

LFC Requester:	Connor Jorgensen
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**AGENCY BILL ANALYSIS
2013 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

And

DFA@STATE.NM.US

{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 X **Amendment**
Correction **Substitute**

Date 01/30/13
Bill No: HB 304--305

Sponsor: Rep. Gail Chasey
Short Human Trafficking Civil
Title: Remedies & Services

Reviewing Attorney General's Office
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SECTION II: FISCAL IMPACT **FOR LFC OFFICIAL PURPOSES******
AGO STAFF SHOULD LEAVE SHADED AREAS BLANK

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY13	FY14		

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:

Duplicates/Relates to Appropriation in the General Appropriation Act

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY13	FY14	FY15		

(Parenthesis () Indicate Expenditure Decreases)

Duplicates, Relates to, Conflicts with, Companion to

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

SECTION III: NARRATIVE

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Opinion Letter. This is a staff analysis in response to the agency's committee's or legislator's request.

BILL SUMMARY

Summary Synopsis:

Section 1 includes new statutory language codifying the ability of a human trafficking victim to bring a civil action against the defendant for actual, compensatory and punitive damages and injunctive relief, reasonable attorneys fees and costs, with the possibility of treble damages where the court finds the defendant's actions were willful and malicious, as well time limitations for filing.

Section 2 would amend Section 30-52-1(E) to provide that a victim is not to be charged "with crimes committed due to coercion by a person committing human trafficking."

Section 3

Amends Section 30-52-2(A) to add four additional benefits and services provided to human trafficking victims to include child care, legal assistance, state-funded cash assistance and food assistance, as well as authorizing the human services department to conclude other general assistance services and benefits should be provided.

Adds requirement in Section 30-52-2(B) that victim advocate "from the district attorney's office" be provided "immediately" upon identification of a "human trafficking victim".

Adds new Section 30-52-2(C) providing that "a victim's ability to cooperate", presumably with the Section 30-52-2(A) requirement that a victim cooperate in the human trafficking investigation or prosecution in order to be eligible for benefits and services, shall be determined by the court if raised by the victim advocate "from the district attorney's office."

Adds new Section 30-52-2(D) providing that the attorney general coordinate law enforcement agencies to provide victims or family members "protection from retaliatory action" "immediately upon identifying the presence in the state of a victim who offers" law enforcement information regarding a human trafficker.

Adds new Section 30-52-2(E) providing the "prosecuting authority" take "all reasonable steps within its authority" to provide the victim 1.) all necessary documentation under federal law for adjustment of immigration status, and 2.) assistance in accessing civil legal service providers to petition for adjustment of immigration status.

Amends the definition of "human trafficking victim" by removing the requirement that a person has been charged in New Mexico with the crime of human trafficking, leaving only "a person subjected to human trafficking".

Adds new definition of "human trafficking victim advocate".

Adds human trafficking to the enumerated list of crimes to which the Crime Victims Reparation

Act applies and for which reparations to victims may be made.

FISCAL IMPLICATIONS WITH ENACTING THIS BILL

SIGNIFICANT LEGAL ISSUES

The Section 1 codification of a human trafficking victim bringing a civil action against the defendant for damages and injunctive relief is something that can already be accomplished under current civil law. Additionally, in current Section 30-52-1(F), upon conviction, a human trafficking defendant must make restitution to the victim for the gross income or value of labor or services, and actual damages pursuant to Section 31-17-1 Victim Restitution.

Section 2 amendment to Section 30-52-1(E) providing that a victim is not to be charged "with crimes committed due to coercion by a person committing human trafficking" creates a problem in that, a violation of Section 30-52-1(2) obtaining a minor to engage in commercial sexual does not require force, fraud or coercion. Cases with minor victims often do not have any evidence of coercion, which is the precise reason that this element is not required in the statute as the charge relates to minors. The language utilized in the bill, proposes not charging victims with "crimes committed due to coercion", which still leaves the potential of minor being charged with human trafficking related crimes, such as prostitution. Additionally the case involving the minor victim may have no evidence of coercion.

The Section 3 amendment to Section 30-52-2(A) adding four additional benefits and services provided to victims, to include child care, legal assistance, state-funded cash assistance and food assistance, does not have an accompanying appropriation to CYFD and HSD. This amendment also changes the "may" to a mandatory "shall" (Page 5, line 6). Without an appropriation, it is unclear if CYFD or HSD are equipped to provide the additional listed benefits. It is also unclear whether providing legal assistance is within the legal purview of either of these agencies.

The purpose of Section 3 new Section 30-52-2(C) providing that "a victim's ability to cooperate" be adjudicated if raised by the victim advocate is unclear. Is it to provide a basis for an exception that the victims cooperate in order to be eligible for benefits and services? Is it to provide a basis for terminating or denying benefits and services? Placing the responsibility upon the victim advocate to "raise the issue", and then presumably give factual reasons why the victim is not cooperating places the advocate at odds with the victim and implicates advocate-victim confidentiality.

In new Section 3, Section 30-52-2(D), the bill imposes requirements on the NM Attorney General's Office that it is not equipped to provide. Additionally there is not a corresponding appropriation to fund the additional proposed requirements. The requirements of this section would also involve providing an unprecedented level of protection, not provided to victims of any other state crime and their families. This will exceed the statutory and jurisdictional authority of these agencies.

The immigration related services listed in new Section 3, Section 30-52-2(E) are federal in nature and jurisdiction. Further, many of the human trafficking cases in which adjustment of immigration status is appropriate for the victim will be prosecuted federally, to which this section would be inapplicable.

The change in the definition of "human trafficking victim" in new Section 3, Section 30-52-2(F)

contradicts the federal definition. This change also removes the requirement that a person be charged in New Mexico with human trafficking, which serves as a threshold determination on who is eligible to receive benefits. Under the proposed language, one would need to only claim to be a human trafficking victim, and they would be eligible to receive benefits, even though a criminal case has not been filed. Therefore, 30-52-2A takes on new meaning by allowing a self-identifying victim to receive benefits and service from the state until the victim qualifies for federal benefits. With this proposed change and resulting inconsistency with the federal and state definition, it is critical to note that this victim will not qualify for federal benefits, absent a corresponding criminal charge against the trafficking offender.

The self-identifying victim would also be entitled to immediate services referenced in this bill, such as "a human trafficking victim advocate or a victim advocate from a district attorneys office," and "protection" for themselves and their family "from retaliatory action." This bill places that responsibility on the Attorney General's Office by the language in Section 3, new Section 30-52-2(D). Absent a criminal case, it is unlikely that the Attorney General's Office, District Attorney or law enforcement would be aware of the victim. Also it is not likely these agencies would have the resources to provide these services for anyone claiming to be a victim of human trafficking with no requirement of substantiation that typically presents itself through investigation and subsequent charging.

On various occasions, this bill refers to "the District Attorneys" and the "Attorney General" which ignores the concurrent jurisdiction shared by these agencies relative to human trafficking prosecutions and may create confusion.

The bill also implicates victim advocate-victim confidentiality. The Section 3 addition of the definition of "human trafficking victim advocate" lumps advocates that are employed by the state with advocates from non-profit agencies. This is dangerous in that the confidentiality between victims and state prosecution office victim advocates, and confidentiality between victims and victim advocates from non-profits are not the same. Compare State ex rel Brandenburg v. Blackmer, 137 N.M. 258 (N.M. S.Ct 2005), in which the Court ruled that while a state victim advocate was part of the prosecution team protected by work product doctrine, the State was required by Rule 5-501 to disclose statements made by the victim to the state victim advocate; and Albuquerque Rape Crisis Center v. Blackmer, 138 N.M. 398 (N.M. S.Ct. 2005), in which the Court held that the Victim Counselor Confidentiality Act was consistent with the Rule 11-504 psychotherapist-patient privilege and was to be given effect, reversing the district court order granting defendant's motion to compel rape crisis counselors to disclose communications from the victim.

PERFORMANCE IMPLICATIONS WITH ENACTING THIS BILL

ADMINISTRATIVE IMPLICATIONS WITH ENACTING THIS BILL

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP WITH BILLS INTRODUCED THIS SESSION

TECHNICAL ISSUES OR DRAFTING ERROR

OTHER SUBSTANTIVE LEGAL ISSUES

ALTERNATIVES TO ENACTING THIS BILL

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL
AMENDMENTS NEEDED TO IMPROVE THIS BILL