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FISCAL IMPACT REPORT

SPONSOR Garratt/Hickey/Gurrola **LAST UPDATED** _____
ORIGINAL DATE 2/9/2023
SHORT TITLE Discharging Firearm in Dense Population Areas **BILL NUMBER** House Bill 238
ANALYST Tolman

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Costs to NMCD	\$0.0	At least \$26.6	At least \$37.6	At least \$64.2	Recurring	General Fund
Total	\$0.0	At least \$26.6	At least \$37.6	At least \$64.2	Recurring	General Fund

Parentheses () indicate expenditure decreases.

*Amounts reflect most recent analysis of this legislation.

Relates to House Bill 224

Sources of Information

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
Administrative Office of the District Attorneys (AODA)
Law Offices of the Public Defender (PDD)
Office of Attorney General (NMAG)
New Mexico Sentencing Commission (NMSC)
Corrections Department (NMCD)
Department of Public Safety (DPS)

No Response Received

Department of Health (DOH)

SUMMARY

Synopsis of House Bill 238

House Bill 238 (HB238) creates a new criminal offense of unlawful discharge of a firearm in a densely populated area, unless that person is a peace officer or other public employee authorized to use a firearm and acting in the course of their lawful duties. The penalty for violating this new criminal offense is a fourth-degree felony.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023,

(90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

Incarceration drives costs in the criminal justice system, so any changes in the number of individuals in prison and jail and the length of time served in prison and jail that might result from this bill could have moderate fiscal impacts. 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 jails, consequently increasing long-term costs to state and county general funds. The Corrections Department (NMCD) reports the average cost to incarcerate a single inmate in FY22 was \$54.9 thousand; however, due to the high fixed costs of the state's prison facilities and administrative overhead, LFC estimates a marginal cost (the cost per each additional inmate) of \$26.6 thousand per year across all facilities. HB238 is anticipated to increase the number of incarcerated individuals and increase the time they spend incarcerated.

The proposed new crime of unlawful discharge of a firearm in a densely populated area is a fourth-degree felony, which carries an 18-month prison sentence; the Sentencing Commission (NMSC) estimates the average length of time served by offenders released from prison in FY21 whose highest charge was for a fourth-degree felony was 516 days. Based on the marginal cost of each additional inmate in New Mexico's prison system, each offender sentenced to prison for this crime could result in estimated increased costs of \$37.6 thousand to NMCD.

It is difficult to estimate how many individuals will be charged, convicted, or get time in prison or jail based on the creation of a new crime. Without additional information, this analysis assumes at least one person will be admitted to prison each year for this crime, at a cost of \$37.6 thousand. Because the estimated time served is greater than one year, the costs of one year (\$26.6 thousand) would be incurred in the first year of incarceration, while the cost of the remaining 151 days (\$11 thousand) would be incurred in the second year of incarceration. To account for time to adjudication, no costs are anticipated to be incurred until one year after the bill takes effect, in FY25. Because the estimated time served is greater than one year, costs are anticipated to increase in FY26; offenders admitted in FY25 would be serving the remainder of their terms as other offenders are being admitted. The costs would then level out as offenders begin to be released from prison and remain level in future fiscal years.

Additional increased system costs beyond incarceration, such as costs to the judicial branch for increased trials or to law enforcement to investigate and arrest individuals for the new crimes under HB238, are not included in this analysis, but could be moderate.

The Administrative Office of the Courts (AOC), Administrative Office of District Attorneys (AODA), and Law Office of the Public Defenders (PDD) all note administrative costs could increase, which 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. The AOC states that, as penalties become more severe, defendants may invoke their right to trial and their right to trial by jury. More trials and more jury trials will require additional judge time, courtroom staff time, courtroom availability, and jury fees. NMCD also notes the fiscal impacts would be expected to be minimal based on the increased caseload within the prisons, probation, and parole departments.

SIGNIFICANT ISSUES

The lack of definition provided by HB238 for “densely populated area” could be challenged as unconstitutionally vague. PDD cites *Swafford v. State*, which states, “The rule that criminal statutes must be sufficiently clear and definite to inform a person of ordinary intelligence what conduct is punishable.” PDD notes litigation over whether the statute applies to a particular area and whether the statute is unconstitutionally vague can be expected, citing *State v. Tsoisie*, which applies “a two-part test for vagueness, considering whether the statute (1) fails to provide persons of ordinary intelligence using ordinary common sense a fair opportunity to determine whether their conduct is prohibited, or (2) fails to create minimum guidelines for enforcement and thus encourages subjective and ad hoc application of the law.”

NMSC states the statute is unconstitutionally vague under both the New Mexico and the U.S. constitutions. Statutes are found to be unconstitutionally vague, in violation of due process, “if the statute either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application.” (*State v. Segotta*¹; See also *Connally v. General Construction Co.*²)

DPS further states HB238 may be challenged as unconstitutionally vague be a person could have difficulty determining if they live in a densely populated area, and so would not have notice that the law applied to them. A statute is unconstitutionally vague if it “(1) fails to provide persons of ordinary intelligence using ordinary common sense a fair opportunity to determine whether their conduct is prohibited, or (2) fails to create minimum guidelines for enforcement and thus encourages subjective and ad hoc application of the law.” (*State v. Duttie*³)

AOC, AODA, and DPS note the proposed law created by HB238 is likely already addressed by “Negligent Use of a Deadly Weapon”, NMSA1978, Section 30-7-4, which states:

- A. **Negligent** use of a deadly weapon consists of:
 - (1) discharging a firearm into any building or vehicle or so as to knowingly endanger a person or his property;
 - (2) carrying a firearm while under the influence of an intoxicant or narcotic;
 - (3) endangering the safety of another by handling or using a firearm or other deadly weapon in a negligent manner; or
 - (4) discharging a firearm within one hundred fifty yards of a dwelling or building, not including abandoned or vacated buildings on public lands during hunting seasons, without the permission of the owner or lessees thereof.
- B. The provisions of Paragraphs (1), (3) and (4) of Subsection A of this section shall not apply to a peace officer or other public employee who is required or authorized by law to carry or use a firearm in the course of his employment and who carries, handles, uses or discharges a firearm while lawfully engaged in carrying out the duties of his office or employment.
- C. The exceptions from criminal liability provided for in Subsection B of this section shall

¹ <https://nmonesource.com/nmos/nmsc/en/385263/1/document.do>.

² <https://supreme.justia.com/cases/federal/us/269/385/>

³

not preclude or affect civil liability for the same conduct.
Whoever commits negligent use of a deadly weapon is guilty of a petty misdemeanor.

AODA, NMAG, and NMSC also note the proposed bill appears to create a strict liability for the new crime because there are no exceptions states. For example, AODA notes there are no exceptions for self-defense, defense of others, or other justifiable use. NMSC notes there are no exceptions for shooting ranges, lawful self-defense, organized competitions involving firearms, and other circumstances under which the discharge of a firearm would otherwise be lawful. The NMAG notes it is unclear if the intent of the bill is to create a strict liability crime or if some level of *mens rea* (intent) is missing from the bill. NMAG states even the accidental or unintentional discharge would be subject to prosecution.

PERFORMANCE IMPLICATIONS

AOC notes the courts are participating in performance-based budgeting, and the bill may have an impact on the measures of the district courts in the areas of cases disposed as a percent of cases file and percent change in case filings by case type.

PDD notes that, because the statute does not define what constitutes a “densely populated area,” litigation over whether the statute applies to a particular area and whether the statute is unconstitutionally vague can be expected (see sections on “Significant Issues” and “Technical Issues”). This bill would have the result of imposing different penalties for the same conduct based solely on the geographic location of the offender, which appears to treat city-dwellers more harshly than individuals who reside in smaller communities. This distinction could lead to equal protection constitutional challenges.

ADMINISTRATIVE IMPLICATIONS

NMAG states it would have to determine what “densely populated area” means without a clear definition in law (see section on “Technical Issues”).

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

AOC, PDD, NMAG, and the Department of Public Safety (DPS) all noted HB338 relates to, conflicts with, or duplicates HB224, which also creates a new fourth-degree felony for the offense of carrying a firearm while under the influence of an intoxicant or narcotic in a “high population district.” HB224 defines a high population district as having a population of more than 90 thousand.

TECHNICAL ISSUES

AOC, AODA, PDD, NMAG, NMSC, and DPS noted that “densely populated area” is not defined. PDD states the term does not have a commonly understood meaning and is subject to interpretation. NMAG notes HB238 does not provide any objective measurement or other description, and no other similar term exists in this area of law in New Mexico. This will create an interpretation problem that will affect the application, enforcement, and prosecution of the crime.

RT/mg/hg/mg