made without a warrant. A violation of a permanent order of protection is a misdemeanor offense.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

Incarceration drives costs in the criminal justice system, so any changes in the number of individuals in prison and jail and the length of time served in prison and jail that might result from this bill could have moderate fiscal impacts. The creation of any new crime, increase of felony degree, or increase of sentencing penalties will likely increase the population of New Mexico's prisons and jails, consequently increasing long-term costs to state and county general funds. NMCD reports the average cost to incarcerate a single inmate in FY22 was \$54.9 thousand; however, due to the high fixed costs of the state's prison facilities and administrative overhead, LFC estimates a marginal cost (the cost per each additional inmate) of \$26.6 thousand per year across all facilities. LFC estimates a marginal cost (the cost per each additional inmate) of \$19.2 thousand per county jail inmate per year, based on incarceration costs at the Metropolitan Detention Center. HB282 is anticipated to increase the number of incarcerated individuals and increase the time they spend incarcerated.

The proposed new criminal penalty contained in Subsection J for violating a condition of a permanent order of protection is a misdemeanor, punishable by up to a year in jail; for purposes of this analysis, it is estimated an individual could spend between six months and one year incarcerated for this offense. Based on the marginal cost of each additional inmate in New Mexico's jail system, each offender sentenced to jail for this crime could result in an estimated increased cost of \$9,614 to \$19.2 thousand to counties.

It is difficult to estimate how many individuals will be charged, convicted, or get time in prison or jail based on the creation of a new crime. Without additional information, this analysis assumes at least one person will be admitted to jail each year for this crime, at a cost of \$9,614 to \$19.2 thousand, although it seems possible this penalty could be levied so rarely that the impact could be lower. To account for time to adjudication, no costs are anticipated to be incurred until one year after the bill takes effect, in FY25; however, a minimal cost may apply in FY 24 for individuals who are detained for some period of time prior to adjudication.

Additional increased system costs beyond incarceration, such as costs to the judicial branch for increased trials or to law enforcement to investigate and arrest individuals for the new crimes under HB282, are not included in this analysis, but may exist.

SIGNIFICANT ISSUES

In authorizing permanent orders of protection for the benefit of victims of certain crimes, HB282 creates new law in an area that is already addressed, to both a greater and lesser extent, in the existing Family Violence Protection Act (FVPA). See Sections 40-13-1 through 13, NMSA 1978--which is itself a subject of extensive revision in Senate Bill 18 in this session. As a result, conflicts with that law as well as other issues are the subjects of agencies' analyses of HB282.

AODA calls attention to Section 1(A) of this bill, which allows for the issuance of permanent protective orders as to, in particular, "assault" and "kidnapping". In the case of assault, the bill cites to existing provisions in law that include 19 crimes that may be encompassed in the term "assault", including battery, aggravated battery, threatening a judge, shooting at a dwelling, and certain crimes against household members. Similarly, in the case of kidnapping, the bill cites existing provisions in law that enumerate four crimes, including false imprisonment and

custodial interference. It is unclear if the authority granted in the bills applies to the specific crimes of assault and kidnapping, or if the intent is to include all of the different crimes included in the cited sections. AODA cautions that the public needs to be put on notice when certain actions can result in a deprivation of liberties. Further, HB282 and FVPA conflict, given the different offenses to which each applies.

AOC points to another conflict that arises between the provisions of this bill and an existing provision of FVPA. It advises HB282 would overlap and conflict with Section 40-13-5.1 of that Act, also known as “Racheal’s Law”, allowing a victim of criminal sexual penetration (one of the sexual offenses to which this bill applies) to obtain an order of protection against a defendant after submitting evidence of that person's conviction for criminal sexual penetration, including one rendered in another state. Significantly, under Section 40-13-5.1, the victim is not required to appear before the court to obtain an extended order of protection, which can be in effect for the victim’s lifetime. That procedural safeguard is not provided in HB282. In addition, a question arises whether HB282’s references to New Mexico law might prevent an out-of-state conviction to satisfy its terms.

Additionally, AOC raises concerns about the provisions governing petitions filed by unemancipated minors, noting the process excludes a petition being filed “against the unemancipated minor’s parent or legal guardian”, noting that parents and guardians of children may commit violent felonies against their own children. AOC comments that if the defendant parent or guardian has been convicted of the one of the crimes included in HB282, that party has already been afforded due process under the law; the victim, even if the victim is the defendant’s own child, should be afforded access to the same protections as other crime victims. Further, AOC expresses concern that:

The list of “eligible” adults who can “sign” a petition is rather limited and may present an obstacle for some unemancipated minors. Minors that are runaways, trafficking victims or are in CYFD custody, may not have access to an adult defined in Subsection E of this bill. It may be helpful to include, “an adult interested in the unemancipated minor’s minor well-being” to the list of eligible adults that are able to sign a petition for a permanent order of protection.

The mandatory directive that a court issue a permanent order of protection upon proof of respondent’s conviction and petitioner’s status as the victim is the subject of concerns raised by LOPD:

Stripping the court’s discretion to even consider other evidence at the hearing could create constitutional due process questions. In addition, such an order could implicate other due process concerns, such as liberty interests if it deprives a defendant of a relationship with his children or a property interest if the alleged victim and defendant share property. The Supreme Court has found that the liberty interest protected by the Fifth and Fourteenth Amendments includes the right to establish a home and bring up children. *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). Accordingly, the state may not terminate the parent-child relationship without a hearing. *Stanley v. Illinois*, 405 U.S. 645 (1972); *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).

Similarly, both AOC and LOPD point out the lack of a provision to allow an order to be withdrawn under changed circumstances. As LOPD notes, a defendant may be working towards

rehabilitation, and posits the collateral effects of a permanent order could likely interfere with a defendant’s ability to find employment, visit their children, or secure school or housing loans. In contrast, Section 40-13-5.1 of the FVPA allows of a permanent protective order to be modified or rescinded upon motion by the victim.

LOPD also notes Subsection I authorizes law enforcement to arrest a restrained party without a warrant, which it asserts raises constitutional concerns, especially since the “reasonable cause” requirement is amorphous and different than the constitutional requirement of probable cause.

CONFLICT

In addition to the conflicts discussed in the Significant Issues section above, HB282 conflicts with SB18 to the extent that in Section 9(C) of SB18, certain protective orders issued under the re-named Protection Against Abuse and Violence Act must be for a fixed period of any length, which can be extended. AOC notes that the five-day period for service of the petition and notice of hearing in HB282 is different than that in existing law governing protective orders. Additionally, SB18 also allows minors who are 13 or older to file a petition for an order of protection.

TECHNICAL ISSUES

Page 4, line 3: “maybe” should be “may”.

MD/rl/ne