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FISCAL IMPACT REPORT

SPONSOR SHPAC ORIGINAL DATE 3/5/2021
 LAST UPDATED _____ HB _____
 SHORT TITLE Inspection of Police Misconduct Investigation SB 227/SHPACS
 ANALYST Rabin

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Minimal to Moderate – See Fiscal Implications				Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

May conflict with Senate Bill 189
 Relates to House Bill 254, House Bill 263, and Senate Bill 274

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Public Defender Department (PDD)
 Office of Attorney General (NMAG)
 Sentencing Commission (NMSC)
 Department of Public Safety (DPS)

Reponses to Introduced Bill Received From

Department of Military Affairs (DMA)
 Corrections Department (NMCD)
 New Mexico Counties

SUMMARY

Synopsis of Bill

The Senate Health and Public Affairs substitute for Senate Bill 227 amends existing provisions related to law enforcement use of force and misconduct, establishes a system for reporting officer-involved injuries and deaths, and establishes the Law Enforcement Officer Procedures Act.

SB227/SHPACS amends the Inspection of Public Records Act (IPRA) to clarify law enforcement misconduct investigation records are not exempt from its provisions.

The bill further establishes a process for law enforcement agencies to report officer-involved injuries or deaths to the Department of Public Safety (DPS) and for DPS to report annually on all incidents to the governor, Legislature, and public. Law enforcement agencies that fail to comply with these reporting requirements are ineligible to apply for any state-agency-administered grants.

The bill also amends the definition of justifiable homicide by a public officer or employee under Section 30-2-6 NMSA 1978. Under this section, homicide is justifiable when “necessarily committed” to overcome actual resistance to performing legal duties or processes, to arrest or apprehend felons, or to prevent felons’ escape from lawful custody. SB227/SHPACS amends the definition of “necessarily committed” to include only those actions undertaken in compliance with the newly established Law Enforcement Officer Procedures Act.

Sections 4 through 9 of SB227/SHPACS establish the Law Enforcement Officer Procedures Act. The act prohibits the use of physical force by law enforcement officers except when necessary to prevent an imminent threat, conduct an arrest, or prevent an escape from custody. In such instances, reasonable and available de-escalation techniques must first be exhausted, the force used must be proportionate, and the use of force must stop after the law enforcement objective has been achieved. Deadly physical force (defined as “physical force that can be reasonably expected to cause death or serious physical injury”) is only to be used as a last resort. The act restricts the condition under which law enforcement officers may shoot at or attempt to block a fleeing vehicle and prohibits the use of chokeholds. Additionally, an otherwise lawful use of force “motivated in substantial part by anger, malice, retaliation, or any other intent unrelated to a law enforcement purpose” is unlawful.

The act provides that officers who have violated the above provisions must be disciplined and may be decommissioned and terminated, based on the seriousness of the incident. However, if a violation of these provisions results in serious bodily injury or death, or an officer uses a chokehold, the act requires the officer be immediately decommissioned, terminated, and disqualified from future employment as a law enforcement officer in New Mexico. The act provides an officer who uses force in violation of these provisions may be charged with battery, aggravated battery, manslaughter, or murder, depending on the outcome of the incident.

The act further creates a duty to intervene, requires law enforcement agencies to develop and publicize use of force policies and procedures in compliance with the act, and puts conditions on the serving of search warrants, including prohibiting “no-knock warrants.”

Notably, Section 2 defines “law enforcement agency” as “the police department of a municipality, the sheriff’s office of a county, the police department of a university, the New Mexico state police or the department,” but defines “law enforcement officer” as “a fulltime state or municipal police officer, county sheriff, deputy sheriff, conservation officer, motor transportation enforcement officer or other state employee authorized by state law to enforce criminal statutes,” which encompasses many individuals not employed by the specified law enforcement agencies. This discrepancy creates some confusion as to the applicability of this section’s provisions, particularly regarding how uses of force by law enforcement officers not employed by defined law enforcement agencies will be reported. For purposes of this analysis, it

is assumed the requirements regarding reporting uses of force apply solely to municipal and university police departments, county sheriffs' offices, and the New Mexico State Police (NMSP) and their employees, while provisions related to allowable uses of force apply to the broader definition of law enforcement officers. Section 5 includes an almost identical discrepancy, although the definition of "law enforcement agency" excludes university police departments, creating confusion as to the applicability of the provisions of Sections 6 through 9. For purposes of this analysis, it is assumed the requirements regarding developing and posting use-of-force policies apply solely to municipal police departments, county sheriffs' offices, and NMSP and their employees, while provisions related to allowable uses of force apply to the broader definition of law enforcement officers. However, such an interpretation still results in numerous technical and practical issues, discussed under "Significant Issues" and "Technical Issues" below.

There is no effective date of this bill. It is assumed the effective date is 90 days following adjournment of the Legislature.

FISCAL IMPLICATIONS

SB227/SHPACS requires DPS to develop a uniform protocol for all law enforcement agencies to report officer involved injuries or deaths. DPS reports it currently has a program to catalog this information for NMSP, which cost about \$88 thousand initially and costs \$12.3 thousand in annual maintenance fees. Assuming DPS can require all other law enforcement agencies to use this program, the agency expects there will still be some additional cost to DPS to upgrade the system so other agencies can input the required data, as well as additional digital storage costs. The agency stated such costs could not be determined at this time.

The LFC recommendation for DPS's FY22 operating budget includes an additional \$300 thousand for NMSP training and \$200 thousand for training other agencies' officers (through the New Mexico Law Enforcement Academy) in policing best practices, including de-escalation techniques.

The Administrative Office of the Courts (AOC) notes the bill's requirement that officers exhaust reasonable and available de-escalation tactics and techniques could potentially result in additional evidence being necessary and additional court time and resources being needed to prove or disprove the reasonableness of de-escalation tactics and techniques either used or not used by a law enforcement officer. AOC further notes the following regarding SB227/SHPACS's potential fiscal impact on the courts:

The SHPAC Substitute for SB 227, Section 6 provisions may have a substantial impact upon the courts. Section 6 provides that a law enforcement officer who uses force against a person in a manner inconsistent with Section 6 provisions that results in death may be charged with manslaughter or murder pursuant to Chapter 30, Article 2 NMSA 1978. While there may not be a profusion of prosecutions of law enforcement officers for manslaughter or murder, these cases will require a significant dedication of court time and resources.

Additionally, an action brought against a law enforcement officer for unlawful use of force will likely see the substantial introduction of testimony and evidence, particularly because the substitute bill for SB 227, Section 6 provides that each

application of force is required to be evaluated independently as a separate use of force to be separately justified as lawful, and particularly when an otherwise lawful use of force is alleged to be unlawful because motivated in substantial part by anger, malice, retaliation or other intent unrelated to a law enforcement purpose.

Further, the SHPAC Substitute for SB 227, Section 7 provisions permitting a law enforcement officer to be held liable, jointly or severally with any officer who used unreasonable force for any injuries or death caused by such officer's unreasonable use of force will result in an increased dedication of court time and resources to handle these actions. The Section 8 search warrant execution provisions will also likely lead to litigation requiring further dedication of court time and resources.

SIGNIFICANT ISSUES

Police Uses of Force. New Mexico had the second highest per capita rate of people killed by police in the country over the past five years, according to two national databases. From 2016 to 2020, between 97 and 108 individuals were killed by police, an average rate of 9.3 to 10.3 per million residents per year, while the average national rate of individuals killed by police ranged from 3 to 3.3 per million residents per year. Comparatively, New York, with over nine times New Mexico's population, saw roughly the same number of people killed by police during this period (between 90 and 109 individuals, an average rate of 0.9 to 1.1 per million residents per year).¹ While increased research has clarified some of the causes of police violence, effective solutions remain elusive.

NMSP investigates all of its officers' uses of force and reports 195 uses of force in FY20, on par with the 194 reported for FY19, and six officer-involved shootings compared with 10 in FY19. Suspect injuries were reported in 41 percent of these cases, with the most common injury types reported as abrasions and scratches. Officers were reported to have been injured in 13.8 percent of incidents, and 16.4 percent of the incidents resulted in a suspect being charged with battery on a peace officer.

New Mexico law enforcement agencies reported 40 officer-involved shootings, half of which resulted in fatalities, and one fatality not involving a gun to the FBI's national use-of-force database in FY20. NMSP investigated 38 of the officer-involved shootings (including all six shootings involving NMSP officers) and the one officer-involved fatality that did not involve shooting. The nonshooting fatality was the result of a neck restraint by a Las Cruces Police Department officer. Five of the six state-police-officer-involved shootings resulted in at least one fatality, with one incident leading to two deaths after an officer shot at a vehicle during a pursuit and the vehicle subsequently entered into oncoming traffic.

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

APD use-of-force incidents have been on the rise in recent years, rising almost 50 percent from 404 in 2016 to 605 in 2019.

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

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

The relationship between violent crime and police-involved fatalities is unclear. LFC analysis of rates of violent crime and police-involved fatalities between 2015 and 2019 found a correlation between the two factors on the state level but no significant relationship among Albuquerque and comparably sized cities. Additionally, the correlation at the state level is considerably more moderate if New Mexico and Alaska (outliers in both factors) are excluded. Several other cities and states demonstrate these factors are not intrinsically linked.

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

The state gives significant autonomy to local law enforcement agencies; however, it retains the authority to determine who can be certified as a police officer. Although the New Mexico Law Enforcement Academy Board, tasked with developing the standards and training required of police officers, is established as an independent entity, it does not have its own budget, and its staff are employees of the New Mexico Law Enforcement Academy, part of the Department of Public Safety (DPS). As a result, the agency responsible for police officer oversight is functionally dependent on an agency that also includes the New Mexico State Police, a potential conflict of interest. A 2005 survey conducted by the International Association of Directors of Law Enforcement Standards and Training found police officer standards and training boards operate as independent agencies in 19 states.

The board also faces issues ensuring law enforcement agencies fulfill their statutory obligations. For example, statute requires all police officers to complete biannual in-service training, and the board is responsible for gathering reports from agencies certifying the completion of these requirements. However, during the last biannual training cycle, only 47 percent of law enforcement agencies complied with reporting requirements, with over half of agencies' compliance with statutory training requirements unclear.

Applicability to Agencies and Officers. Section 2 of SB227/SHPACS defines “law enforcement agency” as “the police department of a municipality, the sheriff’s office of a county, the police department of a university, the New Mexico state police or the department.” This definition is narrow and excludes tribal police departments and state agencies that employ law enforcement officers, including the office of Attorney General (NMAG) (investigators), the Department of Game and Fish (DGF) (conservation officers), the Energy, Minerals and Natural Resources Department (EMNRD) (park rangers), the Livestock Board (inspectors), and the Corrections Department (NMCD) (correctional officers and probation and parole officers). However, this section defines “law enforcement officer” as “a fulltime state or municipal police officer, county sheriff, deputy sheriff, conservation officer, motor transportation enforcement officer or other state employee authorized by state law to enforce criminal statutes,” which would encompass law enforcement employees of tribal police departments and conservation officers, as well as some or all of the law enforcement employees of the other state agencies noted previously. Section 5 includes an almost identical discrepancy, although the definition of “law enforcement agency” excludes university police departments.

As a result, it appears SB227/SHPACS’s requirements to report uses of force apply solely to municipal and university police departments, county sheriffs’ offices, and NMSP and their employees and requirements to develop and post use-of-force policies apply solely to municipal police departments, county sheriffs’ offices, and NMSP and their employees, while provisions related to allowable uses of force apply to the broader definition of law enforcement officers. However, this discrepancy creates several practical issues, including that there is no system for reporting or investigating uses of force by all law enforcement officers, and agencies that are not included are not required to develop or publicize use-of-force policies in compliance with the Law Enforcement Officer Procedures Act.

Chokehold Prohibition. DPS contends that, while neither NMSP nor the New Mexico Law Enforcement Academy advocate the use of chokeholds, if an “officer finds himself or someone else being faced with a lethal attack that could result in great bodily harm or death then the officer is justified in utilizing a ‘weapon of opportunity’ to include a ‘choke hold’ to save their or someone else’s life.” The agency claims that banning the use of chokeholds in all circumstances is unrealistic.

Warrants. DPS believes the realistic effect of SB227/SHPACS’s provisions regarding warrants would make some search warrants excessively dangerous and interfere with the effective administration of public safety. The agency notes many items mentioned in the bill are worded in absolute terms, which it believes are incompatible with the real-world scenarios faced by law enforcement officers.

The Sentencing Commission notes a number of states have considered banning the practice of “no-knock” warrants, and Florida, Oregon, and Virginia have done so.

Potential Legal Considerations. DPS contends the bill does not account for the standards for law enforcement established by existing case law, including U.S. Supreme Court precedents relating to use physical coercion and the “reasonableness” standard. Additionally, the agency argues the amendment of the definition of justifiable homicide by a public employee or officer is unconstitutionally vague under the New Mexico Constitution because it fails to create minimum guidelines for enforcement and thus encourages subjective and ad hoc application of the law. According to the agency:

Allowing prosecutors to engage in a hindsight review of whether an officer “exhausted de-escalation tactics” under the “totality of the circumstances” fails to provide adequate guidance to prosecutors or officers. It will always be possible to argue that with the benefit of hindsight and unlimited time that an officer could have taken some possible action prior to the use of force. This bill as written would allow a prosecutor to formulate any possible additional action that an officer could have taken and on that basis determine that the officer did not “exhaust de-escalation tactics” under the “totality of the circumstances.” This statute allows for broad subjectivity and ad hoc application of a prosecutor’s judgment and is unconstitutionally vague.

CONFLICT, RELATIONSHIP

SB227/SHPACS may conflict with Senate Bill 189, which also amends Section 14-2-1 NMSA 1978 (IPRA). It is not clear if these amendments would be in conflict.

SB227/SHPACS relates to House Bill 254, House Bill 263, and Senate Bill 274, all of which establish policies for reporting and investigating an incident in which a peace officer’s use of deadly force against a person in the course of the officer’s duties results in great bodily harm or death or other in-custody deaths. SB227/SHPACS’s modification the statute defining justifiable homicide by a public officer or public employee and creates additional law regarding law enforcement use of force, which would likely have implications for investigations and prosecutions under HB254, HB263, and SB274.

TECHNICAL ISSUES

As noted previously, discrepancies between SB227/SHPACS’s definitions of “law enforcement agency” and “law enforcement officer” create confusion as to the applicability of the bill’s various provisions, particularly regarding how uses of force by law enforcement officers not employed by defined law enforcement agencies will be reported or investigated. These definitions appear in both Section 2 and Section 5 of this bill. Additionally, the definitions of “law enforcement agency” do not align between the two sections, as Section 2 includes university police departments but Section 5 does not (it is not clear if this is intentional).

Section 3 amends the definition of justifiable homicide by a public officer or employee under Section 30-2-6 NMSA 1978 by redefining “necessarily committed” to include only those actions undertaken in compliance with the newly established Law Enforcement Officer Procedures Act, which only apply to law enforcement officers as defined in that act. However, this definition may not align with the definition of “public officer or employee.”

NMAG notes both Section 2 and Section 5 provide definitions for “serious bodily injury,” “firearm,” and “deadly weapon,” (as well as some other terms) that are inconsistent and slightly different than definitions currently used in the criminal code and uniform jury instructions and could therefore be confusing. NMAG specifically notes potential conflict with the “immediate danger” requirement pursuant to NMRA 14-5171 and “firearm” pursuant to Section 30-7-16(D)(4) NMSA 1978.

According to NMAG, replacing the probable cause standard with a requirement an officer or public employee act in accordance with the new provisions in Section 6 makes the analysis under

that statute much more convoluted. The agency notes each of these standards fails to track NMRA 14-5171, which is the rule governing self-defense, potentially creating confusion.

Subsection K of Section 6 provides for decommissioning, terminating, and prohibiting an individual from serving as a law enforcement officer in the state on specific findings “by a court, the secretary of public safety or the head of any law enforcement agency that a law enforcement officer used physical force.” As noted in “Significant Issues,” above, many agencies whose employees meet SB227/SHPACS’s definition of “law enforcement officer” do not meet the bill’s definition of “law enforcement agency.” As a result, this provision does not apply to findings by the heads of those agencies.

NMAG notes the requirement of Subsection K of Section 6 for “immediate” discipline fails to outline what due process would be required in such a case and is not consistent with the disciplinary process created by the Law Enforcement Training Act and the Law Enforcement Academy Board. The agency further notes that Section 6 uses the term “decommissioned” for law enforcement officers when the term should refer to certification of officers under the Law Enforcement Training Act.

Section 9 states a “law enforcement officer entering a premises pursuant to a search warrant shall not be armed with specialized, military-style equipment, including assault rifles, submachine guns, shotguns, flash bang stun grenades or other stun agents, except when expressly authorized by the search warrant...” However, DPS notes “military-style equipment” and “assault rifles” are undefined.

OTHER SUBSTANTIVE ISSUES

In its analysis of the original bill, New Mexico Counties expressed concerns regarding the reporting timeline established by this bill. Under SB227/SHPACS, every use-of-force incident is required to be reported by the relevant law enforcement agency to DPS within 30 days, and the report must include specific, detailed information, including if the reporting law enforcement agency determined the use of force was justified.

AODA raises concerns the provisions of this bill requiring the publication of reports could pose privacy concerns, interfere with ongoing investigations, and conflict with other provisions of IPRA.

ER/al/rl