

LFC Requester: \_\_\_\_\_

**AGENCY BILL ANALYSIS  
2024 REGULAR SESSION**

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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** January 29, 2024

**Bill No:** HB 103-280

**Sponsor:** Stefani Lord and Harlan Vincent    **Agency Name and Code**    LOPD-280  
**Short Title:** Child Exposure to Controlled Substance    **Number:** \_\_\_\_\_  
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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)**

	<b>FY24</b>	<b>FY25</b>	<b>FY26</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>						

(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: HB 103 Section 1 proposes to amend the child abuse statute, NMSA 1978, Section 30-6-1, to include as child abuse a person knowingly, intentionally, or negligently, and without justifiable cause, causing or permitting a child to be exposed—to the extent that the child “tests positive” at birth—for a Schedule I or II controlled substance, unless the mother took the substance in accordance with a valid prescription. Additionally, the bill amends Subsections I and J of the child abuse statute, which set forth “prima facie” bases for child endangerment (also relating to controlled substance exposures) to include that “It shall be no defense to the crime of child abuse that the defendant did not know that a child was present....”

Section 2 of the bill adds a new section to the Abuse and Neglect Act for how a newborn child in a hospital setting can be taken by law enforcement in temporary protective custody.

Section 3 of the bill gives appropriations from the general fund to the children, youth and families department, the administrative office of the courts, and the department of corrections to carry out the purpose of the act.

**FISCAL IMPLICATIONS**

Expanding the definition of child abuse is likely to result in more felony prosecutions. As a result, LOPD may need to hire more trial attorneys with greater experience to ensure compliance with constitutional mandates of effective assistance of counsel. These felonies would be handled by, at a minimum, mid-level felony capable attorneys (Associate Trial Attorneys), or higher.

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. Depending on the volume of cases in the geographic location there may be a significant recurring increase in needed FTEs for the office and contract counsel compensation.

Further, initial cases are certain to trigger constitutional challenge, so in addition to individual case defenses, the bill is likely to require motion hearings and appellate litigation until those issues are resolved. (*See significant issues section below*).

Analyst does not have access to data that would inform an estimate of how many new prosecutions this bill might generate, but anecdotally presumes that – without any threshold quantity of drugs detected or requirement that the amount be medically harmful – the number could be exceedingly high.

The proposed legislation could also have a fiscal impact on DOC, of course. Presumably the courts, DAs and AGs would be affected in similar measure to LOPD. Assessment would be necessary after the implementation of the proposed higher-penalty scheme. Notably, the bill gives appropriations to CYFC, AOC, and DOC, but not the LOPD, DAs, or the AG.

## SIGNIFICANT ISSUES

This bill proposes to prosecute a person for child abuse based on their own use of a controlled substance during pregnancy. The New Mexico Court of Appeals addressed this exact issue in *State v. Martinez*, 2006-NMCA-068, 137 P.3d 1195. There, the Court held that a “child” for purposes of the child abuse statute is a “person” under the age of eighteen, and a fetus is not a “person” under New Mexico law. *Id.* ¶¶ 6-9. *See also State v. Willis*, 1982-NMCA-151, 652 P.2d 1222 (holding that an unborn fetus is not a “human being” within the meaning of the vehicular homicide statute). Analyst further presents concerns regarding the breadth of this legislation, as it appears to establish a third-degree felony every time an infant “tests positive,” without any minimal drug concentration requirement or corresponding evidence that the levels detected would be *harmful* to an infant.

Additionally, the bill’s amendments to Subsections I and J of the child abuse statute are in direct conflict with the mens rea of the crime. **NMSA 1978, § 30-6-1 (I)-(J)**. By removing any criminal intent requirement, these provisions create strict liability child abuse crimes. New Mexico law strongly disfavors strict liability crimes. *See, e.g., State v. Gonzalez*, 2005-NMCA-031, ¶ 14, 137 N.M. 107 (“Strict liability crimes are the exception. They are generally recognized under statutes in the nature of regulatory measures and designed to proscribe conduct which seriously threatens public health or safety.”); *see also id.*, ¶ 12 (“Since at least 1917, we have followed the common law that where an act is prohibited and punishable as a crime, it is construed as also requiring the existence of a criminal intent.”). DWI and carrying a firearm in a liquor establishment are prototypical examples of strict liability crimes designed to protect the public *at large*. *See NMSA 1978, § 66-8-102* (DWI statute discussed by *State v. Hernandez*, 2001-NMCA-057, ¶ 19, 130 N.M. 698); **NMSA 1978, § 30-7-3**.

Accordingly, as a component of establishing that a defendant has a sufficiently blameworthy mind to warrant criminal prosecution, “a defendant generally must ‘know the facts that make his conduct fit the definition of the offense.’” *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (quoting *Staples v. United States*, 511 U.S. 600, 608, n.3 (1994)). While “knowledge and intent are separate, not synonymous, elements,” the need for a defendant to be aware of particular circumstances can establish that the defendant did not have the required *mens rea* or it can result in a finding that a particular *mens rea* is insufficient to ensure that the requisite knowledge exists. *Elonis*, 135 S. Ct. at 2010 (finding negligence an insufficient *mens rea* to convey the requirement that the defendant know that his words were threatening); *State v. Ramos*, 2013-NMSC-031, ¶ 28, 305 P.3d 921 (finding the general criminal intent instruction

insufficient to convey the requirement that a party must knowingly violate an order of protection).

Under current law, in **Section 30-6-1**, Subsection I provides that knowingly, intentionally, or negligently leaving a child in a facility used for production of a controlled substance is a prima facie case of child abuse, but the amendment does away with any knowledge requirement, expressly eliminating any defense that the person did not know a child was present. Similarly, Section J provides that knowingly or intentionally exposing a child to use of methamphetamine is a prima facie case of child abuse, with the same amendment as Subsection I. New Mexico precedent has long recognized that a person cannot be convicted of child abuse for generally negligent conduct without knowing that their behavior endangered a particular child that was foreseeable at the time of the conduct. *State v. Gonzales*, 2011-NMCA-081, ¶ 25, 150 N.M. 494 (“the consequences of the defendant’s actions must be specifically directed at children in the case of child abuse”); *see also State v. Clements*, 2006-NMCA-031, ¶ 16, 139 N.M. 147 (endangerment of children cannot be predicated on a child’s mere proximity to a dangerous situation, but rather that the defendant’s actions must place the child who is endangered “in the direct line of any danger” so as to create more than a “mere possibility of harm.”). These requirements help the statute comply with constitutional due process requirements. *See State v. Lovato*, 2011-NMCA-065, ¶ 14, 150 N.M. 39 (“[T]he vagueness doctrine is based on the principle of fair notice in that no one may be held criminally responsible and subject to criminal sanctions for conduct without fair warning as to the nature of the proscribed activity.”).

Meanwhile, New Mexico has been consistent and adamant that child endangerment requires a “substantial foreseeable risk” of harm and is “reserved for the most serious occurrences, and not for minor or theoretical dangers.” *State v. Chavez*, 2009-NMSC-035, ¶¶ 16, 26, 146 N.M. 434. The Supreme Court continuously advises prosecutors to maintain the distinction between civil and criminal laws aimed at child abuse and neglect. Within the current framework, the prosecution has “a broad array of civil remedies” and criminal sanctions for child abuse fall on “the far end of [the] spectrum” and are “reserved for the most serious occurrences.” *Id.* ¶¶ 12-16. Thus, criminal child abuse must encompass “conduct that creates a truly significant risk of serious harm to children.” *State v. Garcia*, 2014-NMCA-006, ¶ 21, 315 P.3d 331 (citing *Chavez*, 2009-NMSC-035, ¶ 22); *see also State v. Juan*, 2010-NMSC-041, ¶ 25, 148 N.M. 717 (noting that criminal punishment is reserved for the most extreme cases of child abuse).

“Negligent” child abuse requires recklessness that is “morally culpable, not merely inadvertent.” *State v. Consaul*, 2014-NMSC-030, ¶ 28, 332 P.3d 850 (quoting *Santillanes v. State*, 1993-NMSC-012, ¶ 28, 115 N.M. 215). Thus, endangerment requires “specific evidence of antecedent conduct by the parent that placed the child in a dangerous situation and in the direct line of danger.” *Garcia*, 2014-NMCA-006, ¶ 10.

This bill proposes to foreclose a core defense (lack of knowledge/mistake of fact) for criminal defendants. This could have constitutional implications. *See Washington v. Texas*, 388 U.S. 14, 19 (1967) (A criminal defendant has a fundamental right under the Due Process Clause of the United States Constitution “to present his own witnesses to establish a defense.”); *see also State v. Sanders*, 1994-NMSC-043, ¶ 26, 117 N.M. 452 (“A defendant’s right to present evidence on his own behalf is subject to his compliance with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.”) (internal quotation marks and citation omitted); *State v. Rosales*, 2004-NMSC-022, ¶ 7, 136 N.M. 25 (stating that “state rules of evidence do not abridge an accused’s right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to

serve”) (internal quotation marks and citation omitted)). This bill is wholly inconsistent with New Mexico’s criminal and civil structure and presents serious due process concerns.

Section 2 of the bill is not criminal law and would not affect the LOPD. Section 2(C)(1) provides that “[a] newborn child may be taken into temporary protective custody without a court order when a new born child is identified by a physician, registered nurse, licensed practical nurse, or physician assistant when the newborn child is identified as being affected by substance abuse or demonstrating withdrawal symptoms resulting from prenatal drug exposure.” However, as noted above, without any required showing that the amount detected is *harmful*, these circumstances may not justify such blanket interference with parental custodial rights.

## **PERFORMANCE IMPLICATIONS**

As noted above, increasing the reach of a criminal statute is likely to result in more prosecutions. LOPD may need to higher more attorneys with a greater level of experience to take these serious, felony cases.

## **ADMINISTRATIVE IMPLICATIONS**

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

## **TECHNICAL ISSUES**

## **OTHER SUBSTANTIVE 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.

## **ALTERNATIVES**

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status quo.

## **AMENDMENTS**