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FISCAL IMPACT REPORT

LAST UPDATED _____

SPONSOR Roybal Caballero/Herndon **ORIGINAL DATE** 3/17/2023

BILL

SHORT TITLE Independent Review of Force Act **NUMBER** House Bill 503

ANALYST Daly

APPROPRIATION* (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY23	FY24		
	\$2,000.0	Recurring	General Fund

Parentheses () indicate expenditure decreases.
*Amounts reflect most recent version of this legislation.

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
DPS	No fiscal impact	\$1,700.1 to \$6,800.1	\$1,163.2 to \$4,536.1	\$2,763.3 to \$11,336.2	Recurring	General Fund
NMAG Investigations	No fiscal impact	See Fiscal Implications			Recurring	General Fund
NMAG Prosecutions	No fiscal impact				Recurring	General Fund
District Attorneys and Other State Agencies	See Fiscal Implications				Recurring	General Fund
Local Law Enforcement Agencies	No fiscal impact	up to \$5,100.3	up to \$3,372.9	up to \$8,473.2	Recurring	County Operating Funds

(Parenthesis () Indicate Expenditure Decreases)
*Amounts reflect most recent version of this legislation.

Relates to/may conflict with Senate Bill 252
Conflicts with Senate Bill 265

Sources of Information

LFC Files

Responses Received From
Administrative Office of the District Attorneys (AODA)
Department of Public Safety (DPS)
Public Defender Department (PDD)

Corrections Department (NMCD)
Sentencing Commission (NMSC)

SUMMARY

Synopsis of House Bill 503

House Bill 503 enacts the Independent Review of Force Act, which provides procedures for investigation and, if justified, prosecution of a law enforcement officer who in the course of the officer's duties uses deadly force against a person and that person suffers death or serious bodily injury. It creates a Citizen Review Board (CRB) to review and take action at various times throughout the process, and amends existing law governing district attorneys to provide consistency with the act.

Notification and Appointment. When an officer uses deadly force, the chief law enforcement officer of the agency that employed the officer must notify NMAG and Secretary of Public Safety within 24 hours. The victim of the use of deadly force or certain related persons may also submit a complaint to NMAG. NMAG must then notify the CRB within 24 hours. The District Attorney of the district in which the incident occurred is divested of jurisdiction over the case in favor of the CRB's selection, within 72 hours of receiving notification, of a prosecuting attorney at random from the special prosecutor database it establishes and maintains. Specific conflict of interest criteria must be satisfied in the appointment, which may exclude a particular prosecutor from serving in a specific case.

Investigation. DPS shall assist in investigations, including assigning a multi-agency task force or law enforcement agency (LEA) to lead investigations if requested. The LEA that employs the officer being investigated cannot lead or be part of a taskforce, but may assist if requested. If a state police officer is involved in the incident, the case it will be assigned to another LEA or task force appointed by the DPS Secretary.

Determination regarding Prosecution. The special prosecutor shall determine within 75 days if there are sufficient grounds to prosecute for criminal conduct. If the prosecutor declines to prosecute, the prosecutor shall provide public, detailed report of findings and reasoning not to prosecute, which shall be transmitted to the CRB and the NMAG. Within seven days, the CRB will review that report and approve or disapprove it. If approved, jurisdiction and power to investigate and prosecute would be returned to the District Attorney of the judicial district in which the incident occurred. Upon disapproval, the Board must detail its reasons for disapproval in a written statement and notify NMAG within 75 days. NMAG shall review the case, conduct any additional investigation and determine if sufficient grounds exist for prosecution within 75 days.

Action Following Prosecution or Non-prosecution. If the officer is convicted of a crime, the officer shall be decommissioned, terminated, and decertified. If the officer is charged but not convicted, CRB shall determine a binding disciplinary action implemented by the LEA that employs the officer. If the officer is not charged and prosecuted, CRB shall make a non-binding recommendation for disciplinary action by the employing law enforcement agency. If the agency declines to take that action, it shall notify the CRB of its reasoning in a public document.

Composition and Other Responsibilities of CRB. The CRB consists of a chair appointed by

NMAG, a vice chair appointed by the governor, another vice-chair appointed by DPS, and one citizen resident from each judicial district, appointed by majority action of the chair and vice-chairs. Members are entitled to per diem and mileage for their services. Among other duties set out in Section 7, CRB establishes and maintains the special prosecutor data base containing at least three prosecuting attorneys from each judicial district who meet the qualifications set by rule by the NMAG. The governor, the NMAG and the district attorney of each judicial district shall nominate candidates for consideration by CRB.

Costs. HB503 requires the costs of investigation by DPS, or a multi-agency task force or other LEA, be paid by the public entity that employs the officer under investigation. The costs incurred by the special prosecutor are to be reimbursed by the District Attorney's office in the judicial district in which the conduct is alleged to have occurred.

House Bill 503 appropriates \$2 million from the general fund to the New Mexico Attorney General for expenditure in FY24 through FY26 for the purposes of the Independent Review Act.

The effective date of this bill is July 1, 2023.

FISCAL IMPLICATIONS

Appropriation. The appropriation of \$2 million contained in this bill is recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of FY26 shall revert to the general fund.

Operating Budget Impact:

Investigation Costs. DPS/ New Mexico State Police (NMSP) reports it would need to create a new Use of Force Unit in the Investigations Bureau to carry out the provisions of the legislation. According to DPS, the Unit needs one lieutenant to oversee the Unit, two sergeants and 10 agents to create two sections housed in Albuquerque and Las Cruces to respond to, and conduct investigations, one sergeant and six agents in a crime scene team to respond to locations to collect evidence, and three civilian positions (two Data Analyst Is and one Business Operations Specialist) to collect, analyze, and disseminate data to stakeholders and process paperwork for the new Unit. The total estimated cost to staff the new Unit with 23 positions is \$6,800,100 in FY24 including the initial purchase of investigative equipment, network server, vehicles, and furniture. The recurring cost will be \$4,536,100 in FY25 and future years.

DPS provides this breakdown of its FY 24 estimate:

Description of Request	Total Request
Investigation Unit 2 Supervisors; 10 Investigators	\$1,189.5
Crime Scene Unit 1 Supervisor; 6 Investigators	\$695.1
1 Supervisor - 2 Units	\$143.5
Unit Support Staff 2 Data Analysts; 1 Business Operations Specialist A	\$244.5
Additional Manhours not currently provided by NMSP	\$1,830.4
Other Cost (Vehicles, Uniforms, IT Equipment, Training, Travel, Fuel, etc.)	\$2,697.1
Total	\$6,800.1

DPS advises that the expenses estimated above are based on NMSP investigations of cases traditionally considered to involve the use of deadly force or in-custody deaths. The expansive definition for use of deadly force that is found in HB503 could dramatically increase these estimates depending upon how “serious bodily injury” is interpreted. Further, DPS notes that under HB503, DPS would be required to pay for expenses associated with any outside investigation and review of incidents involving its own officers.

The entirety of this \$6.8 million estimated cost increase could be incurred by DPS in FY24 and an estimated recurring \$4.5 million in future fiscal years in the event the agency is not reimbursed for any of its costs related to investigations. However, assuming some cost sharing, the additional operating budget impact to DPS could be significantly lower, but would likely not be reduced to zero. These cost estimates rely on the following assumptions:

- LEAs reimburse DPS for all investigation costs and additional hours for HB503 investigations;
- The remaining staffing costs (supervisors and crime scene technicians) would be split, with LEAs covering 75 percent of costs and DPS paying 25 percent for times when those personnel were not directly working on a reimbursable investigation; and
- DPS is responsible for all training costs.

This would result in an average annual cost increase to LEAs of \$5.1 million and to DPS of \$1.7 million in the first year, and an LEA increase of \$3.4 million and a DPS increase of \$1.2 million in future fiscal years. As a result, this analysis estimates an increase in costs to DPS between \$1.7 million and \$6.8 million in FY24 and between \$1.2 million and \$4.5 million in future fiscal years. The increase in costs to LEAs is estimated to be up to \$5.1 million in FY24, and up to \$3.3million in future fiscal years.

However, DPS believes any sort of reimbursement would be difficult to manage, and asserts implementing this bill would be more efficiently handled with a recurring budget increase. In addition, DPS advises there are several rural law enforcement agencies throughout the state in

areas with underserved populations and small tax bases who do not have the financial capability to reimburse DPS for such expenditure.

Prosecution Costs. HB503 is anticipated to result in additional prosecution costs, but estimates of those costs were not available at the time of this analysis.

Other Cost Impacts. The 15 CRB members are entitled to mileage and per diem. It is also unclear if or to what extent this law would result in more law enforcement officers being convicted of crimes and incarcerated within county jails or the state prison system. To the extent that the bill increases the prison population, NMCD would incur additional costs. 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 inmate per year across all facilities. Additional fiscal impact on the judiciary would be proportional to commenced prosecutions, trials and appeals from convictions. Prosecution of law enforcement officers, which are generally complex, would require more court resources.

SIGNIFICANT ISSUES

Commenting on Section 3(C)'s language divesting jurisdiction of the local district attorney in favor of a special prosecutor randomly appointed by CRB, AODA asserts that a special prosecutor will not have the resources available to a district attorney, including staff, data bases, and experienced prosecutors. It also notes that the time to report, refer and obtain a designation of a special prosecutor will cause the loss of valuable time before an investigation can begin, and witnesses and evidence could possibly disappear. It also warns that a special prosecutor leading and directing DPS in the investigation could cause ethical and legal problems, since state prosecutors do not lead criminal investigations in New Mexico. PDD, on the other hand, suggests that creating a procedure for reporting incidents of deadly force and use of a special prosecutor may result in a more neutral evaluator to determine whether to pursue charges.

DPS challenges the definition of “deadly force” used in the bill:

Its scope basically defines any use of force as deadly force. The definition adds the word “violent” requirement to the force used; however, violent is not defined, nor will it be immediately understood by law enforcement given that many forms of less lethal weapons are included in the definition for deadly force, including stun gun, tear gas, chemical weapon or kinetic impact projectile from a propulsion device. These are all authorized alternatives to deadly force, which are never likely to create a “substantial risk of causing death or great bodily harm,” but HB503 would label their use as deadly force. The DPS suggests that this definition be simplified to the following: “deadly force” means the degree of force which is likely to cause death or great bodily harm.” Likewise, the Board's [role] should be limited to cases involving great bodily harm, which has been well defined as a matter of law.

HB503 contains a definition of “great bodily harm”, but then uses the phrase “serious bodily injury” in Section 3 when setting forth the procedures to be followed in a use of deadly force case. Use of the defined term might be more consistent within the bill and with existing law.

DPS also questions the 24-hour timeframe for notification of use of deadly force:

While an occurrence may be known and reportable within twenty-four hours, the details, including names of the individuals involved, will not be. DPS has an internal policy, OPR: 29 Investigation of Use of Force Incidents Involving Death or Great Bodily Harm that requires DPS to inform officers involved in these incidents that they are entitled to legal representation and are not to be interviewed for at least forty-eight (48) hours. Sometimes the interviews are postponed for more than forty-eight hours in order to coordinate with the schedules of involved attorneys. Depending upon the situation, DPS may not know with certainty who among several officers were involved in a situation or what occurred for some time. DPS suggests the written notice requirement be changed from “[w]ithin twenty-four hours” to, “as soon as practicable following investigatory interviews of all officers believed to have knowledge of the in-custody death, or use of deadly force causing great bodily harm or death.”

In addition, DPS takes issue with Section 4(C)’s requirement that when it is a DPS officer-involved incident, the investigation shall be conducted by another law enforcement agency or multi-agency task force. It comments:

This is particularly problematic when it comes to the crime scene portion of any officer involved investigation, because of its extremely technical nature. NMSP handles most rural agencies’ crime scenes for this exact reason and there are likely to be no other capable resources in many areas of the state.

The public or non-public nature of the notifications and other determinations required under HB503 also raise issues. DPS notes that requiring release pursuant to Section 3(F) of the officer’s name in the event of a determination not to prosecute is contrary to existing law, which makes the release of the identify of a person accused but not charged unlawful under the Arrest Record Information Act at Section 29-10-4, NMSA 1978. Yet, as the PDD points out, there is no requirement to make public the CRB report of approval or disapproval of a special prosecutor’s decision not to prosecute.

Further, both DPS and NMSC point out the provisions in Section 5 that apply when an officer is charged and prosecuted but not convicted of a crime. The CRB is directed to determine a binding disciplinary action, up to and including involuntary restitution, termination and decertification, which must be implemented by the law enforcement agency which employs the officer. Such action is required even in the face of an acquittal. DPS and NMSC raise due process issues with this directive, and NMSC suggests this may violate the double jeopardy provision of the Fifth Amendment.

Finally, the bill as drafted appears to be internally inconsistent. In the definition of “deadly force case,” in-custody death is included. See Section 1(D). However, that term is not included in Section 3(A), which describes the instances in which the procedures in that section (covering reporting, appointment of a special prosecutor, investigation, and prosecution or CRB approval or disapproval of a prosecutorial determination not to prosecute) apply. Further, the deadly force case definition does not include serious bodily injury, which is included in Section 3(A). That definition does include in its coverage a citizen’s complaint of a law enforcement officer’s use of deadly force, yet it is unclear in HB503 how such a complaint is to be handled. While Section 3(B) authorizes the victim or a person related to the victim in one of the enumerated capacities to submit a complaint to the NMAG, that language is limited to those specifically identified, and

does not include a “citizen” to submit a complaint. Similarly, while one of the duties of the CRB is to “receive complaints from civilians regarding an alleged use of deadly force” by an officer, see Section 7(C), the procedures outlined in the bill do not direct how such a complaint is to be handled, including whether each such complaint is to be referred to a special prosecutor.

Other duties assigned to the CRB in Section 7 appear to be in conflict with specific provisions of HB503. For example, Section 7(H) requires the board “recommend an independent task force or law enforcement agency to conduct investigations”, which seems to run counter to language in Section 3(E), which grants jurisdiction over the investigation to the appointed special prosecutor. More specifically, Section 4(C) directs that prosecutor to request a law enforcement agency or multi-agency task force to conduct investigations in the event the officer under investigation is employed by DPS, and specifies that DPS shall then appoint the agency or members of the task force to conduct investigations. Section 7(E) directs the board to refer cases to the NMAG when a special prosecutor has declined to prosecute, but under Section 3(F), the board is to make such a referral only when it disapproves the declination.

In addition, Section 7(I) requires the board review investigations conducted under the act and issue findings regarding the accuracy, completeness and impartiality of the investigations, although, again, responsibility for those investigations are addressed in other sections of the bill. See Section 4(C). Subsection I also requires CRB to issue findings regarding “the sufficiency of any prosecution.” To the extent this directive goes beyond the board’s authority under Section 3(G), which authorizes it to disapprove a decision not to prosecute and provide the NMAG with a written disapproval statement, Subsection I appears to run counter to Section 3(H)’s recognition of prosecutorial discretion, which is applicable to both a special prosecutor and NMAG when it is acting in that role. Subsection I also requires the board make findings about any discipline resulting from an investigation, although Section 5 specifically imposes limits on CRB’s role in disciplinary matters following a declination to prosecute, a successful prosecution, or a unsuccessful prosecution as well. Section 5 expressly directs what action the board may take in each of those instances, so there appears to be nothing for the board to then make findings about.

CONFLICT, RELATIONSHIP

HB503 conflicts with SB265, In-Custody Death Investigation Procedures, which establishes a separate set of procedures for reporting, investigating and prosecuting (where appropriate) use of force cases resulting in great bodily harm or death, as well as all in-custody deaths. In SB265, there is no citizen review panel, or appointment of a special prosecutor; the District Attorney in whose district the incident occurs or the NMAG acts as the prosecutor.

HB503 also relates to, and may conflict with, SB252, Law Enforcement Officers Procedures Act, which requires the creation of a use of force database and a uniform procedure for law enforcement agencies to report officer-involved injuries or death.

TECHNICAL ISSUES

Page 4, line 7: the phrase “serious bodily injury” is used, although “great bodily harm” is a defined term in Section 2(E).

Page 11, line 6: refers to “vice chair appointed by the office of the attorney general”, although in Section 6(B)(2) it is the governor who appoints one of the vice chairs and DPS the other.

Page 12, lines 1-2: requires the CRB receive complaints from civilians alleging use of deadly force by an officer, while Section 3(B) authorizes only the victim or a person related to the victim to notify the NMAG of the use of deadly force.

OTHER SUBSTANTIVE ISSUES

Police Use of Force. Between 2017 and 2021, New Mexico had the second highest per capita rate of people killed by police, with 114 individuals killed, a rate almost triple the national average. New Mexico law enforcement agencies reported 59 officer-involved shootings to DPS in FY22, a 9 percent increase compared with the 54 reported FY21, but 48 percent more than the 40 reported in FY20. At least 25 individuals were killed during interactions with law enforcement officers, but the share of shootings that resulted in fatalities decreased slightly, from 46 percent in FY21 to 42 percent in FY22.

From 2016 to 2020, between 97 and 108 individuals were killed by police in New Mexico, an average rate of 9.3 to 10.3 per million residents per year, while the average national rate of individuals killed by police ranged from 3 to 3.3 per million residents per year. Comparatively, New York, with over nine times New Mexico’s population, saw roughly the same number of people killed by police during this period (between 90 and 109 individuals, an average rate of 0.9 to 1.1 per million residents per year).¹ While increased research has clarified some of the causes of police use of deadly force, effective solutions remain elusive.

NMSP investigates all of its officers’ uses of force and reports 248 uses of force in FY22, a 5.7 percent decrease compared to FY21 but 27.2 percent higher than FY20. New Mexico law enforcement agencies reported 58 officer-involved shootings in FY22, a 9 percent increase compared to FY21 and a 48 percent increase compared to FY20.

Although best practices for policing include increasing proactive interactions, focusing attention on serious offenders, and deploying more officers, these same practices may be more likely to lead to violent altercations between police and citizens. A 2015 analysis in the *American Journal of Criminal Justice* reviewed several studies of predictors of law enforcement officers’ use-of-force decisions and found more serious offenses, suspect resistance, arrests, citizen conflicts, additional officers, and police-initiated encounters are more likely to result in the use of force. Notably, whether an offender was armed did not have a significant effect on officers’ use-of-force decisions.

Minorities, males, and low-income suspects are also more likely to have force used against them. Officer race, education, and experience were not found to predict use of force, although male officers are more likely to use force than their female colleagues.

¹ Data on police killings sourced from the *Washington Post’s* Fatal Force project, which only includes fatal police shootings (<https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>), and Mapping Police Violence (mappingpoliceviolence.org), which includes all police killings regardless of the cause of death. Population data to calculate rates of police killings sourced from the U.S. Census Bureau.

Research suggests training policies regarding encounters with suspects are more likely to reduce rates of excessive force than policies regarding hiring practices of law enforcement officers. Common trainings aimed at addressing officer behavior include implicit bias training, de-escalation training, and crisis intervention training; evaluation of these programs' impact is limited, and initial research indicates they may not effectively alter long-term behavior without strong use-of-force policies and accountability. A new state law requires all law enforcement officers in New Mexico to wear body cameras and record much of their engagement with the public; however, research on the efficacy of body-worn cameras shows limited impacts on officer and citizen behavior or citizens' views of police.

DPS notes that committing acts of violence or brutality are grounds for discipline under the New Mexico Law Enforcement Training Act and rules promulgated pursuant to that Act. It advises that the Law Enforcement Academy Board has and regularly administers discipline for such acts, which can include suspension or revocation of the officer's license when a violation is found.

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