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## FISCAL IMPACT REPORT

**SPONSOR** HJC **ORIGINAL DATE** 02/08/21 **4/HJCS/aHF1#1/aSHP**  
**LAST UPDATED** 03/12/21 **HB** AC/aSJC  
**SHORT TITLE** NM Civil Rights Act **SB** \_\_\_\_\_  
**ANALYST** Jorgensen/Glenn\*/Dick -Peddie

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>GSD</b>		\$4,500.0	\$4,500.0	\$9,000.0	Recurring	State; Public Liability
<b>Other</b>		Unknown, Significant	Unknown, Significant	Unknown, Significant	Recurring	Public Schools, Higher Education, Local Governments
<b>Total</b>		Over \$4,500.0	Over \$4,500.0	Over \$9,000.0	Recurring	

(Parenthesis ( ) Indicate Expenditure Decreases)

#### Responses Received From

Attorney General's Office (NMAG)  
 Department of Public Safety (DPS)  
 General Services Department (GSD)  
 Law Office of the Public Defender (LOPD)  
 New Mexico Counties  
 New Mexico Public School Insurance Authority (NMPSIA)  
 Public Education Department (PED)

#### No Response Received as of 3/12/21

Administrative Office of the Courts (AOC)  
 New Mexico Municipal League  
 Higher Education Department (HED)  
 Council of University Presidents (CUP)

#### Other Responses

New Mexico Civil Rights Commission Final Report

### **SUMMARY**

#### Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to House Bill 4 (HB4) strikes the SHPAC amendment 1 and replaces it with language exempting "an acequia or community ditch, a land grant-merced, a mutual domestic water consumers association or other association organized

pursuant to the Sanitary Projects Act or a water users' association” from the provisions of the bill.

Additionally, the SJC amendment clarifies the \$2 million cap on damages awarded under the act is per claimant, per occurrence. Lastly, the amendment changes the way interest on awards is calculated by changing language referencing “the prime rate published in the Wall Street Journal” to the “bank prime loan rate published by the board of governors of the federal reserve system.”

#### Synopsis of SHPAC Amendment

The Senate Health and Public Affairs Committee amendment to House Judiciary Committee Substitute for House Bill 4 exempts an acequia association, a land grant-merced, a mutual domestic water consumers and sanitation association district, or a water users association from the provisions of the bill.

#### Synopsis of HF1#1 Amendment

The House Floor #1 amendment to House Judiciary Committee Substitute for House Bill 4 clarifies that the prohibition of the use of qualified immunity and the waiver of sovereign immunity shall not abrogate judicial or legislative immunity, or any other constitutional, statutory, or common law immunity.

#### Synopsis of Original Bill

The House Judiciary Substitute Committee substitute for House Bill 4 (HB4) creates the “New Mexico Civil Rights Act.” The act allows a person who claims a deprivation of any “rights, privileges or immunities” secured by the bill of rights of the New Mexico Constitution to bring a lawsuit in state district court and recover actual damages and injunctive relief.

A lawsuit under the act may only be brought against a public body, which is held liable for the conduct of its employees or other individuals acting on behalf of or within the authority of the public body. Public bodies covered by the act include state and local governments, boards, commissions, agencies or any branch of government that receives public funding, including political subdivisions, school districts and institutions of higher education. The act prohibits a person employed by a public body from pursuing a claim related to the person’s employment under the act.

A public body is required to pay a judgment awarded against and litigation costs of an employee or other person acting on behalf of or within the authority of the public body. The act limits damages recoverable against a public body to \$2 million per claimant, including court costs and reasonable attorney fees. The maximum recovery limit is increased annually for the cost of living, as measured by the consumer price index. The act provides that the maximum recovery limit shall not be adjusted downward.

HB4/HJCS clarifies that a claim brought under the act could not be brought against an individual, but must be brought against the public body employing that individual.

The act prohibits a public body or those acting on the public body’s behalf from using “qualified immunity” as a defense. “Qualified immunity” is a judicially-created defense allowed in federal

civil rights actions brought against state government officials under 42 U.S.C. § 1983. It provides immunity from suit if the officials can show that their conduct did not violate “clearly established” federal statutory or constitutional rights about which a reasonable person would know. The act provides that its prohibition against the qualified immunity defense does not abrogate common law, judicial legislative or other established immunity.

The act imposes a three year limitations period to commence a claim under the act; waives sovereign immunity for the state and local public bodies for claims brought under the act; requires public bodies to keep records of final judgments and settlements they pay; and makes judgments, settlements and complaints subject to disclosure under the Inspection of Public Records Act.

## **FISCAL IMPLICATIONS**

Laws 2020 (1<sup>st</sup> Special Session), Chapter 1 created the Civil Rights Commission (CRC) to evaluate and make recommendation regarding the establishment of a civil right of action for violations of state constitutional rights. The CRC Final Report noted costs to state agencies will certainly increase should the provisions of HB4/HJCS be enacted, though there was disagreement on the extent of the additional liability.

Increased costs to state and local governments may occur if the act results in more litigation against governmental entities and public employees. This might happen if the act made it more likely that a person with a civil rights claim would prevail in a court case. For example, the federal and state constitutions have similar civil rights provisions, such as those that protect against discrimination. If a person had a civil rights claim that could be brought under the act or under Section 1983, they might elect to bring a case under the act. Although Section 1983 provides potentially larger monetary damages, the act does not allow qualified immunity, which makes it more likely that the plaintiff will prevail.

Another source of increased litigation and corresponding cost increases is that the bill of rights of the New Mexico constitution may protect civil rights more broadly or include rights that do not exist under federal law. This provides the opportunity for plaintiffs who cannot file a lawsuit under Section 1983 to bring civil rights actions and seek damages under the act.

The fiscal impact shown in the estimated additional operating budget impact table reflects the GSD analysis of HB4/HJCS. GSD stated that “the costs of defense and the cost of legal fees in the event of a loss at trial will undoubtedly increase if the bill is enacted”, and provided the following cost estimates to the CRC:

- Increase the number of civil rights cases by 35 percent from 284 cases per year to 384
- Increase the annual total cost of civil rights case settlements/judgements from \$3.6 million to \$6.6 million. This reflects the increase in cases and also a projected 35% increase in the average settlement/judgement amount.
- Increase the cost of defense of civil rights claims by 35 percent from \$3 million to \$4 million per year
- Increase plaintiff attorney’s fees to total at least \$500 thousand per year

All of these elements combined are projected to increase costs by approximately \$4.5 million annually.

NMPSIA “would reasonably anticipate substantially more on claims which would eventually necessitate higher premiums to its members. Claim values and settlements could reasonably triple based on the attorney fee provision.” For fiscal year 2021, NMPSIA anticipates paying liability claims totaling \$14.2 million and will pay liability insurance premiums of \$17.2 million.

PED reports the costs associated with HB4/HJCS are unknown, “but likely to be significant”. PED notes that “total annual payments for civil lawsuits brought against covered entities, for both litigated and non-litigated claims, were approximately \$10.2 million in judgments and settlements, and approximately \$3.4 million in attorney fees, for each of the previous five years.”

While Higher Education Institutions and New Mexico Municipalities did not provide analysis of the provisions of HB4/HJCS, it is reasonable to assume these entities will face increased costs as well.

The CRC Final Report acknowledged the potential for increased costs, but stated that, based on research conducted during the hearings, cost increases would be limited. For example, with respect to the discontinuation of qualified immunity, the CRC noted that a review of 1,691 federal civil rights cases filed in the District of New Mexico, qualified immunity motions were filed in 257 cases and motions were granted in 147, or 9 percent, of total cases. Where qualified immunity was granted, 85 cases, or 5 percent of total cases, were dismissed solely based on qualified immunity.

The CRC Final Report stated that the contemplated civil right of action would be limited in scope and this narrow scope would contain cost increases. The CRC reported:

The cost concerns the Majority has heard do not account for the fact that the New Mexico Civil Rights Act fills a narrow gap in the laws under which the state and local governments already can be sued.[...] A limited subset of state constitutional claims are actionable under the New Mexico Tort Claims Act, but only against law enforcement for certain types of injuries. Adding a remedy for misconduct that violates the New Mexico Constitution makes meaningful the fundamental rights that document protects without fundamentally changing the litigation landscape.

## **SIGNIFICANT ISSUES**

The bill includes a cap on damages of \$2 million per claimant, and provides for the recovery of attorney fees. The Tort Claims Act (41-1-1 NMSA 1978) caps damages at just over \$1 million, but does not include attorney fees. Though the \$2 million cap could reduce state and local fiscal liability, Section 3 Subsection E of the bill states that “remedies provided for in the New Mexico Civil Rights Act are not exclusive and shall be in addition to any other remedies prescribed by the law [...]” indicating that individuals may bring claims under both the Tort Claims and New Mexico Civil Rights acts. The New Mexico Counties also stated that the substitute caps each “claim” brought under the act, and multiple claims/claimants arising out of a single occurrence could result in total damages that far exceed \$2 million.

New Mexico Counties also noted that though the attorney fees permitted by the act are included in the \$2 million cap, for most cases brought under the act the attorney fees will exceed the damages awarded to claimants.

NMPSIA notes

[HB4/HJCS] blurs the line between what is covered under the Tort Claims Act and what would be covered under the proposed state Civil Rights Act with much high caps on damages and the inclusion of attorney fees. Under the federal civil rights act, a higher legal standard of “deliberate indifference” essentially bars plaintiffs from asserting negligence and premises liability claims against schools and school personnel. We believe the legislation will allow attorneys to assert violations of the Tort Claims and the proposed Civil Rights Act in many cases based on the broad language that refers to “acts or omissions.”

Based on the present language, it is likely there will be more claims against schools and school officials under the broad claim of “deprivation of any rights” which could be premised on several areas such as student discipline, political curriculum preferences, accommodations for special education, school safety/bullying, and rights related to standardized testing. It broadens liability against schools and school officials provided under the Tort Claims Act. Consideration should be given to excluding schools from this legislation based on the serious, but unknown financial ramifications at this time.

Many of the concerns about the fiscal cost of implementation of the provisions of HB4/HJCS were discussed during meetings of the Civil Rights Commission. The CRC Final Report acknowledged the concerns raised and provided two reasons for pursuing legislation during the 2021 session despite the concerns:

First, the cost of protecting the rights of New Mexicans involves values fundamentally different from other budget questions the Legislature faces. Absent a statutory remedy for state constitutional violations, the Legislature is forcing the citizen who was harmed by government misconduct to pay for the violation they suffered. That is where things stand today. The Legislature therefore has to consider whether it wants to continue saving money by forcing those harmed by government misconduct to bear the cost for the state or responsible local government.

Second, the actual costs of a New Mexico Civil Rights Act are difficult to quantify. Everyone who presented to the commission agreed on this. The commission sought substantial data from state and local governments related to the question, but the responses did not lead to a clear conclusion. It is clear, however, that there are reasons to doubt that adopting the majority’s proposals will result in the significant costs that some have claimed. And the majority is concerned that the inability to answer this question concretely in advance invites speculative doomsday scenarios that never will come to pass. The majority also questions whether allowing New Mexicans to recover when the government violates their state constitutional rights actually will prevent any New Mexico government from securing adequate insurance. The inability to reasonably insure certainly was not proved during hours of presentations the commission heard from those best situated to show that—unlike every other statute that preceded it—the New Mexico Civil Rights Act presents an uninsurable risk.

Additionally, the CRC Final Report noted that increased costs associated with the act “would act as an incentive for government entities to impose the training, oversight, and accountability

policies that are necessary to prevent government misconduct. By implementing aggressive loss prevention programs, the state and local governments can avoid constitutional violations in the first place.”

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

HB123 (related), establishes limits on liability of overdose prevention programs

SB60 (related) establishes qualified immunity within the Physical Therapy Licensure Compact

SB119 (related) establishes qualified immunity within the Psychology In jurisdictional Compact

### **TECHNICAL ISSUES**

NMAG recommends the following:

For clarity, NMAG suggests revising the definition of “public body” in Section 2 to read:

"As used in the New Mexico Civil Rights Act, "public body" means:

- (a) the state, a political subdivision of the state, or any branch of government that receives public funding, including political subdivisions, special tax districts, school districts and institutions of higher education;
- (b) board or commission, or
- (c) an agency or an entity created by the constitution of New Mexico.

### **OTHER SUBSTANTIVE ISSUES**

New Mexico Counties interpret Section 3 Subsection B of the bill permitting claimants to establish liability for the deprivation of rights, privileges, or immunities due to “acts or omissions of a public body” to allow claims to be brought even in instances of negligence. According to the counties, claims of negligence could be broad and wide ranging, including car accidents and zoning decisions. The counties note:

From 2015 through 2020 the NM County Insurance Authority received 2,170 auto and general liability claims. Seventy percent of these claims were resolved without litigation for a total cost of approximately \$4.5 million. The House Judiciary Committee Substitute for HB4/HJCS would create a financial incentive for lawyers to litigate these claims in order to collect their fees at least tripling or quadrupling the cost to taxpayers.

**Disclosure:** Betsy Glenn serves as legal counsel for Harding County.

CJ/BG/ADP/al/rl