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## FISCAL IMPACT REPORT

SPONSOR Candelaria ORIGINAL DATE 2/5/19  
 LAST UPDATED 3/7/19 HB \_\_\_\_\_

SHORT TITLE Prohibit Certain Legal Defenses SB 159/aSJC

ANALYST Torres

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

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	None	Indeterminate but minimal	Indeterminate but minimal	Indeterminate but minimal	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

- Administrative Office of the Courts (AOC)
- Public Defender Department (PDD)
- Administrative Office of the District Attorneys (AODA)
- New Mexico Attorney General (NMAG)
- New Mexico Sentencing Commission (NMSC)

### SUMMARY

#### Synopsis of SJC Amendment

The Senate Judiciary Committee Amendment to Senate Bill 159 modifies the restrictions on the use of the defense in question, so that discovery of gender identity:

- (1) may not be submitted as a justification for the conduct of the defendant; and
- (2) does not constitute a defense of the defendant's self or of another person.

The amendment removed that the discovery of gender identity did not constitute:

- sufficient provocation with respect to the conduct for which the defendant is being prosecuted; and
- evidence of the defendant's diminished responsibility for the offense by reason of mental disease or defect.

#### Synopsis of Original Bill

Senate Bill 159 would create a new section to Article 1 of the Criminal Code (Chapter 30) that

would prohibit a criminal defendant charged with certain violent crimes from asserting a defense of justification, sufficient provocation, diminished responsibility by reason of a mental disease or defect, or self-defense or defense of another, based on the victim's "actual or perceived gender, gender identity, gender expression or sexual orientation under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance toward the defendant, or the defendant and victim were engaged in a personal, romantic or sexual relationship."

This provision would apply only to criminal defendants charged with (1) first degree murder or (2) a crime defined in Section 33-2-34(L)(4)(a)-(n) as a serious violent offense for purposes of determining eligibility for earned meritorious deductions to a prison sentence.

The bill defines the terms "gender expression," "gender identity," and "sexual orientation."

### **FISCAL IMPLICATIONS**

Any additional fiscal impact on the New Mexico Judiciary is proportional to the implementation/enforcement of the law and commenced prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase. There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes.

### **SIGNIFICANT ISSUES**

The Public Defender Department (PDD) submits the following concerns:

SB 159 presents constitutional issues with respect to due process and the right to present a full and effective defense. Particularly with respect to arguing sufficient provocation, which could affect a decision by a jury as to whether a killing constitutes manslaughter as opposed to murder, the sudden discovery that a person's sexual identity was different from that understood or expected by the alleged perpetrator could result in an impulsive action by the perpetrator, and acting on impulse as opposed to deliberation is, in other instances, permitted as evidence regarding the degree of homicide. Limiting the instances under which a defendant could argue that s/he suffered such an impulse may be unconstitutional if it violates a defendant's opportunity to put on a fair and full defense. It is also noteworthy that under SB 159 only serious violent offenses would be covered. Such a defense appears to remain available for misdemeanor level batteries and similar.

The Administrative Office of the Courts (AOC) notes that:

Traditionally, "the gay and trans panic defense" has been used by defendants in three ways to mitigate a case: 1) defense of insanity or diminished capacity, 2) defense of provocation, and 3) defense of self-defense...

The use of the "gay and trans panic defense" was banned in California in 2014, Illinois in 2017, and Rhode Island in 2018. Similar legislation banning the so-called defense has been introduced but not yet passed in Connecticut, the District of Columbia, New Jersey, New York, Minnesota, and Pennsylvania. In July of 2018, U.S. Senator Edward Markey and Congressman Joe Kennedy introduced "The Gay and Trans Panic Defense Prohibition Act of 2018" into their respective houses of the United States Congress. This

act would ban the use of the defense in federal cases.

**TECHNICAL ISSUES**

The AOC identified the following technical issue:

Relating to Mitigation: It appears that the bill does not expressly prohibit a defendant from introducing the specified knowledge or circumstances (as outlined in the bill) as “mitigating circumstances” that a judge may take into consideration to alter a sentence, pursuant to Section 31-18-15.1 NMSA 1978 (see Related/Relevant Statutes above).

IT/sb