# F I S C A L  I M P A C T  R E P O R T

**SPONSOR** Candelaria/Jaramillo **ORIGINAL DATE** 02/05/21 **LAST UPDATED** 03/17/21 **HB**

**SHORT TITLE** Prohibit Gay or Trans Panic Defense **SB** 213/aHCPAC

**ANALYST** Chilton

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

| | FY21 | FY22 | FY23 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|---|---|---|---|---|---|---|
| **Total** | NFI | NFI | NFI | | | |

(Parenthesis ( ) Indicate Expenditure Decreases)

## SOURCES OF INFORMATION

LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Office of the Attorney General (NMAG)
Administrative Office of the District Attorneys (AODA)
Law Offices of the Public Defender (LOPD)
New Mexico Sentencing Commission (NMSC)

## SUMMARY

Synopsis of HCPAC Amendment

The House Consumer and Public Affairs Committee amendment to Senate Bill 213 changes language in several parts of the bill to indicate that a defendant cannot use as a "defense, justification or excuse" his/her perception of a victim's or witness's gender, gender expression, gender identity or sexual orientation. The same wording is then applied to same-sex or gender non-violent, non-threatening romantic propositions. A subsection is added to state that these safeguards do not invalidate defendants' rights to mount other types of affirmative defenses.

Synopsis of Original Bill

Senate Bill 213 would enact a new section of Chapter 30, Article 1, NMSA 1978 (Criminal Offenses, General Provisions) that would prohibit the use by a defendant of a strategy called "gay panic." This refers to the assertion by defendants that they acted in the belief or knowledge that they had been propositioned in a nonthreatening, nonviolent manner by someone thought to be or known to be gay, bisexual, or transgender.

There is no effective date of this bill. It is assumed the effective date is 90 days following adjournment of the Legislature.

## FISCAL IMPLICATIONS

There is no appropriation in Senate Bill 213 and no apparent fiscal impact on state government agencies.

## SIGNIFICANT ISSUES

The National Conference of State Legislatures wrote the following in May 2018:

> At least five states are considering bans on using so-called gay and transgender "panic" defenses in murder cases.
>
> In jurisdictions that allow these defenses, a criminal defendant can argue that his violence was justified or excused by the shock of learning the victim was gay or transgender. Defendants' claims that their panic negated the malice element, required for a murder conviction, have in some cases succeeded in reducing charges to manslaughter.
>
> The only states with legislative bans on gay and trans panic defenses are California, which enacted its law in 2014, and Illinois, which did so last year. Similar measures have gained attention this year in the Minnesota, New Jersey, New York, Rhode Island and Washington legislatures, among others. The Florida Supreme Court barred the defenses in *Patrick v. State* in 2012.
>
> Gay and trans panic defenses have been allowed in about half the states since the 1950s, including in the Matthew Shepard and "Jenny Jones Show" cases. Those who oppose eliminating the defenses are concerned that a murder defendant could be denied the right to a complete, fair defense under the Constitution's 14th Amendment.
>
> No courts in the states that prohibit the defenses, however, have ruled that their elimination deprives defendants of their due process rights. Those who support the bans argue that a defendant doesn't have a right to present any and all kinds of evidence. States typically have broad discretion in determining what evidence they will allow in criminal cases.

NMSC notes the addition of Rhode Island to the list of states prohibiting use of the "gay panic" defense and notes that five other states and the District of Columbia are also considering legislation to do the same. NMSC notes the American Bar Association in 2013 published a resolution condemning use of the "gay panic defense." On the other hand, NMSC quotes extensively from a *Hastings Law Review* article disagreeing with this resolution, saying that judges and juries may be better able than legislatures to determine whether such a defense should be allowed (See Cynthia Lee and Peter Kwan, "The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women", *Hastings Law Journal* (2014), pp. 77-132, quotation at pp. 121-23, available at http://www.hastingslawjournal.org/wp-content/uploads/LeeKwan-66.1.pdf)

AOC notes, "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."

LOPD expresses concerns the bill is overly broad and possibly unconstitutional but concludes, "Because it implicates discriminatory intent, prohibiting the use of a particular affirmative defense that the defendant acted out of fear arising entirely or primarily from the alleged victim's gender, gender identity, or sexual orientation, is likely constitutional. However, a defendant does have a right to present a defense, and SB213 additionally prohibits admitting *any evidence* regarding these surrounding circumstances. This additional limitation could have the unintended consequence of limiting existing defenses, such as self-defense. The bill might need to be narrowed to permit a defendant to present evidence explaining why they feared imminent harm and acted in self-defense, even if they are prohibited from justifying that fear based entirely or primarily upon on the gender, gender identity, or sexual orientation of the alleged victim."

## TECHNICAL ISSUES

NMAG states, "The lack of definition of 'romantically propositioned in a nonviolent or non-threatening manner' could expose SB 213 to a charge of vagueness. Because criminal statutes are strictly construed in favor of a defendant, definitions of the terms would be helpful."

According to AODA,

1. This bill may be in conflict with rules of evidence 11-104 (E), 11-404, 2, (A) and (B).
2. Victims and witnesses may already be protected by rule 11-412.
3. The NM Supreme Court may interpret this bill as procedural and not substantive and thus may rule it null and void.

AOC notes two other technical issues:

1. It appears that the bill does not *expressly* prohibit a defendant from introducing certain evidence (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).
2. The bill uses the term 'transgender' but does not provide a definition. It does not appear that a definition of the term can be located in New Mexico statutes.

LAC/sb/al