

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current and previously issued FIRs are available on the NM Legislative Website (www.nmlegis.gov).

FISCAL IMPACT REPORT

SPONSOR Rubio/Bash/Ely/ Chasey/Duhigg **ORIGINAL DATE** 01/28/21 **LAST UPDATED** 03/01/21 **HB** 40/aHJC/ec
SHORT TITLE Private Detention Facility Moratorium Act **SB** _____
ANALYST Rabin

REVENUE (dollars in thousands)

Estimated Revenue						Recurring or Nonrecurring	Fund Affected
	FY21	FY22	FY23	FY24	FY25		
NMCD-Contracted Facilities	(Negative, up to \$230.0)	(Negative, up to \$2,760.0)	(Negative, up to \$2,760.0)	(Negative, up to \$2,760.0)	(Negative, up to \$2,760.0)	Recurring	State General Fund (GRT)
NMCD-Contracted Facilities	(Negative, up to \$153.3)	(Negative, up to \$1,840.0)	(Negative, up to \$1,840.0)	(Negative, up to \$1,840.0)	(Negative, up to \$1,840.0)	Recurring	Local General Funds (GRT)
Other Facilities	Negative – See Fiscal Implications					Recurring	State and Local General Funds (GRT)

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

Option ¹ and Cost Type	FY21	FY22	FY23	FY24	FY25	5 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Option 1 One-Time/Capital Costs	\$0.0	At least \$18,200.0	At least \$18,200.0	At least \$18,200.0	\$0.0	At least \$54,600.0	Nonrecurring	General Fund
Option 1 Operational (Housing) Costs	(\$166.6) to (\$78.2)	(\$1,998.7) to (\$938.8)	(\$1,998.7) to (\$938.8)	(\$1,998.7) to (\$938.8)	\$5,125.1 to \$9,186.5	(\$1,037.6) to \$6,291.7	Recurring	General Fund
Option 2 One-Time/Capital Costs	\$0.0	\$0.0	\$0.0	\$57,336.3 to \$65,400.3	\$0.0	\$57,336.3 to \$65,400.3	Nonrecurring	General Fund
Option 2 Operational (Housing) Costs	(\$166.6) to (\$78.2)	(\$1,998.7) to (\$938.8)	(\$1,998.7) to (\$938.8)	(\$1,998.7) to (\$938.8)	(\$2,568.9) to \$2,216.7	(\$8,731.6) to (\$678.1)	Recurring	General Fund

¹ This analysis considers several options the Corrections Department may choose from to address the cancellation of its contracts with private detention facilities and house that population. Nonrecurring and recurring costs for each option are outlined in this table

Option ¹ and Cost Type	FY21	FY22	FY23	FY24	FY25	5 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Option 3 One-Time/ Capital Costs	\$0.0	\$0.0	\$0.0	\$1,409.2 to \$1,607.5	\$0.0	\$1,409.2 to \$1,607.5	Nonrecurring	General Fund
Option 3 Operational (Housing) Costs	(\$166.6) to (\$78.2)	(\$1,998.7) to (\$938.8)	(\$1,998.7) to (\$938.8)	(\$1,998.7) to (\$938.8)	(\$2,568.9) to \$2,216.7	(\$8,731.6) to (\$678.1)	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with House Bill 352

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Office of Attorney General (NMAG)
- Sentencing Commission (NMSC)
- Corrections Department (NMCD)
- Workforce Solutions Department (WSD)
- Economic Development Department (EDD)

Responses to Introduced Bill Received From

- Children, Youth and Families Department (CYFD)
- New Mexico Counties

SUMMARY

Synopsis of HJC Amendment

The House Judiciary Committee amendment to House Bill 40 amends the Private Detention Facility Moratorium Act to allow for public operation and management of privately owned detention facilities; bars the extension of contracts to operate or manage private detention facilities as well as entering into, renewing, or modifying (in a manner to increase their capacity) such contracts; clarifies amendments to existing law governing contracts and controls of county jails to apply specifically to *private* independent contractors (previously simply independent contractors); and redirects the duty of annually reviewing inspections of jails and detention facilities under county or municipal jurisdiction and operated by independent contractors for compliance with the relevant contract (and potentially recommending termination of those contracts) from the Corrections Department (NMCD) to the Risk Management Division of the General Services Department (GSD), the Local Government Division of the Department of Finance and Administration (DFA), and the office of Attorney General (NMAG).

Additionally, the amendment establishes two funds to aid counties and their residents affected by prohibiting private prison contracts. The detention facility economic development assistance fund is administered by the Economic Development Department (EDD) to distribute funds to counties affected by the closure of private detention facilities. The detention facility displaced worker assistance fund is administered by the Workforce Solutions Department (WSD) to

distribute funds to assist workers whose employment and earnings are significantly impacted by the Act. The bill does not make any appropriations to or provide for revenue streams to these funds.

Synopsis of Original Bill

House Bill 40 makes it unlawful to operate a private detention facility in New Mexico, bars governmental entities from contracting with private entities to operate a detention facility, repeals laws that previously authorized counties and municipalities to operate jails and authorized NMCD to contract with private entities for the operation of specific correctional facilities, and extensively amends existing law governing contracts and controls of county jails used to house prisoners.

HB40 prohibits the state, other governmental entities, county sheriffs, or other officers, employees, or agents from entering into or renewing an agreement for the detention of individuals in a private detention facility, or from modifying such an agreement in a manner that would increase the capacity of the detention facility. The bill prohibits paying, reimbursing, or otherwise subsidizing costs related to the sale, purchase, construction, development, ownership, management, or operation of a detention facility that is owned, managed, or operated, in whole or in part, by a private entity. However, the bill allows private detention facilities operating pursuant to a contract effective prior to the enactment of the bill to continue in operation unless or until renewal or modification that increases capacity is necessary.

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

FISCAL IMPLICATIONS

Revenue Impact

NMCD-Contracted Facilities. The provisions of HB40 will likely decrease gross receipts tax (GRT) revenues to the state and local governmental entities. The Taxation and Revenue Department (TRD) estimates private detention facilities contracted by NMCD to house state inmates generated a total of \$4.6 million in GRT revenue to the state and local governments in FY20, about \$2.8 million of which was revenue the state and about \$1.8 million of which was revenue local governments. If GRT revenues remain relatively steady, closure of all NMCD-contracted private prison facilities will result in estimated decreased revenues of about \$2.8 million to the state general fund and about \$1.8 million to local government general funds.

However, because the amended bill allows for the continued *ownership* of detention facilities by private entities, it is possible private entities may retain ownership of facilities that are operated by public entities. As a result, these revenue impacts are considered to be maximum impacts, which could be lowered if the facilities continue to generate taxable revenue without being operated or managed by private entities.

As outlined below, this analysis anticipates HB40 would impact one NMCD-contracted private facility in FY21 but would not impact the others until FY25. Because the GRT revenues attributable to each individual facility are not known, this analysis shows a revenue decrease of up to \$2.8 million (for the state) and \$1.8 million (for local governments) in each full fiscal year

in which this bill would apply (FY22 onward), but it is likely the impact would be significantly greater in FY25 than prior fiscal years. For FY21, the maximum impact is prorated based on one month of applicability (June 2021) at up to \$230 thousand (for the state) and \$153.3 thousand (for local governments).

Other Facilities. Other facilities that do not house state inmates also contribute to state and local GRT revenue and other revenue streams; however, TRD did not supply GRT revenue estimates for these facilities. New Mexico Counties reports that CoreCivic is the largest property tax payer in Torrance County and generates about \$100 thousand in GRT revenue for the county. At the time of this writing, information regarding tax revenue impacts from non-NMCD-contracted facilities to other counties was not available; however, additional information on cost impacts to counties is detailed under Other Substantive Issues.

Additional Operating Budget Impact

The state may face significant short-term costs, including capital costs, to fulfill the requirements of this bill. Depending on how NMCD chooses to comply with the terms of this bill, its implementation could result in long-term cost increases or savings.

NMCD currently houses state prisoners at four privately operated detention facilities: Guadalupe County Correctional Facility (GCCF) in Santa Rosa, Lea County Correctional Facility (LCCF) in Hobbs, Otero County Prison Facility (OCPF) in Chaparral, and Northwest New Mexico Correctional Center (NWNMCC) in Grants. Based on the structure and terms of these contracts (discussed below in “Significant Issues”), it appears Otero County’s existing agreement for the operation of OCPF by a private entity will be impacted in June 2021 (FY21), but the contracts with LCCF, GCCF, and NWNMCC will not be impacted until FY25.

Prison Populations and Facility Capacity. As of February 1, 46 percent of the state’s inmates were housed in private prison facilities, including 496 at OCPF, with the remaining 54 percent housed at public facilities. The Sentencing Commission’s (NMSC) revised FY21 prison population forecast projects an average population of 5,759 in June, when inmates could no longer be held at OCPF under the provisions of this bill. Total public prison capacity under the revised *Duran* settlement is 4,482; assuming a similar share of the prison population is housed at public facilities in June, about 1,389 of these beds will be unoccupied, providing sufficient room for these inmates to be transferred to public facilities. After this transfer, approximately 38 percent of the total prison population would be housed at private facilities.²

Notably, OCPF primarily houses specialized populations (sex offenders and ex-law enforcement) that may not be able to be integrated with other populations. As a result, some of the expected beds available in public facilities may not be suitable for these offenders, and NMCD may be forced to make significant adjustments and transfers to accommodate these offenders, which could incur additional costs. Those costs are not contemplated in this analysis.

² Under the provisions of this bill, NMCD could move some or all of OCPF’s population to available space in other private facilities; however, those inmates would still need to be transferred to public facilities when the other private facilities’ contracts expired, and similar cost impacts would be realized at that time. For purposes of this analysis, it is assumed NMCD transfers OCPF’s population to private facilities.

Prison population has been falling year-over-year since December 2018 and had dropped 6.9 percent by March 2020, even before the impacts of the Covid-19 pandemic on court adjudications and early releases. Prison populations averaged 6,837 in FY20 and 6,195 in the first six months of FY21, and NMSC’s revised FY21 prison population forecast projects an average population of 5,851 in the last six months of FY21, resulting in an overall average projected population of 6,023 in FY21. This represents an 18 percent decrease in average prison population compared with FY17; if these trends continue over the next four years, the average prison population in FY25 will be 4,938.³

Assuming a similar share of the prison population is housed at private facilities in FY25, an estimated 1,861 inmates held at GCCF, LCCF, and NWNMCC would need to be relocated to public facilities under the terms of this bill, which would hold an estimated 3,077 inmates and could accommodate 1,405 of the inmates transferred from private facilities in their remaining capacity. NMCD would need to make alternate housing arrangements for the housing of the remaining 456 private prison inmates.

Because NMCD is in the process of reforming its inmate classification process (which determines custody level), it is not possible to effectively project what the inmate population or capacity at varying custody levels will be in FY25. As a result, these estimates do not account for inmate custody levels, which may significantly restrict the capacity of existing public facilities to hold inmates transferred from private facilities, the number of inmates who require alternate housing arrangements, and how many or what type of additional housing units might need to be constructed.

Options for Remaining Populations. NMCD has three primary options for housing the estimated 456 private prison inmates who cannot be housed at existing public facilities in FY25: (1) constructing new housing units at an existing prison facility or constructing a new prison facility, (2) taking over operation of an existing private prison facility and purchasing the facility, or (3) taking over operation of an existing private facility and leasing the facility from its owner. Notably, due to constraints on construction timelines, options 2 or 3 are likely more feasible than option 1.

If the state were to take over operations of an existing private prison facility, the most likely options for takeover would be GCCF (capacity: 590 inmates) or NWNMCC (capacity: 673 inmates). LCCF’s capacity of 1,293 inmates will likely be too large for the anticipated need and OCPF currently houses both state and federal inmates, with an overall capacity (at least 1,200 inmates) that is likely too large for the anticipated need.

Capital and Other Nonrecurring Cost Impacts. The following analysis lays out anticipated capital and other nonrecurring cost impacts based on the options to house the remaining prison population outlined above.

³ The Sentencing Commission has not revised its population forecast beyond the end of calendar year 2021, so the projection used in this analysis simply anticipates continued population decrease trends as seen over the past four years. However, it is unclear the extent to which the Covid-19 pandemic impacted FY20 and FY21 populations compared with preceding population decrease trends, which were already falling at an increasing rate for over two years prior to the pandemic (declines of 0.3 percent between FY17 and FY18, 1.4 percent between FY18 and FY19, and 4 percent between FY19 and the first nine months – through March 2020 – of FY20).

Option 1: NMCD constructs new housing units at an existing prison facility or constructs an entirely new prison facility. Estimated capital cost of \$18.2 million in each of FY22, FY23, and FY24:

In 2019, LFC evaluators estimated the cost of building a new, 192-bed medium-security housing unit would be \$18.2 million. Housing 456 inmates would require three such housing units, at a total capital cost of \$54.6 million. Based on the implementation timeline outlined above, these costs would likely be incurred in FY22, FY23, and FY24; this analysis assumes the costs would be split evenly across each of the three years at \$18.2 million per year.

Similar costs would be incurred to build a new prison facility as to build new housing units. However, additional land costs and construction of administrative buildings would likely incur additional costs, which could not be estimated at the time of this writing.

Notably, two years is a much tighter timeframe for the construction of new housing units or a new prison than such a capital project would typically entail. It is likely such a tight timeframe would result in additional costs, but it is not possible to estimate those costs at the time of this writing. It is also possible such a tight timeframe would not be feasible for completing this construction.

Option 2: NMCD takes over operation of an existing private prison facility and purchases the facility. Estimated capital cost of \$57.3 million to \$65.4 million in FY24:

LFC evaluators' estimated cost to build a new housing unit carries an average cost of \$94.8 thousand per bed. Assuming a similar per-bed cost were charged by the facility owners to purchase GCCF or NWNMCC, the purchase price of these facilities would be \$55.9 million for GCCF and \$63.8 million for NWNMCC. Such a purchase, if it were to occur, would likely take place in FY24.

When NMCD took over operations of Northeast New Mexico Detention Facility (NENMDF) (previously operated by the Geo Group), it used \$1.5 million from its fund balance to cover one-time costs related to the transition, purchasing transportation vans and officer uniforms, conducting drug testing and polygraphs, paying for contractual IT needs, and establishing a hospitality center. GCCF's capacity is approximately 94 percent of NENMDF's (628 inmates); it is therefore estimated that similar one-time costs would total 94 percent of NENMDF's, about \$1.4 million. NWNMCC's capacity is approximately 107 percent of NENMDF's; it is therefore estimated that similar one-time costs would total 107 percent of NENMDF's, about \$1.6 million. Such costs, if they were incurred, would likely impact FY24.

In total, the estimated cost of this option would range between \$57.3 million (for GCCF) and \$65.4 million (for NWNMCC), with the entirety of the impact estimated to occur in FY24.

Option 3: NMCD takes over operation of an existing private prison facility and leases the facility from its owner. Estimated capital cost of \$1.4 million to \$1.6 million in FY24:

As noted under option 2, when NMCD took over operations of NENMDF, it used \$1.5

million from its fund balance to cover one-type costs related to the transition. GCCF’s capacity is approximately 94 percent of NENMDF’s (628 inmates); it is therefore estimated that similar one-type costs would total 94 percent of NENMDF’s, about \$1.4 million. NWNMCC’s capacity is approximately 107 percent of NENMDF’s; it is therefore estimated that similar one-type costs would total 107 percent of NENMDF’s, about \$1.6 million. Such costs, if they were incurred, would likely impact FY24.

Any of these options would likely require significant planning efforts on the part of NMCD. The cost impacts of this planning, if any, cannot be estimated at the time of this writing, and NMCD’s analysis did not include any planning-related costs.

Estimated Capital and Nonrecurring Cost Impacts

Options 1 and 2
(dollars in thousands)

Option	FY21	FY22	FY23	FY24	FY25	5-Year Cost
Option 1	\$0.0	at least \$18,200.0	at least \$18,200.0	at least \$18,200.0	\$0.0	\$54,600.0
Option 2	\$0.0	\$0.0	\$0.0	\$57,336.3 to \$65,400.3	\$0.0	\$57,336.3 to \$65,400.3
Option 3	\$0.0	\$0.0	\$0.0	\$1,409.2 to \$1,607.5	\$0.0	\$1,409.2 to \$1,607.5

Source: LFC analysis

Operational Cost Impacts. The average cost to incarcerate a single inmate in a public prison facility in FY20 was \$53.4 thousand; however, due to the high fixed costs and overhead of the state’s public prison facilities (such as the number of correctional officers in prisons and program administration), LFC evaluators estimate a marginal cost (the cost per each additional inmate) for inmates in public facilities of \$21.4 thousand, with 60 percent of costs dedicated to fixed costs and overhead. The average cost to incarcerate a single inmate in a public prison facility in FY20 was \$34.9 thousand and private prisons held an average of 3,259 inmates; NMCD expended \$82.8 million on its private prison contracts in FY20, meaning about 27 percent of the per inmate cost was dedicated to fixed costs and overhead related to NMCD administration. This results in a marginal cost for inmates in private facilities of \$25.4 thousand.

Notably, these marginal cost calculations do not account for inmate custody level, which may significantly impact costs. Because NMCD is in the process of reforming its inmate classification process (which determines custody level), it is not possible to effectively project what the inmate population or capacity at varying custody levels will be in FY25, nor is it possible to anticipate the costs specifically related to each custody level. To account for this unknown variation, the analysis below uses two estimates for marginal costs of inmates held in public facilities: the \$21.4 thousand per year cost seen in FY20 and a marginal cost 10 percent higher, of \$23.5 thousand.

The transfer of inmates 496 inmates from OCPF to public facilities is anticipated to occur in June of FY21. Assuming marginal costs for private prisons in FY21 are flat with FY20, reducing the private prison population by 496 inmates will result in operational savings of \$12.6 million. If marginal costs for public prisons in FY21 range from \$21.4 thousand to \$23.5 thousand, increasing the public prison population in existing facilities by 496 inmates will result in increased operational costs of \$10.6 million to \$11.7 million, resulting in net savings of between \$938.8 thousand and \$2 million per year in FY22 and future fiscal years. For FY21, it is assumed the net savings would be equal to 1/12 of the annual net savings, \$78.2 thousand to \$166.6 thousand.

This analysis assumes HB40 will result in a further reduction in the private prison population by

1,861 inmates, the increase in the population of existing public prisons of 1,405 inmates, and the execution of one of the two options identified above to house an additional 456 in public facilities beginning in FY25. These operational cost impacts are also expected to recur in future fiscal years.

Assuming marginal costs for public and private prisons in FY25 are flat with those of FY20, reducing the private prison population by 1,861 inmates will result in operational savings of \$47.3 million. If marginal costs for public prisons in FY25 range from \$21.4 thousand to \$23.5 thousand, increasing the public prison population in existing facilities by 1,405 inmates will result in increased operational costs of \$30 million to \$33 million. Housing the remaining 456 inmates in new or newly public facilities will likely bring on new fixed and overhead costs, the impacts of which are outlined below.

Option 1: NMCD constructs new housing units at an existing prison facility or constructs an entirely new prison facility. Estimated net operational cost increases (including transfer of private prison inmates to existing public facilities and the FY21 transfer of inmates from OCPF) of \$5.1 million to \$9.2 million per year:

The cost of housing an inmate in a new public facility should be calculated at the full (nonmarginal) cost to incarcerate an inmate in a public prison in FY20 of \$53.4 thousand. This results in estimated additional operating costs of \$24.3 million to house 456 inmates in new public facilities.

Assuming the marginal cost of inmates held in public facilities is flat with FY20 and accounting for the cost impacts of relocating 1,861 inmates from private facilities to public facilities results in additional operational costs of \$5.1 million per year. Assuming the marginal cost of inmates held in public facilities is 10 percent higher than FY20 and accounting for the cost impacts of relocating 1,861 inmates from private facilities to public facilities and the FY21 transfer of inmates from OCPF results in operational cost increases of \$9.2 million per year.

Option 2 or 3: NMCD takes over operation of an existing private prison facility and either purchases the facility (option 1) or leases the facility (option 2). Estimated net operational cost impact (including transfer of private prison inmates to existing public facilities and the FY21 transfer of inmates from OCPF) ranging from \$2.6 million in savings to \$2.2 million in increases.

When NMCD took over operations of NENMDF, LFC estimated its operational costs for that facility would increase 22 percent compared with the amount budgeted for the contract in FY20. NMCD projects GCCF's contract will cost \$13.7 million in FY22 and NWNMCC's contract will cost \$14.3 million. Assuming similar contract amounts in out years and a 22 percent increase for public operation compared with the anticipated contract costs, public operation of GCCF would cost an estimated \$16.7 million and public operation of NWNMCC would cost an estimated \$17.4 million.

Assuming the marginal cost of inmates held in public facilities is flat with FY20 and accounting for the cost impacts of relocating 1,861 inmates from private facilities to public facilities results in operational cost savings of between \$1.8 million (for NWNMCC) and \$2.6 million (for GCCF) per year. Assuming the marginal cost of

inmates held in public facilities is 10 percent higher than FY20 and accounting for the cost impacts of relocating 1,861 inmates from private facilities to public facilities and the FY21 transfer of inmates from OCPF results in operational cost increases of between \$1.5 million (for GCCF) and \$2.2 million (for NWNMCC) per year.

Estimated Operational (Recurring) Cost Impacts
Options 1 and 2
(dollars in thousands)

Option	FY21	FY22	FY23	FY24	FY25	5-Year Cost
Option 1	(\$166.6) to (\$78.2)	(\$1,998.7) to (\$938.8)	(\$1,998.7) to (\$938.8)	(\$1,998.7) to (\$938.8)	\$5,125.1 to \$9,186.5	(\$1,037.6) to \$6,291.7
Option 2	(\$166.6) to (\$78.2)	(\$1,998.7) to (\$938.8)	(\$1,998.7) to (\$938.8)	(\$1,998.7) to (\$938.8)	(\$2,568.9) to \$2,216.7	(\$8,731.6) to (\$678.1)
Option 3	(\$166.6) to (\$78.2)	(\$1,998.7) to (\$938.8)	(\$1,998.7) to (\$938.8)	(\$1,998.7) to (\$938.8)	(\$2,568.9) to \$2,216.7	(\$8,731.6) to (\$678.1)

Source: LFC analysis

SIGNIFICANT ISSUES

NMCD Private Detention Facility Contracts. NMCD currently contracts for the operation of four private detention facilities. For GCCF, LCCF, and OCPF, NMCD’s contracts are with Guadalupe, Lea, and Otero counties, respectively, so while NMCD’s contracts with the counties would need to be renewed in FY21 or FY22 (after enactment of this bill), it appears this bill will not ban renewal of those contracts between public entities. As a result, NMCD will experience cost impacts when the counties’ contracts with the private prison operators expire. GCCF and LCCF’s contracts expire in the fall of 2024 (FY25); however, the contract between OCPF and Otero County is set to be renewed in June 2021, prior to the end of FY21. NMCD’s contract for operation of NWNMCC is directly with the private prison operator but does not expire until the end of FY24.

OCPF Transfer. As noted above, OCPF primarily houses specialized populations (sex offenders and ex-law enforcement) who may not be able to be integrated with other populations, potentially requiring NMCD to make significant adjustments and transfers to accommodate these offenders. The exceptionally tight timeline to make this transition may result in inmates being housed in inappropriate facilities or in facilities that have been quickly adapted, and could impact inmates beyond those being transferred from OCPF. Transfers from OCPF or to accommodate the OCPF inmates will likely also result in significant disruptions to inmate programming.

Most crucially, however, transferring almost 500 inmates from OCPF and an unknown number of inmates among other facilities to accommodate them poses significant risks at this time due to the Covid-19 pandemic.

Prison Population. In FY20, total prison population averaged 6,837 (6,157 men and 680 women), a decrease of 5.4 percent over FY19’s average population. Since December 2018, each month’s average prison population has represented a year-over-year decline, and overall prison population had dropped 6.9 percent by March 2020, even before the impacts of the Covid-19 pandemic on court adjudications and early releases. These changes have been driven by declines in prison admissions, which fell 15.1 percent between FY18 and FY19 and 15.6 percent between FY19 and FY20.

While admissions began decreasing in FY16, average prison population did not begin to decline until FY17. Between FY11 and FY19, the median length of stay of prisoners admitted to the

prison system averaged 12.5 months; as a result, a delay between a decline in admissions and its impact on the overall prison population is to be expected. Since FY16, the average prison population has decreased by 7.6 percent, and the impact of the significant reductions in admissions between FY19 and FY20 will likely become apparent over the course of FY21.

Recently, NMCD has begun focusing population declines among private facilities while keeping the population at public facilities relatively steady. Currently, public prisons hold about 54 percent of the state's inmates while private prisons hold about 46 percent. Between November 2019 and November 2020, the difference between the number of inmates housed at public versus private facilities increased from about 480 to 746. These shifts will likely result in significant cost savings for the department and the state. If HB40 is enacted and NMCD continues these population distribution trends prior to FY25, it will likely realize part of the anticipated operational cost savings prior to FY25.

Inmate Classification. A July 2020 report on inmate classification at NMCD by LFC's program evaluation unit found the current system is not consistent with best practices and has not been validated. The system has not been revised in almost two decades, and housing inmates at higher (and more expensive) custody levels than warranted may be driving up costs and hampering offender rehabilitation. While the majority of prisoners admitted to the correctional system initially received minimum security custody scores, more than half are housed in medium-security facilities. Inmates at higher-security facilities tend to have higher rates of misconduct and recidivism than inmates in lower-security prisons, so expanding access to minimum-security settings could help reduce recidivism and associated costs. The report estimated deviations from the initial custody score could be costing the state up to \$28 million annually. Because NMCD's scoring tool has not been validated, it is impossible to definitively say whether override decisions are appropriate or represent unnecessary overclassification; however, the potential costs of overclassifying even a small fraction of inmates are significant. NMCD is currently working with the University of New Mexico's Institute for Social Research to validate its custody scoring tool.

Juvenile Facilities. The Children, Youth and Families Department (CYFD) notes the following:

This bill authorizes the termination of detention facility contracts if the annual inspection report submitted by the governing body to Corrections is found to be out of compliance. However, the authority to inspect *juvenile* detention facilities is held by CYFD.

Currently, CYFD certifies the county juvenile detention centers, and existing regulation specifically limits the population of those centers as follows:

8.14.14.2 SCOPE: This regulation applies to all New Mexico juvenile detention centers operating under the certification of the children, youth and families department and managed by county and local jurisdictions. Juvenile detention centers detain delinquent offenders, youthful offenders, and serious youthful offenders. Juvenile detention centers detain juveniles pending court hearings but do not provide for long-term care and rehabilitation of adjudicated juveniles. Juvenile detention centers shall not detain children younger than the age limit identified in the Children's Code, status offenders, persons charged or previously adjudicated as delinquents or youthful offenders who are 18 years of age and older who have previously been detained with an adult population, or persons who are 18 years of age and older who are participating in a juvenile

specialty court program serving custodial sanctions. [8.14.14.2 NMAC – Rp 8.14.14.2 NMAC, 01/01/2019]

This bill prohibits county commissioners from extending, renewing or entering into a contract with an independent contractor for the operation of a juvenile detention home. It does not vest specific authority for termination of contracts in the event that an inspection report finds the juvenile detention home to be out of compliance.

Although the HJC amendment redirects the authority for terminating these contracts from NMCD to GSD, DFA, or NMAG, that change does not appear to substantively address the concerns raised by CYFD.

Constitutional Concerns. New Mexico Counties raises concerns that HB40 "would violate the constitutional provision prohibiting impairment of contracts. N.M. Const., art. 2, Section 19 (No ex post facto law, bill of attainder nor law impairing the obligation of contracts shall be enacted by the legislature)." However, HB40 appears to apply only to new contracts, renewals, or amendments that add obligations to an existing contract after the bill's effective date. Because the law would only apply prospectively, it is not clear that it would violate this constitutional provision.

Administration of New Funds. WSD is the primary agency responsible for administering the Workforce Innovation and Opportunity Act (WIOA) and for improving the state's workforce systems to help New Mexicans with significant barriers to employment, including adults, dislocated workers, and youth. HB40, as amended by HJC, requires WSD to administer a detention facility displaced worker assistance fund; sign off on vouchers for disbursement of money in the fund; develop a displaced worker development plan to assist displaced workers in affected communities; along with EDD, appoint three "conveners" to community advisory committees in affected communities; request recommendations from the community advisory committees; engage in consultation with Indian nations, tribes, pueblos, etc. in affected areas; and provide assistance to displaced workers using any program established at WSD. WSD states that these activities fit within its existing programs, roles and capabilities. The agency receives approximately \$25 million from the U.S. Department of Labor that is distributed to the four local workforce development boards to fund subsidized training activities for adults, dislocated workers, and youth as part of WIOA.

Similarly, EDD states that its duties under this bill fall within the department's purview, but would require additional funding to be able to fully implement.

PERFORMANCE IMPLICATIONS

WSD notes that all efforts to improve strategic, integrated, and comprehensive approaches that improve opportunities for job seekers to achieve economic success will positively impact the performance outcomes of the programs it administers, and HB40 aligns with specific performance requirements and goals outlined in WIOA. Additionally, WSD notes that it maintains the necessary case management system needed to track participants and their performance.

ADMINISTRATIVE IMPLICATIONS

The HJC amendment indicates that GSD, DFA, and NMAG are required to annually review inspections of jails and detention facilities under county or municipal jurisdiction and operated by independent contractors for compliance with the relevant contract and potentially recommend termination of those contracts. These agencies may require additional staff and resources to carry out such duties.

EDD reports that the additional duties assigned to it by the HJC amendment would require a moderate amount of additional funding. The agency reports it does not have sufficient staffing to create the required economic diversification and development plan to assist each affected community, and would need to contract for the development of such a plan. EDD estimates that such a contract would cost between \$100 thousand and \$200 thousand, and states that it would likely be unable to perform these duties without a future appropriation for this purpose.

CONFLICT

HB40 conflicts with House Bill 352, which is largely duplicative but significantly allow for the extension of existing contracts for the private operation or management of detention facilities as long as the agreements do not extend to allow for the facilities' operations after December 31, 2026. There are also several smaller conflicts between HB40 and HB352 that do not appear to reflect differing intentions between the bills' provisions.

TECHNICAL ISSUES

NMAG notes the following:

House Bill 40 does not define "independent contractor," but seems to suggest that an independent contractor can only be a public body or governmental entity. It would be helpful to define "independent contractor" if such an entity continues to be an option for operation of detention facilities, especially since a "private independent contractor" of a jail or prison is prohibited under the express terms of HB 40.

NMAG retains this technical concern after the HJC amendment.

CYFD notes that Subsection C of Section 3 of this bill refers to "juvenile inmates," but CYFD does not refer to adjudicated juvenile clients as "inmates."

OTHER SUBSTANTIVE ISSUES

County Impacts. New Mexico Counties submitted the following comments regarding fiscal implications to counties:

In addition to receiving an annual administrative fee of \$93,000 to \$102,000 from CoreCivic, Cibola County contracts with CoreCivic to house county detainees formerly held in the county operated detention center. The per diem rate paid by the County is less than half the rate charged by other counties and the net savings to Cibola County for closing the county facility has been approximately \$3million per year. Closing the county run detention center has also greatly reduced the county's liability exposure because

CoreCivic is required to defend and indemnify the county from any claims arising from their operation.

CoreCivic is the single largest property tax payer in Torrance County and also generates significant GRT revenue (estimated to be approximately \$100,000). The privately operated facility in Estancia currently employs 150 people. When the CoreCivic facility closed in 2017, 200 employees lost their jobs, families relocated and the local school district lost a significant number of students. The only grocery store and bank in Estancia also closed. Torrance County contracts with CoreCivic to house county detainees that would otherwise need to be transported to a detention facility outside the county. The county estimates that it would cost an additional \$474,000 per year to transport and house detainees out of county.

Otero County owns two facilities in Chaparral, New Mexico that are operated by Management & Training Corporation (MTC). Otero County operates a county detention facility and does not contract with MTC to house county detainees. The Otero County Prison Facility houses primarily NMCD inmates along with US Marshal, US Army and a sex offender treatment program. It employs 300 employees and Otero County owes \$22.5 million in bonds that are not scheduled to be repaid until 2028. The Otero County Processing Facility houses individuals held by Immigration and Customs Enforcement and also has 300 employees. Otero County owes \$36 million in bonds that are to be fully repaid in 2028. Default on bonds would hurt Otero County's credit rating and its ability to borrow money for projects to benefit Otero County citizens.

HB40 would also eliminate an important contingency strategy for counties that find increased liability exposure for detention operations untenable. Lincoln County contracts with CSG Programs to operate their county detention facility. The county has not run their detention center for over 20 years and does not have the expertise to operate it. Under their operating agreement, CSG agrees to defend and indemnify the county up to \$5 million and subject to a \$250,000 deductible per claim. The ability to transfer liability exposure to a private contractor is critically important. The legislature is also currently considering legislation (HB4) that would greatly increase liability exposure and render county sheriffs and detention facilities "uninsurable." If HB4 passes and counties are unable to procure adequate insurance coverage for detention operations, counties will need to return to privatization to mitigate their liability exposure.

In separate communications with LFC staff, an attorney for Otero County also noted the county receives about \$1.1 million per year in rents under its agreement with MTC. Losing that revenue would significantly impact the county's general fund.

ER/rl/al