

LFC Requester: _____

**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

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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 31, 2024

Bill No: HB 282-280

Sponsor: Reps. Dixon and Matthews
 S
Agency Name and Code 280-LOPD
Number: _____
Person Writing Mark A. Peralta-Silva
Short Title: _____ (505) 369- _____ Email Mark.peralta-silva@lopdm.us
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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: House Bill 282 proposes several changes to New Mexico’s Sex Offender Registration and Notification Act (SORNA). The bill amends seven current statutes and provides an applicability section, specifying the bill would only apply “to any person convicted of a sex offense on or after July 1, 1995.” Each section of the bill is broken up for a brief description.

Section 1. By amending the purpose statute, the bill intends to bring NM’s SORNA closer to federal law, referencing the Adam Walsh Child Protection and Safety Act of 2006.

Section 2. The bill reorders the definitions in NMSA 1978, Section 29-11A-3 (1995), to list the definitions alphabetically. The bill defines “juvenile sex offender” as “a person fourteen years of age or older who has been adjudicated delinquent for committing a sexually violent offense,” and amends the definition of “sex offender” to include a juvenile sex offender who has received an adult sentence. “Sexually violent offense” is defined as “aggravated criminal sexual penetration, criminal sexual penetration in the first degree, criminal sexual penetration in the second degree or criminal sexual penetration in the third degree.” The bill also amends the definitions in SORNA, adding six crimes to the definition of sex offense:

- Patronizing prostitutes when there is a separate finding of fact that the sex offender knew or should have known that the person to be believed a prostitute was younger than sixteen years of age;
- Promoting prostitution when there is a separate finding of fact that the sex offender knew or should have known that the person to be believed a prostitute was younger than sixteen years of age;
- Accepting earnings of a prostitute when there is a separate finding of fact that the sex offender knew or should have known that the person to be believed a prostitute was younger than sixteen years of age;
- Human trafficking for a sexual purpose when the victim is younger than sixteen years of age;
- Criminal sexual communication with a child; and
- Conspiracy to commit any of the sex offenses defined NMSA 1978, Section 29-11A-3(J)(1)-(17).

Finally, the bill defines three tiers of sex offenses. The table below lists the crimes that fall

within each tier:

Tier 1 sex offense	Tier 2 sex offense	Tier 3 sex offense
Enticement of a child, NMSA 1978, Section 30-9-1	Sexual exploitation of children, NMSA 1978, Section 30-6A-3	Kidnapping when committed with intent to inflict a sex offense when victim is younger than 18, NMSA 1978, Section 30-4-1
Sexual exploitation of children, NMSA 1978, Section 30-6A-3(A)	Sexual exploitation of children by prostitution, NMSA 1978, Section 30-6A-4	Aggravated criminal sexual penetration or criminal sexual penetration in the first, second or third degree, NMSA 1978, Section 30-9-11
Criminal sexual contact in the fourth degree, NMSA 1978, Section 30-9-12	False imprisonment committed with the intent to inflict a sex offense, NMSA 1978, Section 30-4-3	Criminal sexual penetration in the fourth degree when the victim is younger than 16, NMSA 1978, Section 30-9-11
Aggravated indecent exposure, NMSA 1978, Section 30-9-14.3	Patronizing prostitutes when there is a finding that the sex offender knew or should have known that the victim was younger than 16 years of age ¹ , NMSA 1978, Section 30-9-3(B)	Criminal sexual contact of a minor when the victim is younger than 13, NMSA 1978, Section 30-9-13
Attempt to commit any tier 1 sex offense	Promoting prostitution requiring specific finding of fact, NMSA 1978, Section 30-9-4	Incest when the victim is younger than 16, NMSA 1978, Section 30-10-3
	Accepting earnings of a prostitute requiring specific finding of fact, NMSA 1978, Section 30-9-4.1	Attempt to commit any tier 3 sex offense
	Criminal sexual penetration in the fourth degree when the victim is 16 or older, NMSA 1978, Section 30-9-11	
	Criminal sexual contact of a minor when the victim is 13-18 years of age, NMSA 1978, Section 30-9-13	
	Incest when the victim is younger than 18, NMSA 1978, Section 30-10-3	
	Criminal sexual	

¹ In the interest of efficiency, future references to this special finding will be specified as “requiring specific finding of fact.”

	communication with a child, NMSA 1978, Section 30-37-3.3	
	Human trafficking for a sexual purpose when victim is younger than 16, NMSA 1978, Section 30-52-21	
	Child solicitation by electronic communication device, NMSA 1978, Section 30-37-3.2(C)	
	Solicitation to commit criminal sexual contact of a minor, NMSA 1978, Sections 30-9-13 and 30-28-3	
	Attempt to commit any tier 2 sex offense	

Section 3. The bill amends NMSA 1978, Section 29-11A-4 (1995) to specify that a juvenile sex offender register with the Children, Youth, and Families Department “within 3 business days of release into the community after adjudication for a sexually violent offense.” The bill also changes the requirement that individuals register with the county sheriff no later than 3 business days *instead of 5 business days* under existing law and requires that the registration happen in person. This 3-day, in-person registration requirement is also extended to individuals with qualifying offenses who move to New Mexico, and applies to individuals who reside in another state but are employed in New Mexico or attending public or private school or a higher education institution in New Mexico.

Moreover, any changes of information under this statute must immediately be reported to the county sheriff. The 3-day, in-person requirement also applies to instances in which a sex offender changes residence to a new county. This 3-day, in-person requirement applies to homeless individuals, as well.

The bill also specifies that sex offenders convicted of (A) a tier 3 sex offense must verify registration information every 90 days for the offender’s natural life, (B) a tier 2 sex offense must verify registration information every six months for 25 years, and (C) a tier 1 sex offense must verify registration information annually for 15 years. The bill also specifies the frequency for sex offenders with out-of-state convictions. A juvenile sex offender must register until they turn 21 years of age or until CYFD releases the offender from supervision.

The bill specifies that a sex offender is only “relieved of the in-person verification requirements...if the sex offender is confined to a hospice facility or skilled nursing home.”

Finally, to apparently clear any confusion, the bill requires that a sex offender appear *in person* to notify the county sheriff “after a sex offender’s change of name, change of residence, change of employment or change in student status.”

Section 5. The bill clarifies that the department shall retain registration information for life for individuals convicted of a tier 3 sex offense, for 25 years for an individual convicted of a

tier 2 sex offense, and for 15 years for an individual convicted of a tier 1 sex offense. CYFD shall retain registration information regarding a juvenile sex offender until the offender turns 21 years of age, at which point CYFD must notify the department and the department shall remove all information about the juvenile sex offender from the department's database and all law enforcement databases.

Section 6. For a sex offender convicted of a tier 2 or tier 3 sex offense or otherwise "required to register as a lifetime sex offender as a result of an out-of-state conviction," the sheriff shall forward registration information to the district attorney or chief law enforcement officer of a municipality.

Further, the bill makes a significant change to the information that must be displayed on a website. The bill now requires the publication of an offender's place of employment. Such information was only previously required if the person's employment directly involved contact with children.

Also, several technical changes are made throughout the bill, mostly changing references of "sex offenders" to "sex offender," or references of "he" or "his" to "sex offender" or "sex offender's," respectively.

FISCAL IMPLICATIONS

Some expansions to SORNA in this bill are likely to cause an increase in LOPD caseloads because defendants may be more likely to take their chances at trial when there is no way to plea bargain out of registration. More trials mean greater resource expenditures. Additionally, people who violate their responsibility to register under SORNA can be charged criminally with failure to register as a sex offender, so having more registrants can directly translate to having more criminal cases for failure to register. It is not clear exactly how many people would be required to register under the proposed changes—for example, LOPD has no way to estimate how many nonresident sex offenders own residential property in New Mexico.

While the LOPD would likely be able to absorb some cases under the proposed law, 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 increased burdens imposed on sex offenders and in effective amendment of substantive criminal law statutes. The change from a 5-day registration requirement to a 3-day, *in-person* registration requirement places a significant and unduly onerous burden on sex offenders. While federal law requires the 3-day registration and periodic in-person verification, see U.S.C. §§ 20913, 20918, these changes to New Mexico law pose barriers for individuals who do not live in major cities (e.g. Albuquerque, Rio Rancho, Santa Fe, Las Cruces), lack transportation and job flexibility, and may find it difficult to comply with these requirements. Further, the bill is explicit in imposing this requirement on homeless offenders. For similar reasons, it could be difficult for individuals to comply if they do not have access to public transit or a personal vehicle to ensure they register and verify with their county sheriff.

One option to ease the burden on offenders would be to open the exception for in-person visits to include financial or transportation difficulties. The bill currently only exempts offenders “confined to a hospice facility or skilled nursing home” from in-person verification requirements. This is an incredibly narrow exemption. Moreover, it is unclear what the bill intends skilled nursing home to mean, and whether that would cover any nursing facility or only certain ones.

This matters because the penalty for failure to willfully or knowingly comply with the registration or verification requirements is guilty of a fourth-degree felony for a first offense and a third-degree felony for a second and subsequent offense. *See* NMSA 1978, Section 29-11A-4(Q) (as amended in the bill).

The other issue deals with this bill’s specification that certain crimes qualify as a sex offense based on a special finding that the offender knew or should have known that the victim was younger than 16 years of age. For example, the bill adds Section 30-9-3, the statute criminalizing patronizing prostitutes as a qualifying sex offense. However, Section 30-9-3 does not provide a particular penalty when the crime involves a person younger than 16 years of age, nor does the statute specify the jury could make such a finding. It is unclear *who* and in what type of proceeding, the requisite finding triggering registration requirements would be made, nor who would bear the burden of proving the added mens rea and by what form of evidence.

In so doing, the bill amends Section 30-9-3 by reference, creating a specific form of “patronizing prostitutes” that is not actually defined within Section 30-9-3. This is in violation of the New Mexico Constitution, Article 4, Section 18. Specifically, Article 4, Section 18 of the NM Constitution specifies: “No law shall be revised or amended, or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended or extended shall be set out in full.” Generally, only procedural law can be amended by reference and there is a legitimate argument that this bill amends substantive law, in this case the crime of patronizing prostitution, in violation of the constitution.

This issue would also seem to apply to promoting prostitution in Section 30-9-4, and accepting earnings of a prostitute in Section 30-9-4.1.

Finally, the last issue worth noting is that this bill removes the limitation on publishing an offender’s place of employment on the department’s website. Under current law, only offenders whose place of employment requires the offender to have direct contact with children is published on the website. The bill would remove the direct contact with children requirement

and require that the department list a sex offender's place of employment on the website. While it is clear that this serves a public safety function it also is likely to make it harder for sex offenders to obtain and maintain employment since potential employers would be known to employ an offender, and therefore disinclined to hire them. For rehabilitation and reintegration to ever succeed, the system must also exercise grace towards offenders by enabling employment. The additional requirements further stigmatize offenders who already have myriad practical roadblocks to living a productive life. A more sensible approach would be to maintain the direct contact with children requirement without requiring employment information on the website.

PERFORMANCE IMPLICATIONS

Amending registration requirements presents unique practical challenges for offenders to understand their obligations, and for law enforcement and courts to readily understand when those requirements have been violated. Indeed, the jury instructions regarding "failure to register" offenses includes a complex chart of SORNA versions, applicability provisions, and thus registrable offenses based on offense date, which includes the following use note guidance for attorneys and courts:

New Mexico's Sex Offender Notification and Registration Act ("SORNA") has been amended multiple times since it first was enacted. Different versions of SORNA also impose different requirements on someone subject to its provisions. Consequently, the necessary first step in correctly instructing a jury on the essential elements of an alleged SORNA violation is to identify which version of the statute applies. This chart is to be used to determine which version of the statute applies and to provide guidance in selecting the correct elements instruction from the instructions that follow. When using the chart to determine the applicable version of SORNA, it is important to first look at when a person was convicted of a sex offense as well as when a person completed their sentence for that sex offense. Second, it is important to determine whether or not the "sex offense" was a registerable offense under the applicable version of SORNA before proceeding further.

UJI 14-990 NMRA, Use Note 1.

The proposed amendments in HB 282 are significant enough (both adding new offenses and changing the registration periods and requirements to almost all registrable offenses prospectively) that they would present exponentially greater challenges in enforcement and ensuring knowing / culpable violations.

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

This bill is germane pursuant to House Executive Message Number 40.

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS