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## FISCAL IMPACT REPORT

ORIGINAL DATE 3/5/2021

SPONSOR HCPAC LAST UPDATED \_\_\_\_\_ HB 352/HPCACS/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		
Negative – See Fiscal Implications					Recurring	State and Local General Funds (GRT)

(Parenthesis ( ) Indicate Revenue Decreases)

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

	FY21	FY22	FY23	FY24	FY25	5 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>NMCD</b>	NFI	NFI	(\$159.2) to (\$74.8)	(\$1,910.0) to (\$897.2)	(\$3,795.7) to (\$1,783.0)	(\$5,864.9) to (\$2,754.9)	Recurring	General Fund
<b>Other</b>	NFI	\$100.0 to \$200.0	NFI	NFI	NFI	\$100.0 to \$200.0	Nonrecurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to Senate Bill 291, Senate Memorial 7  
Conflicts with House Bill 40

#### SOURCES OF INFORMATION

LFC Files

Responses Received From  
Office of Attorney General (NMAG)

Responses to Introduced Bill Received From  
Sentencing Commission (NMSC)  
Economic Development Department (EDD)  
Workforce Solutions Department (WSD)  
Corrections Department (NMCD)  
New Mexico Counties

## SUMMARY

### Synopsis of Bill

The proposed House Consumer and Public Affairs Committee substitute for House Bill 352 bars governmental entities from entering into new agreements with private entities to operate detention facilities or modifying existing agreements in a manner that would increase a privately operated detention facility's capacity, repeals statutes that previously authorized counties and municipalities to enter into agreements to operate jails and authorized NMCD to contract with private entities for the operation of specific correctional facilities, and amends existing law governing contracts and controls of county jails used to house prisoners.

Proposed HB352/HCPACS further creates the Private Prisons Transition Task Force, which shall exist through December 20, 2021, and includes 17 members representing a range of stakeholders, including the legislative and executive branches and county governments, as well as other organizations with expertise and interest in corrections. The bill requires the task force to issue a report to the governor and the Legislature by December 20, 2021, with recommendations to determine the economic impacts of phasing out the facilities, safely reduce the prison population overall, and analyze the state's capacity to take over private detention facilities.

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

## FISCAL IMPLICATIONS

### Revenue Impact

The provisions of proposed HB352/HCPACS will likely decrease gross receipts tax (GRT) revenues to the state and local governmental entities. The Taxation and Revenue Department reports the three companies that operate private detention facilities in New Mexico (Geo Group, Management and Training Corporation, and CoreCivic) generated a total of \$4.6 million in GRT revenue to state and local governments in FY20, about \$2.8 million of which was revenue to the state and about \$1.8 million of which was revenue to local governments. If GRT revenue remains flat and these companies cease all taxable activities in the state, this would result in annual reductions in revenue of \$2.8 million to the state general fund and \$1.8 million to local governments.

However, these revenues are not limited solely to the operation of private prison facilities; Geo Group, for example, also runs inpatient drug and alcohol rehabilitation programs. Additionally, because the bill allows for the continued *ownership* of detention facilities by private entities, it is possible private entities may retain ownership of facilities operated by public entities. Further, many private detention facilities' contracts will allow them to operate for many years after the enactment of this bill (which only bans new contracts or those modified to increase capacity), so it is unlikely these companies will cease all taxable activities in the state in the near future, meaning these revenue impacts should be considered as maximum impacts, and the actual impact will likely be significantly lower but may increase in future fiscal years, as contracts for private detention facility operations expire or end and public entities cannot enter into new contracts.

### Additional Operating Budget Impact to NMCD

Implementation of proposed HB352/HCPACS could result in long-term cost savings for NMCD.

These potential savings are largely driven by anticipated declines in prison population, and without this bill, it is likely some of these cost savings would still be realized due to these trends. However, realizing such savings would be dependent on numerous factors, including the modification or cancellation of existing private prison contracts, many of which currently ensure compensation for minimum inmate populations. Because these impacts would occur several years in the future, NMCD's FY21 operating budget and FY22 budget request do not reflect such actions, nor has the department announced an intent to take such actions in the future. As a result, the entirety of this impact is considered as an effect of proposed HB352/HCPACS.

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"), this analysis assumes existing contracts will end (and the provisions of the bill banning NMCD from entering into new contracts for their operations) will take effect on the following dates:

- OCPF: June 23, 2023
- NWNMCC: June 30, 2024
- GCCF: September 24, 2034
- LCCF: November 25, 2034

The impacts to the state of no longer being able to contract with a private operator to house inmates at GCCF and LCCF would occur so far in the future as to make their projection impractical, because the underlying factors affecting those impacts (overall prison population and populations housed at those specific facilities, among others) could change significantly and in unpredictable ways by 2034. Indeed, the Sentencing Commission's (NMSC) prison population forecast released in July 2020 only projects through 2030.

As a result, this analysis focuses on the impact to NMCD of relevant entities (in this case, Otero County and NMCD) being unable to enter into new contracts with private entities for the operations of OCPF after June 23, 2023, and NWNMCC after June 30, 2024. While NMCD has several options to accommodate this change (including taking over the operations of one or both of those facilities or moving their populations to other private facilities), the most cost-effective option will be to move those inmates into existing public facilities. This analysis assumes that path, but if NMCD chose to move these populations to other private facilities, there would be no to minimal additional operating budget impact on the agency. If NMCD chose to split these populations between existing facilities, it would realize cost savings, but those savings would be lower than if it transferred the entirety of those populations to existing public facilities.

***Prison Populations and Facility Capacity.*** For purposes of this analysis, it is assumed that any transfer of inmates from OCPF to accommodate the provisions of this bill will occur no more than one month prior to the end of FY23, and any transfer of inmates from NWNMCC to accommodate the provisions of this bill will occur at the end of FY24. As a result, this analysis uses the projected average annual inmate populations for FY23 and FY24 to estimate additional housing needs and costs.<sup>1</sup>

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<sup>1</sup> Given recent population trends, this is likely a conservative assumption, and actual populations at the time of this bill's impact on both nonrecurring and recurring costs may be lower.

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 average year-over-year decrease in population of 3.9 percent annually between FY16 and FY21; if these trends continue over the coming years, the average prison population will be 5,559 in FY24 and 5,340 in FY25.<sup>2</sup>

As of February 1, 54 percent of the state’s inmates were housed in public prison facilities, with the remaining 46 percent housed at private facilities; OCPF held 8.5 percent of the total inmate population (public and private) and NWNMCC held 9.1 percent. Assuming a similar share of the prison population is housed at OCPF one month prior to the end of FY23 and NWNMCC at the end of FY24, an estimated 474 inmates would need to be relocated from OCPF to public facilities no more than one month prior to the end of FY23, at which point those public facilities (with an estimated population of 2,985 and capacity of 4,482) could accommodate the entirety of that transfer. An additional 487 inmates need to be relocated from NWNMCC at the end of FY24, and public facilities (with an estimated population of 3,323 – including the inmates previously transferred from OCPF – and capacity of 4,482) could also fully accommodate that transfer.

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 at the time of the transition. 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.

***Marginal Cost per Inmate.*** 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. NMCD does not provide information on the cost per inmate for each private facility, so for purposes of this analysis, it is assumed it is equal across all private facilities.

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<sup>2</sup> NMSC 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).

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 at the time of the transfer, 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 FY20 marginal cost to house inmates at public facilities is \$4,030 less than the cost to house them at private facilities, and the marginal cost that is 10 percent higher than FY20’s is \$1,893 less than the cost to house inmates at private facilities.

**Cost Impacts of OCPF Transfer.** Based on the cost difference between housing inmates at public versus private facilities noted above and assuming the annual marginal cost per inmate in FY23 and FY24 ranges from flat with FY20 to 10 percent greater than FY20, transferring 474 inmates from OCPF to public facilities will result in annual cost savings of between \$897.2 thousand and \$1.9 million. The cost impact of this transition for FY23 is prorated for one month (savings between \$74.8 thousand and \$159.2 thousand), and the entire annual cost is anticipated to impact FY24.

Given population declines, the cost impact of the OCPF transfer for FY25 is calculated based on what the OCPF population would have been if that population was not transferred at the end of FY23, an estimated 455 inmates. Transferring 455 inmates from OCPF to public facilities will result in annual cost savings of between \$861.9 thousand and \$1.8 million.

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.

**Cost Impacts of NWNMCC Transfer.** Based on the cost difference between housing inmates at public versus private facilities noted above and assuming the annual marginal cost per inmate in FY25 ranges from flat with FY20 to 10 percent greater than FY20, transferring 487 inmates from NWNMCC to public facilities will result in annual cost savings of between \$921 thousand and \$2 million. The entirety of this impact is assumed to occur in FY25.

**Overall Cost Impacts.** Overall cost impacts of both transfers are outlined below:

**Estimated Operational (Recurring) Cost Impacts of Events Assumed in Analysis**  
(dollars in thousands)

Event	FY21	FY22	FY23	FY24	FY25	5 Year Total Cost
OCPF Transfer	\$0.0	\$0.0	(\$159.2) to (\$74.8)	(\$1,910.0) to (\$897.2)	(\$1,835.0) to (\$861.9)	(\$3,904.2) to (\$1,833.9)
NWNMCC Transfer	\$0.0	\$0.0	\$0.0	\$0.0	(\$1,960.8) to (\$921.0)	(\$1,960.8) to (\$921.0)
<b>Total</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>(\$159.2) to (\$74.8)</b>	<b>(\$1,910.0) to (\$897.2)</b>	<b>(\$3,795.7) to (\$1,783.0)</b>	<b>(\$5,864.9) to (\$2,754.9)</b>

Source: LFC analysis

**Additional Operating Budget Impact to Other Agencies**

In its analysis of a similar bill (proposed House Appropriations and Finance Committee substitute for House Bill 40), EDD reported the duties assigned to the newly created Private Prisons Transition Task Force would require a moderate amount of additional funding. The agency stated that developing the recommendations required of the task force would likely require hiring a contractor for a one-time cost of between \$100 thousand and \$200 thousand. The bill does not state where this task force will be located, so it is not clear what agency will incur this cost.

**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, and 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. NMCD’s contract for operation of NWNMCC is directly with the private prison operator but does not expire until the end of FY24.

Because this bill allows the renewal and extension of existing contracts, however, some of these contracts may be renewed and extended for some time, delaying the impact of this bill to NMCD. For purposes of this analysis, it is assumed any options for contract renewal or extension under the current contracts will be utilized. However, although some of these contracts may be able to amended to provide for longer terms under the provisions of this bill, this analysis does not assume any contract amendments.

**Anticipated Expiration Dates of Relevant Private Detention Facility Contracts**

Facility	Relevant Contracting Entities	Contract Effective Date	Current Contract Term Expiration Date	Options for Renewal or Extension	Anticipated Contract Expiration Date
OCPF	Otero County and MTC	6/23/2008	6/23/2021	Provides for an initial term of five years and up to five two-year contract extensions for a total term of up to 15 years past its effective date	6/23/2023
NWNMCC	NMCD and CoreCivic	9/1/2020	6/30/2024	N/A	6/30/2024
GCCF	Guadalupe County and Geo Group	9/24/2019	9/24/2024	Provides for an initial five-year term and one-, two-, or three-year extensions, not to exceed a total of six extensions for a total term not to exceed 15 years from its effective date	9/24/2034
LCCF	Lea County and Geo Group	11/25/2019	11/25/2024	Provides for an initial five-year term and one-, two-, or three-year extensions, not to exceed a total of six extensions for a total term not to exceed 15 years from its effective date	11/25/2034

Source: LFC files

**Prison Population.** In FY20, total prison population averaged 6,837 (6,157 men and 680 women), a decrease of 5.4 percent from 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 proposed HB352/HCPACS 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.

***Constitutional Concerns.*** In its analysis of the introduced bill, New Mexico Counties raises concerns the bill "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, proposed HB352/HCPACS appears to apply only to new contracts 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.

## **CONFLICT, RELATIONSHIP**

Proposed HB352/HCPACS conflicts with House Bill 40, which makes it unlawful to operate a private detention facility in New Mexico and bars the extension of contracts to operate or manage private detention facilities, as well as enter into, renew, or modify (in a manner to increase their capacity) such contracts. Additionally, HB40 establishes two funds to aid counties and their residents affected by prohibiting private prison contracts, but, unlike proposed HB352/HCPACS, does not establish the Private Prisons Transition Task Force.

Proposed HB352/HCPACS relates to Senate Bill 291, which adds a new section to the Privately Operated Correctional Facilities Oversight Act (Chapter 33, Article 15 NMSA 1978) making privately operated correctional facilities subject to inspection without prior notice by an inspector designated by the attorney general.

Proposed HB352/HCPACS relates to Senate Memorial 7, which requests that the Legislative Council appoint a joint subcommittee of the interim Courts, Corrections and Justice Committee and the interim Economic and Rural Development Committee to study strategies to mitigate the economic consequences of closing private prisons.

## **OTHER SUBSTANTIVE ISSUES**

**County Impacts.** In its analysis of the introduced bill, 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 \$3 million 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 employees 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.

HB352 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.

Speculation on the potential impacts of proposed House Bill 4 on counties and the utility of private detention facility options is solely that of New Mexico Counties and was not independently analyzed for purposes of this analysis.

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/al