

LFC Requester: _____

**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

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{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 1/18/2024
Bill No: HB 116-280

Sponsor: Elizabeth "Liz" Thomson & Marian Matthews
Short Title: HUMAN TRAFFICKING & SEXUAL EXPLOITATION CRIME

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:

HB 116 appears to be similar to HB 445, a bill introduced during the 2023 legislative session (which was itself similar to HB 56, a bill introduced during the 2021 regular session, and to two bills from 2020 (HB 237 and HB 232)).

HB 116 would make a number of changes expanding the reach of the criminal law prohibiting human trafficking, and the criminal law prohibiting sexual exploitation of children by prostitution. It also changes some related provisions in the sentencing laws, statute of limitations, and the Victims of Crime Act. The major substantive changes are described below.

Changes to Sexual Exploitation of Children by Prostitution

Section 2 of the bill would expand the reach of the crime “sexual exploitation of children by prostitution” in NMSA 30-6A-4. It currently applies to children under the age of sixteen, the age of sexual consent in New Mexico. This bill would expand it to include minors up to the age of eighteen.

Section 2 of the bill would also add that it is not a defense if the “victim” is actually a police officer posing as a minor.

Changes to Human Trafficking Law

Section 4 of the bill would add “harboring, maintaining, patronizing, [or] providing” to the list of prohibited activities to the human trafficking law, expanding the types of conduct that constitute the crime. This would appear to allow prosecution of a person who owned property where human trafficking occurred, as well as a person who patronized or used the services of a trafficked person.

Section 4 also proposes to reduce the *mens rea* required for punishment under subsection (3)—involving the receipt of anything of value from an exploited individual’s labor or services—by requiring only that the defendant “should have known” that force, fraud, or coercion were involved.

Section 4 of the bill would also add a new ground for prosecution based on a person “utilizing a person’s services to compel” the repayment of a debt or obligation when the person holding the debt does not pay the laborer in accordance with state or local law, holds actual or perceived control over the laborer, and the laborer has no reasonable to terminate the agreement.

Section 4 of the bill would increase the penalties for human trafficking. Currently, human trafficking where the victim is at least sixteen is a third-degree felony. If the victim is at least thirteen but under sixteen, trafficking is a second-degree felony, and if the victim is less than thirteen, it is a first-degree felony.

Under the bill, trafficking of any person under eighteen would become a first-degree felony, carrying an 18-year prison sentence that could not be suspended or deferred. Trafficking where the victim was at least eighteen would be punished as a second-degree felony.

Section 4 of the bill adds language to the human trafficking statute stating that “each violation of this section constitutes a separate offense and shall not merge with any other offenses.” The existing statute already has a provision, 30-52-1(D), stating that human trafficking may be punished in addition to any other offenses based on the same conduct.

The existing statute states that a victim of human trafficking shall not be charged as an accessory to human trafficking. This bill would add that a victim also may not be charged with prostitution.

The current statute applies to labor, services, or commercial sexual activity obtained by “force, fraud or coercion.” This bill would expand the definition of “coercion,” adding the use or threat of “physical restraint.”

This bill also would add a definition of “harm.” The proposed definition (on p. 10 of the bill) is long, quite broad, and includes psychological, financial, and reputational harm.

The bill adds a list of factors that “shall not constitute a defense” to human trafficking. These include the victim’s history of commercial sexual activity, or sexual history in general; opinion or reputation evidence about the victim’s sexual history; “consent of a minor”; mistake about the victim’s age; and the fact that the “victim” may have been a police officer posing as a minor.

Finally, the bill specifies that people convicted of human trafficking are subject to the provisions of the Forfeiture Act.

Changes to Other Provisions

Section 1 of HB 116 would eliminate the statute of limitations for human trafficking. Currently, human trafficking of a person sixteen years or older has a statute of limitations of five years from the time the crime was committed; six years for a person age thirteen to sixteen. For a person younger than thirteen, human trafficking is already a first-degree felony, and there is no statute of limitations.

Section 3 of the bill would add human trafficking to the list of racketeering offenses under New Mexico law.

Section 5 of the bill would extend the rights and protections of the Victims of Crime Act to victims of human trafficking and sexual exploitation of children under NMSA 1978, Section 30-6A-3 (involving child pornography).

Section 6 of the bill would add human trafficking to the list of discretionary “serious violent offenses” under Section 33-22-34 so that the sentencing judge may cap the ability to accrue earned meritorious deductions in prison to only 4 days per month based on “the nature of the offense and the resulting harm” in a particular case; otherwise, day-for-day deductions would be available.

The legislation’s effective date is not specified, but would presumably be 90 days following the adjournment of the Legislature.

FISCAL IMPLICATIONS

Any increase in criminal offenses or penalties increases the strain on LOPD. Any defendant charged with a crime has a constitutional right to a defense, and LOPD is tasked with providing that defense. Currently, several LOPD offices are operating at (or above) their caseload capacity and cannot provide effective assistance of counsel to all of their current clients. LOPD would have difficulty absorbing additional cases in these areas.

It is hard to estimate the precise impact of the expansion of the laws prohibiting human trafficking and sexual exploitation of children by prostitution. We do not see many charges brought under these statutes compared to other criminal statutes, but these changes may encourage prosecutors to charge them more frequently.

Additionally, some of the changes (described in the “significant issues” section below) would create confusion in the law or make it less appealing for defendants to take a plea bargain. Because the system relies on a certain number of cases resolving with a plea, this legislation has the potential to strain resources for LOPD and for the court system generally. It could therefore increase the need for more attorneys and, given the increased punishment for these offenses, for more experienced attorneys.

An entry-level Assistant Trial Attorney’s mid-point salary *including benefits* is \$121,723.30 in Albuquerque/Santa Fe and \$130,212.59 in the outlying areas (due to salary differential required to maintain qualified employees). A mid-level felony capable 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. A senior-level Trial attorney’s mid-point salary *including benefits* is \$149,063.13 in Albuquerque/Santa Fe and \$157,552.44 in the outlying areas. 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 due to the increased reach of these statutes, the increased severity of the charges, the increased likelihood of trials and lengthy sentences.

SIGNIFICANT ISSUES

Increased penalties for human trafficking

HB 116 would increase the penalties for human trafficking dramatically while simultaneously expanding its reach. Currently, human trafficking of victims who are at least sixteen is punished as a third-degree felony, which carries a sentence of up to three years. There are harsher penalties for trafficking younger victims.

The bill would increase the penalty for trafficking adults (at least eighteen years old) to a second-degree felony, which carries a sentence of up to nine years in prison. For trafficking anyone under the age of eighteen, the bill would increase the penalty to a first-degree felony, which carries a penalty of eighteen years in prison. These eighteen years cannot be suspended; a judge must impose them unless the judge formally finds mitigating circumstances, in which case the judge still must impose twelve years in prison.

Under current law, a person may be convicted of human trafficking in addition to other offenses for the same conduct, and the penalties may stack. For example, in one recent case, the

defendant was convicted of multiple counts of human trafficking, kidnapping, promoting prostitution, and accepting the earnings of a prostitute. He was sentenced to 54 years in prison. *See State v. Carson*, 2020-NMCA-015.

As discussed below, this bill would expand the definition of human trafficking. The likely impact of these changes is that more people would face human trafficking charges, and those charges would carry substantially more prison time than under current law.

Expansion of Definitions of Human Trafficking and Sexual Exploitation of Children by Prostitution

The bill would expand the reach of these two statutes in several ways, as described above. As amended, the statutes would cover a broad range of conduct. In addition to the fourth-degree felony of “promoting prostitution” (pimping), a pimp who used any degree of “physical restraint” would also be guilty of second-degree human trafficking. “Physical restraint” is not defined, and it is not clear how much would be required under the proposed legislation. However, since it would be an alternative *other than* “physical force,” it presumably applies to *non-forceful* restraint. Thus, closing a door, placing someone in a car, or grabbing someone’s arm non-forcefully during the course of promoting prostitution might satisfy the bill’s language.

In addition, the alteration of the *mens rea* under subsection (3) and the addition of subsection (4) in the human trafficking statute could significantly expand the number of potential persons covered by the statute. For instance, where subsection (3) currently punishes someone who benefits from labor or services by an exploited individual with knowledge that force, fraud or coercion was involved, the proposed statute would cover anyone who “should have known” about the force, fraud or coercion. This might extend the reach of the statute to persons who subcontract with a company without knowing they exploit their laborers while punishing them as harshly as those who act with knowledge.

It is not clear that these expansions in the statutes are necessary. Prosecutors have successfully brought human trafficking charges under the existing statute. *See, e.g., State v. Jackson*, 2018-NMCA-066; *Carson*, 2020-NMCA-015.

Double Jeopardy

The bill would add language to the human trafficking statute stating, “Each violation of this section constitutes a separate offense and shall not merge with any other offense.” The “shall not merge with any other offense” language is likely redundant, as Section 30-52-1(D) already permits prosecution for human trafficking *in addition to* any related offenses, and the penalties can stack. *See Carson*, 2020-NMCA-015, ¶ 17 (“Defendant was found guilty of two counts of human trafficking as to Stormy, one count of human trafficking as to R.R., a minor, two counts of promoting prostitution, two counts of accepting earnings of a prostitute, and kidnapping. After the guilty verdict, the district court sentenced Defendant to fifty-four years in prison”).

The other part of the new sentence, “Each violation of this section constitutes a separate offense,” is ambiguous. Under current law, what constitutes a “violation” depends on the six-factor test courts use to determine distinctness of a defendant’s actions. *Carson*, 2020-NMCA-015, ¶ 34. Under this analysis, it is very likely that every victim warrants a separate charge; depending on the circumstances, there might be more than one charge for a particular victim. *See id.* ¶ 38. The new language does not provide a different definition of what constitutes a “violation,” and it does not add anything to the current analysis.

PERFORMANCE IMPLICATIONS

The bill proposes several factors that would not constitute a defense to human trafficking or sexual exploitation of children by prostitution. Three of the factors listed for human trafficking—the victim’s history of commercial sexual activity, the consent of a minor, and mistake about a victim’s age—have the potential to limit effective representation in court. In a prosecution for human trafficking, if a defendant could present evidence that a seventeen-year-old victim (of legal age to consent to sex) had agreed to participate in sex work, had participated in sex work before meeting the defendant, and had lied to the defendant and claimed to be over 18, those factors could be relevant *to the element of coercion*. Even if these factors, standing alone, do not constitute a defense, evidence of them may still be relevant for the jury to hear.

Although some of the limitations related to an individual’s sexual history appear to be an effort to apply rape shield provisions from Rule 11-412, making evidence of these factors inadmissible could violate a defendant’s constitutional right to present a defense. The bill could avoid this constitutional issue by clarifying that evidence of these factors may still be admissible.

ADMINISTRATIVE IMPLICATIONS

See Fiscal Implications, above

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

None noted

ALTERNATIVES

Remove limitations on defense evidence so that admissibility is determined under existing rules of evidence. Specify that evidence may still be admissible if necessary to protect a defendant’s right to present a defense.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo. Both sexual exploitation and human trafficking are currently illegal, and human trafficking is currently punishable in addition to other crimes committed during the course of the trafficking conduct.

AMENDMENTS

None known