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FISCAL IMPACT REPORT

SPONSOR Padilla ORIGINAL DATE 02/15/21
LAST UPDATED _____ HB _____
SHORT TITLE Financial Crimes Against the Vulnerable SB 221
ANALYST Glenn

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	See Fiscal Implications					

(Parenthesis () Indicate Expenditure Decreases)

Relates to
SB189

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the Attorney General (NMAG)
Law Offices of the Public Defender (LOPD)
Administrative Office of the District Attorneys (AODA)
Administrative Office of the Courts (AOC)
Aging & Long-Term Services Department (ALTSD)
Department of Public Safety (DPS)
Sentencing Commission (NMSC)
Corrections Department (NMCD)

SUMMARY

Synopsis of Bill

Senate Bill 221 enacts the Financial Crimes Against Elderly, Disabled or Vulnerable Adults Act. The bill creates two new crimes:

1. Financial exploitation of an elderly, disabled or vulnerable adult, which is deprivation by a fiduciary of an elderly, disabled or vulnerable adult's property or financial resources, or the use of deceit, trickery, duress, or coercion by a non-fiduciary to acquire control of an elderly, disabled or vulnerable adult's property or resources or to induce an elderly, disabled or

vulnerable adult to perform services against their will.

2. Unlawful use of power of attorney, which is use of a power of attorney with intent to unlawfully deprive an elderly, disabled or vulnerable adult of an asset or property.

The Act criminalizes these crimes as a third degree felony for the first offense, and a second degree felony for a second or subsequent offense. Additionally, a person convicted of the crimes created by the bill must pay restitution to the victim.

SB221 provides for concurrent jurisdiction by state and local law enforcement agencies.

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

FISCAL IMPLICATIONS

AOC states that there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this 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.

LOPD notes that SB221 broadly defines “vulnerable adult” to include adults who are unable to protect themselves from financial exploitation due to a physical or mental impairment, with no requirement for a medical diagnosis. This may require the prosecution and defense to hire experts to prove whether or not a person is a vulnerable adult. This would be a great expense to both sides.

NMCD notes that the fiscal impact of SB221 is difficult to estimate, as it will depend on the number of individuals who might be charged and convicted of the new crimes created by the bill. However, the creation of any new crime, increase of felony degree, or increase of sentencing penalties will likely increase the population of New Mexico’s prisons and long-term costs to the general fund. In addition to the potential of new crimes to send more individuals to prison, increased sentence lengths decrease releases relative to the rate of admissions, pushing the overall prison population higher. According to NMSC, the new crimes created by the bill are analogous to the state’s current larceny or fraud provisions. The average length of stay for 3rd degree larceny is 731 days; for 3rd degree fraud, 648 days. Second degree charges are not common for these types of crimes – the average length of stay for those is 980 days. NMCD reports the average cost to incarcerate a single inmate in FY20 was \$44.8 thousand; however, due to the high fixed costs of the state’s prison facilities, LFC estimates a marginal cost (the cost per each additional inmate) of \$23.3 thousand per inmate per year across all facilities.

SIGNIFICANT ISSUES

According to LOPD, the crimes created by the bill may overlap with current criminal provisions addressing larceny, fraud, and embezzlement. *See* NMSA 1978, § 30-16-1(A)(providing that “larceny consists of the stealing of anything of value that belongs to another”); § 30-16-6(A) (providing that “fraud consists of the intentional misappropriation or taking of anything of value that belongs to another by means of fraudulent conduct, practices or representations); § 30-16-8(A) (providing that “embezzlement consists of a person embezzling or converting to the person’s

own use or anything of value with which the person has been entrusted, with fraudulent intent to deprive the owner thereof”). In addition to the criminal penalties for those crimes under current law, LOPD notes that Section 31-17-1 NMSA 1978 provides for restitution for crime victims in the amount of their actual damages.

LOPD further states that the Hate Crimes Act imposes sentence enhancements for hate crimes against a person based on age or physical or mental disability, and that the specific vulnerability of a victim may be considered in determining whether aggravating circumstances exist to justify increasing the basic sentence. *See* NMSA 1978, § 31-18-15.1. AOC also notes that SB221 may conflict with the Hate Crimes Act.

Finally, LOPD notes that the Habitual Offender Act provides that repeat felony offenders are subject to increases in their sentences of one to eight years, depending on the number of their prior convictions. The self-enhancing punishment proposed by SB221 would add six additional years to the basic sentence on a second conviction for these crimes.

AOC notes that the penalties for a fraud conviction under Section 30-16-6 NMSA 1978 are based upon the value: \$500 to \$2.5 thousand is a fourth degree felony, \$2.5 thousand to \$20 thousand is a third degree felony and over \$20 thousand is a second degree felony. SB221 would make any financial exploitation a third degree felony, regardless of the amount alleged to have been taken from the older, disabled or vulnerable adult.

AODA believes that the bill would protect our most vulnerable classes of people. It raises the penalty applicable under existing law for theft crimes to a third degree felony on a first offense and a second degree felony for subsequent offenses. This class of victims need this additional protection because of the ease of stealing or defrauding them based on their physical or mental limitations.

ALTSD states that in FY20, Adult Protective Services (APS) substantiated a total of 121 allegations of exploitation, of which three were against a power of attorney and one against a representative payee. APS views the bill as a mechanism to begin more vital collaboration with local law enforcement and the attorney general. ALTSD also states that the Long-Term Ombudsman Program views the bill as beneficial for long term care residents and seniors who have been the victim of financial crimes.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SB189 (“Financial Exploitation Act”) places reporting obligations on financial institutions for suspected financial exploitation of vulnerable adults by caregivers and authorizes institutions to delay suspicious transactions.

TECHNICAL ISSUES

AOC believes that because a guardian can manage a protected person’s finances under the Probate Code, a guardian and a protected person should be included in the definition of “fiduciary relationship.”

AOC also notes that in the disability community, person-centered language is a preferable, and suggests that instead of “disabled adult” the terms “adult with a disability” or a “person with a

disability” might be used in the bill. Similarly, the term “elderly” might be replaced with “older adult” or “senior adult.” Similarly, ALTSD states that SB221 appears to presume that an individual who is older or disabled may be incapable of making their own informed decisions, regardless of whether those choices appear rational or irrational to the outside observer. ALTSD notes that to avoid ageist or discriminatory implications, APS bases its legal protections on the concept of “incapacity” rather than age or disability.

NMAG notes that an existing law, the Protecting Vulnerable Adults from Financial Exploitation Act, NMSA 1978, §§ 58-13D-1 to -8, requires broker-dealers and other financial advisors to report financial exploitation of older and incapacitated adults. That Act and SB189, also introduced this session, use certain terms (e.g., eligible adults, financial exploitation, incapacitated persons) that overlap in concept (but differ in the defined terms and their definitions) with SB221. NMAG suggests that, if New Mexico is trying to build a comprehensive set of statutes to protect the vulnerable adults, it would be easier if SB221 used the same terms and definitions as are used in Section 58-13D-2 and SB 189.

DPS has concerns with the vagueness as to who will determine or diagnose someone as a disabled or vulnerable adult. Additionally, DPS believes the inability of a disabled or vulnerable adult to provide consent could create legal challenges for law enforcement and the courts as it pertains to competence when providing victim statements and/or testimony. To address some of these concerns, DPS recommends:

- Amend Section 2 (A) to add after “diagnosed” the language of “by a medical or osteopathic doctor...” Additionally, after “impairment” add language “that affects that person’s judgement or behavior to the extent that the person lacks sufficient understanding or capacity to make, communicate or implement decisions regarding property, funds or resources.”
- Amend Section 2 (F) to add after “impairment” the language “diagnosed by a medical or osteopathic doctor.”

BG/sb