

LFC Requester: _____

**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original **Amendment** _____
Correction _____ **Substitute** _____

Date 1/17/2024

Bill No: HB 57-280

Sponsor: Rep. Stefani Lord
Short Title: CHEMICAL CASTRATION
FOR SEX OFFENDERS

Agency Name and Code LOPD 280
Number: _____
Person Writing Mary Barket
Phone: 505-395-2890 **Email** mary.barket@lopdm.us

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: None known
Duplicates/Relates to Appropriation in the General Appropriation Act: None known

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

This appears to a revised version of HB 128, which was submitted during the 2023 legislative session. HB 57 involves some notable changes in that it applies to slightly different sexual offenses, lacks funding for indigent defendants, and removes the portion making refusal to continue chemical castration a crime.

HB 57 would amend NMSA 1978, Section 31-21-10.1 to require any person convicted of some sex crimes to undergo “chemical castration treatment” as a mandatory condition of parole. It would also create a new statute, NMSA 1978, Section 31-21-10.3, to outline the specifics. In accordance with Subsection I of Section 31-21-10.1, HB 57 would apply to anyone convicted of:

- kidnapping with intent to inflict a sexual offense under Section 30-4-1 (whether or not a sexual offense was inflicted);
- aggravated criminal sexual penetration or first, second, or third degree criminal sexual penetration under Section 30-9-11;
- criminal sexual contact of a minor in the second, third, or fourth degree under in Section 30-9-13;
- sexual exploitation of children in the second degree under Section 30-6A-3;
- sexual exploitation of children by prostitution in the first or second degree under Section 30-6A-4; or
- child solicitation by electronic communication device under Section 30-37-3.2 (whether or not any meeting occurs or any child is actually involved).

There would be no exception for consensual conduct, such as sex between an inmate and a person in position of authority over them—*see* § 30-9-11(E)(2)—or consensual electronic communications (*see* § 30-37-3.2). In addition, persons required to undergo chemical castration under HB 57 would include persons who did not inflict a sexual offense on another person. *See e.g.*, § 30-4-1 (kidnapping); § 30-37-3.2(A), (D) (punishing solicitation whether or not a sexual offense occurs, is consensual, or involves an actual child).

Subsection A of Section 31-21-10.3 would define “chemical castration treatment” as “the use of hormonal drugs such as medroxyprogesterone acetate or a chemical equivalent to reduce sexual violence recidivism.”

Subsection B would require the district court, as opposed to a medical doctor, to inform a person about the effect of chemical castration treatment and any side effects of treatment. This would likely occur at sentencing and a significant time before the parole requirement would take effect.

Subsection C says that chemical castration would begin at least one month before the person's release from custody.

Subsection F requires the parolee to pay for all costs associated with chemical castration, but notes that a person "may not be denied parole based solely on the person's inability to pay for the costs associated with the chemical castration treatment." There is no provision to assist indigent defendants in paying the costs associated with chemical castration.

Subsection G requires a person to continue receiving chemical castration treatment until the board, as opposed to a doctor or medical professional, determines it is no longer necessary.

Subsection H provides that refusal to participate in chemical castration would constitute a violation of parole, and a person who refuses to participate "shall be immediately remanded to the custody of the corrections department for the remainder of the sentence from which the person was paroled."

FISCAL IMPLICATIONS

If HB 57 were enacted, it would be virtually certain to trigger constitutional challenges, which would require resources from LOPD, prosecutors, and the courts.

Assuming that HB 57 was upheld, additional LOPD resources might be required to address prosecutions for offenses resulting in chemical castration or to assist in handling sex offender parole review hearings. Because chemical castration has significant medical implications, retention of medical doctors as experts might also be required for prosecutions or sex offender parole review hearings.

Finally, because defendants may wish to avoid the health risks or costs associated with chemical castration, fewer defendants would be likely to plea to the crimes in which chemical castration is a possible punishment, resulting in more cases going to trial. LOPD may need to hire more trial attorneys with greater experience to ensure compliance with constitutional mandates of effective assistance of counsel. These felonies would be handled by mid-level felony capable attorneys (Associate Trial Attorneys). Depending on the volume of cases in the geographic location there may be a significant recurring increase in needed FTEs for the office and contract counsel compensation. Associate Trial Attorney's mid-point salary including benefits is \$136,321.97 in Albuquerque/Santa Fe and \$144,811.26 in the outlying areas (due to necessary salary differential to maintain qualified employees). Recurring statewide operational costs per attorney would be \$12,780.00; additionally, average support staff (secretarial, investigator and social worker) costs per attorney would total \$126,722.33.

In addition to the impact on LOPD, courts, DAs, AGs, and NMCD could anticipate increased costs.

SIGNIFICANT ISSUES

LOPD sees several significant issues with HB 57. Most seriously, as was true of its predecessor HB 128, HB 57 might violate constitutional prohibitions against cruel and unusual punishment. *See generally* John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. St. Thomas L.J. 559 (2006); *Weems v. United States*, 217 U.S. 349, 404 (1910) (quoting a Georgia case holding that the cruel and unusual punishment clause “was, doubtless, intended to prohibit the barbarities of quartering, hanging in chains, castration, etc.”).

Cruel and unusual punishment is prohibited by both the Eighth Amendment of the United States Constitution and Article II, Section 13 of the New Mexico Constitution, and the New Mexico provision provides greater protection for defendants than the federal provision does. *Montoya v. Ulibarri*, 2007-NMSC-035, ¶ 22. Therefore, the existence of chemical castration laws in other states does not mean that HB 57 would pass constitutional muster in New Mexico.

In addition, HB 57 is substantially broader in application than existing chemical castration laws in other states. It would impose chemical castration as a mandatory condition of parole for all persons convicted of certain sex offenses even if the offenses involve consensual conduct (such as for electronic solicitation); do not result in the infliction of a sexual offense (such as for kidnapping or electronic solicitation); or involve communication with an officer rather than a child (electronic solicitation). HB 57 does not limit its application to violent crimes or crimes against minors. By contrast, the laws in other states are more selective. For example, based on a brief review of other states’ statutes:

- Alabama Code § 15-22-27.4 limits chemical castration to sex offenses against a person under the age of 13.
- California Penal Code § 645(a) allows, but does not require, chemical castration for some violent sex crimes where the victim is under the age of 13. It becomes mandatory upon a second conviction.
- Florida § 794.0235(1)(a) allows, but does not require, courts to impose chemical castration as a condition of parole when a defendant has been convicted of “sexual battery,” which appears to require penetration, not just sexual contact. FSA § 794.011(1)(j). Chemical castration becomes mandatory on a section offense, § 794.0235(1)(b). However, a court-appointed medical expert must determine that the defendant is an appropriate candidate for treatment. § 794.0235(2)(a).
- Louisiana Revised Statutes § 538(C) limits chemical castration to second offenses or crimes against children under the age of 13, and chemical castration is discussed as part of a broader “treatment plan”; it is not mandatory.
- Montana Code § 45-5-512 appears to have only discretionary chemical castration, not mandatory provisions.

In addition, HB 57 is also ambiguous or confusing in places:

1) Unlike HB 128, HB 57 defines “chemical castration,” but it lists only medroxyprogesterone acetate (commonly known as depo provera) as one of the potential hormonal drugs involved. The medical risks to parolees are difficult to evaluate without this information, but can include depression, osteoporosis, anemia, anaphylaxis, kidney failure or heart failure depending on the medication used—which might further support the constitutional challenge discussed above. *See e.g.*, Marisa Iati, *State lawmakers voted to force “chemical castration” on sex offenders. Medical*

experts urge caution, Washington Post (June 5, 2019), available online at: <https://www.washingtonpost.com/health/2019/06/05/lawmakers-voted-force-chemical-castration-sex-offenders-medical-experts-urge-caution/>

2) Subsection B would require the district court to inform the defendant of the effects of chemical castration treatment. It is not clear when this would occur, but presumably it would happen at sentencing, which is likely to be many years prior to when the defendant would have to undergo the treatment. It is not clear if the defendant would be re-informed of the risks, if he would be permitted to discuss the risks with a medical professional, or if the court informing the defendant of the risks would be considered medically informed consent.

3) Subsections C and G say that chemical castration would begin at least a month before a parolee is released from the department of corrections and shall continue “until the board determines that the treatment is no longer necessary.” It is not clear how this review would be triggered or upon which grounds the board would make such a determination (that is, which factors would be considered, what the burden of proof would be, or who would have the burden of proof).

4) Subsection H says that if a person chooses not to be chemically castrated, it will be treated as a parole violation, and the person will be remanded to prison “for the remainder of the sentence from which the person was paroled.” It is not clear what this means. Many parolees will have fully finished serving their underlying sentences before they begin parole. If the bill means that they will be remanded for the remainder of their *parole terms*, this is likely to be an extraordinarily long sentence—if the person is serving sex offender parole, the minimum term is five years, and the maximum term is either 20 years or the rest of the person’s life. *See* § 31-21-10.1(A).

If the bill means that the person would be remanded for the remainder of the underlying sentence, this is also a confusing outcome. Imposing the remainder of a suspended sentence usually requires finding a violation of *probation* rather than parole. Probation and parole often impose similar conditions (although this bill would add a big condition to parole), and a parolee often has one combined probation/parole officer, but the processes for finding a violation are different in the two systems. A defendant charged with a probation violation is entitled to a hearing in court, with a lawyer to represent him, and the judge determines whether a violation has been committed and what the penalty should be. A parole violation is judged by the parole board, and the defendant is not entitled to a lawyer. Revoking a person’s suspended sentence through a *parole* process rather than a *probation* process could lead to due process challenges in court.

PERFORMANCE IMPLICATIONS

None known

ADMINISTRATIVE IMPLICATIONS

None known

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None known

TECHNICAL ISSUES

Reviewer is unaware whether this legislation is germane under Art. IV, Section 5. It is not a budget bill, analyst is unaware if it has been drawn pursuant to a special message of the Governor, and it was not vetoed following the previous regular session.

OTHER SUBSTANTIVE ISSUES

This would be a significant change to the parole process. When the parole board convenes to determine whether to extend a sex offender parolee's term or release him from parole, the board tries to decide whether the person has the tools to be successful without parole supervision. If the parolee has been on chemical castration drugs throughout the term of parole, the end of parole would mean not just a shift in supervision, but in biochemistry. The person might be less prepared for the transition and less able to function successfully after parole.

The broad and mandatory nature of the chemical castration that would be implemented with HB 57 not only presents striking constitutional problems, but practical concerns of the effectiveness of mandatory chemical castration. Most chemical castration methods would effectively reduce the sex drive and the seminal fluid in a male. This does not, however, guarantee the elimination of sexual violence or aggressive behavior. Critically, the consensus appears to be that as punishment levied involuntarily against sex offenders, chemical castration alone may not be effective and comes with a host of medical-ethical concerns. When chemical castration is employed as a "treatment" for sexually aggressive behavior, any success comes when it is part of voluntary plan that includes assessment and supportive psychotherapy. But mandatory chemical castration is not a cure-all to prevent sexual crimes. *See* Lee JY, Cho KS. Chemical castration for sexual offenders: physicians' views. *J Korean Med Sci.* 2013 Feb;28(2):171-2; Warda Imran, *How effective a punishment is 'chemical castration'?* (March 15, 2021), available at <https://www.dw.com/en/combating-sexual-violence-is-chemical-castration-a-valid-method/a-56839505>.

ALTERNATIVES Applying such a requirement to a very limited subset of offenders (repeat sexual offenders, violent sexual offenders, etc.) or using non-mandatory incentives to encourage certain offenders to voluntarily utilize chemical castration treatment.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status Quo

AMENDMENTS

None known