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FISCAL IMPACT REPORT

SPONSOR Roybal Caballero/ Chasey **ORIGINAL DATE** 06/19/20 **LAST UPDATED** _____ **HB** 7/ec

SHORT TITLE Law Enforcement Use of Force Reporting **SB** _____

ANALYST Rabin

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY20	FY21	FY22	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	See Fiscal Implications				Recurring	District Attorneys' Operating Funds
Total	See Fiscal Implications				Recurring	Attorney General's Office Operating Fund
Total	See Fiscal Implications				Recurring	NMCD Operating Fund
Total	See Fiscal Implications				Recurring	County Operating Funds

(Parenthesis () Indicate Expenditure Decreases)

Duplicates Senate Bill 17; Relates to Senate Bill 8

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (NMAG)

Public Defender Department (PDD)

SUMMARY

Synopsis of Bill

House Bill 7 establishes a policy for reporting an incident in which a peace officer's use of force against a person in the course of the officer's duties results in great bodily harm or death. In such a case, the sheriff or chief of police within whose district the incident occurred is mandated to report the incident to the district attorney of the area in which the incident occurred within 24 hours of the incident, who in turn must report it to the attorney general and the governor within

24 hours of being notified. Under the provisions of the bill, the governor is required to maintain a record of such reports, which is considered a public record and subject to the Inspection of Public Records Act (IPRA).

Within 72 hours of receipt of notification by the governor and the attorney general, the district attorney is subsequently required to inform the attorney general of their intention to evaluate the incident for prosecution or request the attorney general select an assistant attorney general, another district attorney, or a special prosecutor to investigate the matter, and the prosecutor is required to provide quarterly reports to the attorney general and the relevant district attorney, which are considered public records and subject to IPRA. The Department of Public Safety (DPS) is the default investigating agency, unless a DPS employee was the perpetrator or recipient of the use of force being investigated. Declinations to prosecute must be documented in detailed reports provided to the attorney general, the relevant district attorney, and the governor, and are considered public record and subject to IPRA.

The bill proposes the costs of investigation shall be paid out of the general fund of the county in which the investigation is made, and the costs of prosecution shall be paid “as are the costs in cases presented by district attorneys.”

The bill specifies that the attorney general has concurrent authority to prosecute unlawful uses of force resulting in great bodily harm or death and to prosecute any unlawful use of force involved in a failure to comply with the requirements for electronic recordings of custodial interrogations (pursuant to Section 29-1-16 NMSA 1978) or a failure to record the incident by using a body-worn camera approved by DPS.

The bill contains an emergency clause and would become effective immediately upon signature by the governor.

FISCAL IMPLICATIONS

The primary fiscal implication of the bill for the state is the cost of prosecuting peace officers for criminal liability resulting from alleged use of force resulting in great bodily harm or death. The bill specifies that these costs “shall be paid as are the costs in cases prosecuted by district attorneys.”

The average general fund cost of prosecution by a district attorney is about \$1,000 per case, although it is likely that prosecutions of law enforcement officers, which are generally complex, would require more resources. The total number of incidents that will be prosecuted is more difficult to determine. While data exists for the number of people killed by police each year, an average of 20.2 to 21.4 in New Mexico according to two national databases, comprehensive data on nonfatal incidents involving police that resulted in harm that could be interpreted as great bodily harm is not as easily accessible. Additionally, it is unclear if or to what extent this law will result in more peace officers being prosecuted for such incidents than under current law, making the actual fiscal impact of the bill difficult to estimate.

Under this bill, costs to investigate incidents of peace officer use of force resulting in great bodily harm or death are born by counties and would not have a direct fiscal impact on the state; however, use of DPS personnel to investigate these cases could have an impact on the department’s workload.

There may be some additional costs related to staff time (from police departments, sheriffs' offices, district attorneys' offices, the Attorney General's Office, and the Office of the Governor) necessary to comply with the reporting requirements of this bill. Additionally, while prosecution costs may be paid by district attorneys' offices, cases that are prosecuted by assistant attorneys general could have an impact on NMAG's workload. NMAG also notes that compliance with the reporting timelines within this bill would require an on-call staff member, especially during weekends or holidays, which could create additional costs.

NMAG notes that its Special Prosecutions Division (SPD), which currently deals with prosecutions related to law enforcement use of force, has 11 full-time attorneys and four full-time support staff. NMAG estimates it would require an additional 19 attorneys, at an average cost of \$125.7 thousand each, and eight support staff, at an average cost of \$88 thousand each, a total estimated cost of about \$3.1 million, to conduct prosecutions under this bill. NMAG would not be responsible for the costs of prosecution of cases under this bill, which would be paid by district attorneys' offices. It is not clear if the provisions of this bill would result in such a vast increase in prosecutions of law enforcement officers as to require such a large number of full-time staff.

It is unclear if or to what extent this law would result in more peace 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, the Corrections Department would incur additional costs.

Due to the emergency clause, the bill could take effect near the end of FY20, potentially resulting in some costs in FY20, but it is likely significant costs related to this bill would not be incurred until FY21.

SIGNIFICANT ISSUES

New Mexico has the highest per capita rate of people killed by police in the country over the past five years, according to two national databases. From 2015 to 2019, between 101 and 107 individuals were killed by police, a rate of 9.7 to 10.2 per million residents, while the national rate of individuals killed by police ranged from 3 to 3.4 per million residents. 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 108 individuals, a rate of 0.9 to 1.1 per million residents).¹

Very few incidents of police killings in New Mexico have resulted in the prosecution of the officer or officers involved. As of this writing, the most recent completed prosecution of police officers for death or great bodily harm LFC staff could identify was the 2016 prosecution of the officers involved in the killing of James Boyd, which occurred in 2014, although this month an officer with the Las Cruces Police Department was charged with involuntary manslaughter related to an incident that occurred in February. Whether the procedures outlined in this bill will result in additional prosecutions is unknown.

¹ Data on police killings sourced from the *Washington Post's* Fatal Force project, which only includes fatal police shootings, 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.

The Public Defender Department (PDD) notes that:

Typically, criminal prosecution for an officer's conduct during the discharge of their duties hinges on a determination that the use of force was "excessive," and thus not in the lawful discharge of duty. It appears that under Paragraph F, the relevant prosecutor and not the investigating law enforcement agency, bears the obligation of determining this "excessive force" question. Due to the culture within law enforcement nationwide, this bill would significantly alter common practice which defers to "internal investigations" in deciding whether an officer's use of force was excessive. That said, prosecuting agencies have close ties with law enforcement so that it is possible this bill would not wholly avoid the conflict of interest and culture concerns present in current practices.

It is unclear if the reporting requirements contained in this bill will be sufficient to ensure accurate reporting by law enforcement agencies. For over a decade, state statute has required law enforcement agencies to report uniform crime data to DPS; however, DPS has historically had problems ensuring complete reporting. The bill does not specify what (if any) consequences law enforcement agencies will face if they fail to report as required by the bill.

PERFORMANCE IMPLICATIONS

Establishing performance measures related to the incident reporting system as well as the investigation and prosecution procedures outlined in this bill could help ensure transparency and accountability within the system.

Additionally, PDD notes:

When a person is criminally charged after incurring great bodily harm from an officer, this legislation could provide for criminal defenses that are otherwise nearly impossible to establish since "excessive force" is extremely difficult to establish as a defense for the victim of that use of force. A prior determination by a prosecutor that force was excessive and prosecution of the offending officer would likely preclude charges against the victim in the first instance, or could otherwise expand available defenses. While there are other benefits to potential LOPD clients in the abstract, analyst cannot anticipate how they would directly impact agency performance.

ADMINISTRATIVE IMPLICATIONS

Under the provisions of the bill, police departments, sheriffs' offices, district attorneys' offices, the Attorney General's Office (NMAG), and the Office of the Governor would need to establish procedures for complying with the provisions of this bill. Police departments, sheriffs' offices, and the Office of the Governor would need to establish procedures related to the bill's reporting requirements, which are unlikely to be particularly burdensome. District attorneys' offices and NMAG would need to implement procedures applicable to prosecutions. DPS already handles many investigations into officer-involved-shootings; however, it may need to establish procedures specific to the requirements of this law.

Under the bill, both DPS and NMAG could see their workloads increase. While the costs of investigation and prosecution are not directly charged to those agencies, potential staffing shortages and recruitment difficulties could pose challenges to those agencies in taking on

increased workloads.

NMAG notes that compliance with the reporting timelines within this bill would require an on-call staff member, especially during weekends or holidays, and anticipates that district attorneys' offices and the Governor's Office would also require on-call staff.

DUPLICATION, RELATIONSHIP

This bill duplicates Senate Bill 17.

This bill relates to Senate Bill 8, which establishes requirements and policies regarding the law enforcement use of body-worn cameras.

OTHER SUBSTANTIVE ISSUES

District Attorney Panels. Currently, district attorneys can ask the state District Attorneys Association to appoint a panel of three other district attorneys to review police shooting cases. However, these panels are not statutorily established and district attorneys are not required to follow their recommendations. As of August 2019, only four district attorneys used this system, which had reviewed six cases and recommended the officers be cleared in each case. It is unclear if the bill would affect the existence or use of such panels.

Peace Officers. The bill defines a peace officer as “any public official or public officer vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes,” including correctional officers employed by private correctional facilities. Such a definition would appear to be inclusive of law enforcement officers beyond those employed by police departments, sheriffs' offices, and correctional facilities, including law enforcement officers employed by other state agencies and officers employed by federal law enforcement agencies, such as Border Patrol agents. At the time of this writing, it was not known if all law enforcement agencies operating within the state employ policies and procedures that would require all such incidents be reported to the relevant sheriff's office or police department, although such policies and procedures would seem essential. Furthermore, it is unclear to what extent federal law enforcement agencies can be compelled to “fully cooperate with and promptly respond to requests for information from the relevant prosecuting authority and the law enforcement agency or independent investigator charged with authority over the investigation.”

Incidents Involving Incarcerated Persons. Uses of force resulting in death or great bodily harm that occur within publicly-operated state prisons and county jails are covered by the provisions of this bill, as statute gives the power of a peace officer with respect to arrests or enforcements of law within such facilities to employees of the Corrections Department (Section 33-1-10 NMSA 1978) and local jails (Section 33-3-28 NMSA 1978) who have the custodial duties or responsibilities. Section 33-3-28 NMSA 1978 also provides these powers to “persons employed by private independent contractors who have been designated as jailers by the sheriff.” Additionally, this bill specifically includes correctional officers employed by private facilities in the definition of peace officer.

It is unclear whether the bill would apply to incidents that occur within federal detention facilities, whether publicly- or privately-operated. As the state is not responsible for conferring powers upon the individuals operating such facilities, determining if those individuals meet the

definition of peace officer as provided in this bill would require a review of federal laws and policies that is not feasible at the time of this writing. However, even if all the individuals working in such facilities met this definition of peace officer, the state’s authority to compel such facilities to report incidents or cooperate with investigations remains unclear.

Investigation Costs. The bill states that “the costs of the investigation shall be paid out of the general fund of the county in which the investigation is made,” which would require county governments to cover the costs of investigations into use of force incidents resulting in death or great bodily harm involving law enforcement officers from other jurisdictions. This could result in a disproportionate distribution of costs for counties that include large municipalities with significant police forces. For example, the City of Albuquerque’s general fund budget is almost twice that of Bernalillo County, while between 2015 and 2019, the Albuquerque Police Department (APD) was responsible for about twice as many deaths as the Bernalillo County Sheriff’s Office.² As written, the bill would require Bernalillo County to cover the costs to investigate all use of force incidents resulting in death or great bodily harm involving APD officers.

These provisions also require counties to bear the costs of investigations into use of force incidents resulting in death or great bodily harm involving New Mexico State Police officers as well as other law enforcement agencies operating within its boundaries.

It may be desirable to instead require investigation costs be paid by the law enforcement agency that employs the peace officer involved in the incident; however, it may not be possible to enforce such provisions for federal law enforcement agencies.

Prosecution Costs. The bill also states that “the costs of any prosecution arising out of the investigation shall be paid as are the costs in cases prosecuted by district attorneys.” This language is somewhat nonspecific, but appears to imply that the costs of prosecutions led by the judicial district attorney, assistant attorney general, or special prosecutor would be paid by the judicial district attorney’s office in which the incident occurred. However, the ambiguity of the language could cause confusion in cases where a district attorney from another judicial district is assigned as prosecutor. The language does not make clear whether costs related to that prosecution would be paid by the office of the district attorney in which the incident occurred or the office of the district attorney conducting the prosecution. More specific language could resolve this discrepancy.

Great Bodily Harm. The bill does not include a definition of great bodily harm. The bill would be added as a new section of Chapter 31 NMSA 1978, which does include a definition of great bodily harm as used in the Criminal Sentencing Act (Chapter 31, Article 18), but it does not appear that this bill would section that article and, as such, it is unclear if the definition provided within the Criminal Sentencing Act applies to the bill.

Section 31-18-23 NMSA 1978 defines great bodily harm as “an injury to the person that creates a high probability of death or that causes serious disfigurement or that results in permanent loss or impairment of the function of any member or organ of the body.” This definition raises

² According to data from Mapping Police Violence, APD was responsible for 19 deaths between 2015 and 2019, while the Bernalillo County Sheriff’s Office was responsible for nine. One death was listed as the responsibility of both agencies.

questions regarding what constitutes a “high probability of death” and what constitutes a “serious disfigurement.”. If the bill aims to employ this or a similar definition, it is unclear how differing interpretations of whether an incident constitutes great bodily harm will be handled. For example, if a sheriff or police chief feels an incident does not constitute great bodily harm (or suspected great bodily harm, which they are also required to report under the bill) and does not report it within the procedures outlined by this bill, but a district attorney or the attorney general determines that it does constitute great bodily harm, it is unclear if the procedures of this bill still apply. Could a district attorney determine an incident constitutes great bodily harm (or suspected great bodily harm) but decline to either evaluate the matter for prosecution or to request the attorney general select an assistant attorney general or special prosecutor to do so? Could the relevant prosecutor evaluate such a case for prosecution, decline to prosecute, but not provide a detailed report documenting the decision not to prosecute? Would such incidents be recorded in the log kept by the governor?

Investigations of Incidents Involving DPS. If a DPS employee was the perpetrator or recipient of the use of force being investigated pursuant to the provisions of the bill, the bill states that “the sheriff of the county or other competent investigative agency as otherwise provided by law or agreement shall be responsible for investigation.” The bill does not specify who will make the decision as to which agency shall conduct the investigation or who the parties to an agreement providing for another competent investigative agency would be.

Victim Information. The bill requires the log of peace officer use of force incidents resulting in death or great bodily injury include “victim information,” but does not specify what type of information is required. With researchers and policymakers increasingly focusing on demographic disparities in incidents of police violence, it may be desirable to specify certain victim demographic information be recorded.

NMAG notes this bill require reports and logs of the incidents to be public records, and suggests adding a provision to protect the privacy of the victims and witnesses and to make sure that sensitive, medical, or identifying data is redacted from such reports.

Body-Worn Cameras and Custodial Interrogation Recordings. The bill specifies that the attorney general has concurrent jurisdiction to prosecute “a failure to record the incident by using a body-worn camera approved by the department of public safety.” There do not appear to be any statutory provisions requiring the use of body-worn cameras by peace officers or requiring DPS to approve such cameras, although proposed Senate Bill 8 creates such requirements and relevant policies. While there may be such requirements at the local or county levels, prosecuting infractions of such requirements does not appear to be within the jurisdiction of the attorney general. However, the attorney general is statutorily required to “perform all other duties required by law” (Section 8-5-2 NMSA 1978), so a duty to prosecute infractions of body camera requirements not at the state level could potentially be created; however, this does not appear to be the intention of the bill.

Additionally, the bill specifies that the attorney general has concurrent jurisdiction to prosecute “a failure to comply with the requirements for electronic recordings of custodial interrogations pursuant to Section 29-1-16 NMSA 1978. PDD notes there is currently no criminal remedy for failure to record a custodial interrogation that could be prosecuted.

Relevant Prosecuting Authority. NMAG notes that although the intent of the bill appears to be

that, if the district attorney in whose district the incident occurred declines to evaluate the case for prosecution, the attorney general is tasked with either appointing an assistant attorney general, a district attorney for another district, or special prosecutor; however, the language of the bill is slightly unclear and conceivably could be read to allow the district attorney to appoint another district attorney or special prosecutor. If the intent is for the attorney general to make this appointment, NMAG suggests the language in Section D that currently states “the district attorney shall advise the attorney general of the district attorney's intent either to evaluate the matter for prosecution or to request that the attorney general select an assistant attorney general or appoint a district attorney from a different judicial district or a practicing member of the bar of this state as a special prosecutor to evaluate the matter for prosecution” be changed to read “the district attorney shall advise the attorney general of the district attorney's intent either to evaluate the matter for prosecution or to request that the attorney general (1) select an assistant attorney general or (2) appoint a district attorney from a different judicial district or (3) appoint a practicing member of the bar of this state as a special prosecutor to evaluate the matter for prosecution.”

Time Limitations. NMAG points out that it is unclear why there is no outer time limit for that relevant prosecuting authority to make a final decision to prosecute or decline to prosecute, since the bill establishes specific time limits for reporting and appointing a relevant prosecuting authority.

Other Comments from PDD. PDD also adds following comments:

The real potential for criminal liability is critical to deterring officer misconduct. Without a doubt, peace officers often need to use some sort of force to reasonably discharge their duties, so they should not be prosecuted for battery or false imprisonment every time they arrest someone. This bill appears to recognize a threshold requirement that their conduct be unreasonable or not in the “lawful discharge of their duties” before criminal liability attaches; i.e., that the force used was “excessive.”

The bill might benefit from clearer guidance on what is “excessive”; typically it’s determined case-by-case in very fact-specific analyses, and there is an unfortunate dilution of the concept based on recognition that officers must make split-second decisions. Stringent policies and guidance would help provide predictability and consistency in prosecutions for officer use of force. That said, SB 17 [sic] would create a framework for prosecution, may not fully account for the complexities or provides actual guidance to the prosecutors for determining whether and when to charge them.

ER/rl/al