

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 January 24, 2024

Bill No: SB 102-280

Sponsor: Sen. Brandt
Racketeering Act Changes

Agency Name
and Code 280-LOPD
Number: _____

Person Writing Mark A. Peralta-Silva

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Title: _____

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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:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: SB 102 amends the Racketeering Act to add eleven (11) additional predicate crimes to the definition of racketeering. The bill also creates and defines the term, “criminal gang” for purposes of establishing an enterprise under the Act. Additionally, the bill creates two new crimes for (1) either soliciting or coercing another’s participation in an enterprise or (2) if someone is in a leadership position in an enterprise to finance, supervise, or conspire to commit any racketeering activity. Finally, the bill makes several technical changes to statutes in the Racketeering Act.

This bill seeks to do quite a bit. Among the most notable propositions is the addition of eleven (11) crimes to definition of racketeering. These crimes are:

- Sexual exploitation of children;
- Criminal sexual penetration;
- Criminal sexual contact;
- Dog fighting and cockfighting;
- Escape from jail;
- Escape from penitentiary;
- Assisting escape;
- Bringing contraband into places of imprisonment;
- Tampering with public records;
- Impersonating a peace officer; and
- Human trafficking.

The bill defines “criminal gang” as “three or more persons having a common identifying sign or symbol or an identifiable leadership and who continuously or regularly associate in the commission of criminal activities.” This definition requires essentially two things to establish a “criminal gang,” specifically (1) three or more persons having (A) a common sign or symbol OR (B) an identifiable leadership, and (2) continuous or regular commission of criminal activities. This definition for criminal gang is used only once for the definition of “enterprise,” amending “other legal entity or a group of persons.”

The bill also seeks to create two entirely new crimes in NMSA 1978, Section 30-42-4 (1980), the section of the Racketeering Act defining crimes and penalties.

FISCAL IMPLICATIONS

Racketeering prosecutions are seldom undertaken and it is unlikely that the new crimes contemplated in the bill would lead to a significant increase in the number of prosecutions. Absent an elevated focus by law enforcement and prosecutors in the investigation and prosecution of presumed racketeering, no significant impact is anticipated.

That being said, while the LOPD would likely be able to absorb some cases under the proposed law, those cases would certainly need to be handled by, at a minimum, mid-level felony capable attorneys (Associate Trial Attorneys), but more likely higher-level attorneys (Trial Attorneys). 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. Moreover, any increase in the number of prosecutions brought about by the cumulative effect of this and all other proposed criminal legislation would bring a concomitant need for an increase in indigent defense funding to maintain compliance with constitutional mandates.

Under the present statutory scheme, LOPD workload is so heavy in some offices that lawyers have been required to move to withdraw from new cases in order to provide constitutionally mandated effective assistance of counsel to their existing clients. Barring some other way to reduce indigent defense workload, any increase in the number of felony prosecutions would bring a concomitant need for an increase in indigent defense funding in order to keep this problem from spreading. Of course accurate prediction of the fiscal impact would be impossible to speculate; assessment of the required resources would be necessary after the implementation of the proposed statutory scheme.

SIGNIFICANT ISSUES

This bill presents some significant issues mostly regarding the creation of its two new crimes in Section 30-42-4. The first crime this bill creates is a third degree felony "for a person to solicit or coerce another person, including a minor, into becoming or continuing as a member of an enterprise or participating in the racketeering activity of an enterprise." This crime omits a requirement that solicitation or coercion be part of a *pattern of racketeering activity*, a requirement that exists in all other, existing crimes under the Act and ensures that racketeering does not cover isolated, singular incidents. Straying from a pattern of racketeering activity moves this crime away from the spirit of fighting organized crime which justified the creation of these statutes.

The other crime creates a first degree felony "for a person who is in a leadership position within an enterprise to knowingly finance, supervise or conspire to commit, through the direction of members of the enterprise, any racketeering activity." Like the other crime of solicitation and coercion, this crime does not require a showing that finance, supervision, or conspiracy to be part of a pattern of racketeering activity. It also appears that finance or supervision of racketeering activity would overlap with the crimes in Subsections A and B of Section 30-42-4, which punish the use or investing of proceeds derived from racketeering activity and the acquisition or maintenance of an interest, respectively. Finally, Subsection C specifies that a person associated with an enterprise is guilty of a second degree felony for directly or indirectly conducting or

participating in a pattern of racketeering activity, which would seem to cover supervision in the new crime.

Including conspiracy in this new crime overlaps with Subsection D of Section 30-42-4, which makes it unlawful for a person “to conspire to violate” the Racketeering Act, a third degree felony. If a person is in a leadership position and conspires to commit a racketeering activity is this person guilty of the greater first degree felony or the lesser third degree felony? If a court finds this situation to create ambiguity in the statute, then the rule of lenity may require the imposition of the lesser penalty. Moreover, it is strange that conspiracy to commit a racketeering activity would constitute a first degree felony when solicitation, coercion, and the existing crimes would otherwise impose at most second degree felonies. Generally, conspiracy, an inchoate (or incomplete) crime, does not carry a stiffer penalty than the actual commission of the underlying offense.

Furthermore, the State is already able to charge someone with “conspiracy to commit racketeering” by relying on the existing Conspiracy statute, NMSA 1978, § 30-28-2. *See, e.g., State v. Catt*, 2019-NMCA-013, ¶ 17, 435 P.3d 1255 (explaining the requirements for instructing the jury on a charge of conspiracy to commit racketeering). *Catt* was particularly concerned that a jury should not be able to convict a defendant for conspiracy to commit racketeering based solely on the fact of a conspiracy to commit the predicate crime because both the enterprise and pattern of conduct are crucial to racketeering. *Catt* clarifies that the conspiracy must involve an enterprise and a pattern, although the charged defendant need not be the person who committed the underlying pattern of predicate crimes. *Id.* ¶¶ 20-22.

In sum, the issue with these two new crimes is that they cover otherwise existing criminal conduct and remove the element of *pattern of racketeering activity*. It is unclear how such changes benefit the citizens of New Mexico.

This analyst also notes that the portion of the definition of “criminal gang” as three or more persons who have a *common identifying sign or symbol* may pose Federal First Amendment concerns or free speech concerns under Article 2, Section 17 of the New Mexico Constitution, since it appears the definition could potentially incriminate some speech or expression. For example, would some crimes be elevated to racketeering simply because three friends all had the same tattoo?

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Other bills proposed this regular session contemplate amending the Racketeering Act. HB 116 proposes to add human trafficking to the list of crimes defining racketeering. HB 128 and SB 6 propose to add trafficking cannabis products to the racketeering list.

TECHNICAL ISSUES

This bill is germane as noted by the Senate Committee’s Committee pursuant to Senate Executive Message Number 9.

OTHER SUBSTANTIVE ISSUES

The inclusion of crimes like sexual assault appears to misapprehend the conduct “racketeering” is designed to address. It is difficult to imagine a criminal enterprise designed to “profit” from a pattern of sexual assault crimes. Any such conduct is already criminal as either human trafficking, NMSA 1978, § 30-52-1, or promoting prostitution, NMSA 1978, § 30-9-4. Racketeering is simply the incorrect criminal statute to address it. Similarly, crimes like escape from jail are not those typically committed as a profitable criminal enterprise, nor crimes committed as a “pattern.” Their inclusion in Racketeering is misguided.

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS