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FISCAL IMPACT REPORT

SPONSOR <u>HJC</u>	LAST UPDATED _____
	ORIGINAL DATE <u>3/08/2023</u>
SHORT TITLE <u>Unlawful Private Paramilitary Activity Act</u>	BILL NUMBER <u>CS/House Bill 14/HJCS</u>
	ANALYST <u>Tolman/Rabin</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY26	FY27	FY28	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Costs to NMCD	\$46.8	\$126.5	\$199.3	\$372.6	Recurring	General Fund
Total	\$46.8	\$126.5	\$199.3	\$372.6	Recurring	General Fund

Parentheses () indicate expenditure decreases.
 *Amounts reflect most recent analysis of this legislation.

Sources of Information

LFC Files

Responses Received From

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

SUMMARY

Synopsis of HJC Substitute for House Bill 14

The bill would create a new statute titled the “Unlawful Private Paramilitary Activity Act.” The act sets out definitions for nine terms used in the act: armed forces, explosive, firearm, paramilitary organization, peace officer, person, and regularly organized state militia. It defines a “paramilitary organization” as “a group of three or more person associating under a command structure for the purpose of functioning in public or training to function in public as a combat, combat support, law enforcement, or security services unit.”

The act would prohibit anyone in a “paramilitary organization or on behalf of or in furtherance of any objectives of a paramilitary organization,” while “armed with a firearm, explosive device, or other dangerous weapon,” from knowingly doing certain acts:

- “Publicly patrol, drill or engage in techniques” capable of causing injury or death.

- “Interfere with, interrupt, or attempt to interfere with or interrupt government operations or a government proceeding.”
- “Exercise or attempt to exercise, without due authority, the function of a peace officer” or pretend to be a peace officer with the intent to deceive.
- “Interfere with or intimidate another person,” depriving them of “right, privilege, or immunity” provided by law.
- “Train or engage” in any of the above.

The proposed bill sets a penalty that whoever violates the provisions of acting as part of a paramilitary organization or on behalf of or in furtherance of any objectives of a paramilitary organization, and while armed with a firearm, explosive device or deadly weapon is guilty of a third degree felony.

Forfeiture applies following conviction to property involved in the violation or its facilitation, used in the violation or its facilitation, intended to be used for the violation or its facilitation, or comes from proceeds traceable to the violation.

The proposed act empowers the attorney general to sue for equitable relief if the attorney general has “reasonable cause” to believe a person has violated or is about to violate the act and a person injured by conduct forbidden by the act can civilly sue for equitable relief (e.g. injunctions) or money damages.

The act provides exceptions to whom the proposed law would apply including a person who is acting in the person’s capacity as a member of:

- The armed forces of the United States, national guard, regularly organized state militia, or any unorganized or reserve militia called into service by this state or the United States;
- A group of individuals that associate as a military organization solely for historical purposes or fictional performances or parade in public as part of a bona fide veterans organization with no intent to engage in activities prohibited by this act;
- An educational institution that is authorized to teach military science under the supervision of a military instructor; or
- An organization that is authorized by this state or the United States to provide or engage in paramilitary activity, law enforcement, or security services training and if performing these functions are authorized functions and under the direction and control of a governmental authority.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

Incarceration drives costs in the criminal justice system, so any changes in the number of individuals in prison and jail and the length of time served in prison and jail that might result from this bill could have moderate fiscal impacts. The creation of any new crime, increase of felony degree, or increase of sentencing penalties will likely increase the population of New Mexico’s prisons and jails, consequently increasing long-term costs to state and county general funds. The Corrections Department (NMCD) reports the average cost to incarcerate a single inmate in FY22 was \$54.9 thousand; however, due to the high fixed costs of the state’s prison

facilities and administrative overhead, LFC estimates a marginal cost (the cost per each additional inmate) of \$26.6 thousand per year across all facilities. LFC estimates a marginal cost (the cost per each additional inmate) of \$19.2 thousand per county jail inmate per year, based on incarceration costs at the Metropolitan Detention Center. HB14 may increase the number of incarcerated individuals and increase the time they spend incarcerated.

Much of the conduct covered by the new crimes created in HB14 are already criminalized, and the most analogous existing crimes are violations of the Antiterrorism Act (a fourth-degree felony) and impersonating a peace officer (a misdemeanor for a first offense and fourth-degree felony for a subsequent offense). The Sentencing Commission (NMSC) reports no individuals were arrested or incarcerated for violations of the Antiterrorism Act or impersonating a peace officer in FY22. As a result, it is likely the crimes created by HB14 will rarely be charged or result in additional prison admissions. However, if the purpose of the bill is to improve the state's ability to charge and convict individuals of this conduct, it may result in increased charges and admissions going forward.

The conduct criminalized within HB14 requires at least three people to participate in the conduct. Without additional information, this analysis estimates a minimum cost based on three individuals being incarcerated for a third-degree felony each fiscal year. Because HB14 enhances the sentence for an existing crime, the fiscal impacts of this change are not anticipated to be realized until the first group of offenders admitted under the enhanced sentence have served the term they would have served under the original sentence. Under the original sentence, offenders serve an average of 1.41 years or 516 days (based on the average time served for offenders released from prison in FY22 whose highest charge was for this offense). As a result, offenders admitted to prison in FY25 under HB155 would begin to impact costs in FY26, when they remain in prison serving the longer sentence rather than being released as they would be under the current sentence. As more people are admitted to prison, costs increase. Costs continue to rise for each year until offenders admitted in the first year the change takes effect begin to leave prison after the change in time served resulting from HB155.

Based on actual time served for third-degree felonies for offenders released from prison in FY21, provided by the Sentencing Commission, these individuals will spend an additional 1.08 years or 396 days in prison each due to the changes proposed by this bill, a cost of \$66.4 thousand per offender and \$199.3 thousand overall. These additional costs will begin to be realized in FY26, increasing over the following two years (as more individuals serve longer sentences for this crime) and leveling out at \$199.3 thousand in FY28 (as offenders begin to be released from prison) and future fiscal years.

Additional increased system costs beyond incarceration, such as costs to the judicial branch for increased trials or to law enforcement to investigate and arrest individuals for the new crimes under HB14 may exist. The Public Defender Department (PDD) notes the fiscal impacts of the proposed bill are difficult to determine and would be determined by how many people are currently engaging in the conduct covered by the proposed bill, which is unknown, and how aggressively (if at all) the proposed statute would be pursued and enforced. If enforced in an aggressive manner, the costs to PDD could increase due to the need for increased staffing since such litigation would involve extensive appellate litigation. The recurring agency cost of a PDD associate trial attorney's mid-point salary including benefits is \$104.9 thousand in Albuquerque and Santa Fe and \$113.4 thousand in the outlying areas, \$114.7 thousand and \$123.2 thousand, respectively, for more experienced attorneys handling more complex felony cases, recurring

statewide operational costs per attorney would be \$12.8 thousand with start-up costs of \$5,210 and average support staff (secretarial, investigator and social worker) costs per attorney would total \$102.2 thousand.

The office of the New Mexico Attorney General (NMAG) notes the proposed bill creates a new crime and grants their office the authority to pursue civil remedies. If NMAG pursues civil or criminal enforcement of the proposed bill, it may require additional resources.

This analysis does not include potential benefits of crime deterrence due to increased punishment, as research shows sentence length has little to no deterrent effect. Certainty of being caught is a significantly more effective deterrent to criminal behavior than the severity of punishment if convicted.

SIGNIFICANT ISSUES

HB14 criminalizes conduct that is already illegal under other laws, potentially increasing penalties for such conduct under certain circumstances. Research shows the certainty of being caught is a more powerful deterrent to crime than severity of punishment, and although laws and policies designed to deter crime focus mainly on increasing the severity of the punishment, this does little to deter criminals because most know little about sanctions for specific crimes. These findings suggest increasing penalties for crimes is unlikely to produce a significant impact on crimes committed. Incarceration (and length of incarceration) has also been shown to have a criminogenic effect, meaning time in jail or prison may make people more likely to commit crimes in the future.

Prioritizing solving crimes and securing convictions, particularly for serious offenses, could be much more impactful than increasing penalties. In New Mexico, however, punishment has grown less certain as crime has increased, with fewer violent crimes solved and more violent felony cases dismissed. LFC's evaluation team has found in the 2nd Judicial District (Bernalillo County) specifically, neither arrests, convictions, nor prison admissions have tracked fluctuations in felony crime, and in 2020, when felonies began to rise, accountability for those crimes fell. Improving policing and increasing cooperation and coordination among criminal justice partners could help increase the certainty of punishment for the most violent offenses and provide a stronger deterrent to serious crime than heightened penalties.

The Georgetown University Law Center's Institute for Constitutional Advocacy and Protection (ICAP) reports that all 50 states already have constitutional and statutory provisions relevant to paramilitary and private militia activity. ICAP categorizes the relevant state laws into four groups: (1) constitutional provisions requiring the subordination of the military to civilian authorities; (2) statutes restricting unauthorized private militia activity; (3) anti-paramilitary-activity criminal laws; and (4) prohibitions on the false assumption of the uniform or duties of a peace officer or member of the military. In New Mexico, relevant constitutional provisions include N.M. Const. art. II, § 9: Military subordination, N.M. Stat. Ann. §§ 30-20A-1 to -4: Antiterrorism Act (includes paramilitary activity prohibition), and N.M. Stat. Ann. § 30-27-2.1: Impersonating a peace officer.¹

¹ Georgetown University Law Center's Institute for Constitutional Advocacy and Protection (September 2020). Prohibiting private armies at public rallies: A catalog of relevant state constitutional and statutory provisions.

The PDD also noted that many of the offenses listed in the proposed statute are already crimes under existing criminal statutes, depending on how the acts are committed. Some additional examples PDD cited includes a variety of weapons offenses, including unlawful carrying of a deadly weapon, NMSA 1978, § 30-7-2, negligent use of a deadly weapon, NMSA 1978, Section 30-7-4(A), or unlawful possession of a deadly weapon by prohibited persons, NMSA 1978, § 30-7-16; simple or aggravated assault or battery, NMSA 1978, §§ 30-3-1 through -5; shooting at a dwelling or occupied building; shooting at or from a motor vehicle, NMSA 1978, § 30-3-8; and homicide, including reckless first or second degree murder or involuntary manslaughter, NMSA 1978, § 30-2-1.

Even though activities targeted by the proposed bill are already prohibited by related existing statute, NMSC notes there were not any arrests or prison admissions for related crimes prohibited by the antiterrorism act (N.M. Stat. Ann. §§ 30-20A-1 to -4) and crime of impersonating a peace officer (N.M. Stat. Ann. § 30-27-2.1). *USA Today* reports that, despite paramilitary or similar groups operating in all 50 states, existing laws prohibiting their behavior are rarely pursued or enforced.²

PDD notes the proposed statute could be interpreted broadly and result in legal tension with a number of statutory and constitutional rights (for example, the right to bear arms as it relates to freedom of association). Because of this, PDD anticipates that extensive litigation is likely if this bill becomes law and prosecutors attempt to enforce it.

PDD also notes the proposed legislation offers no guidance as to whether penalties under this statute are intended to be an alternative to those of other crimes or be in addition to those of other crimes, which could pose a matter of double jeopardy.

OTHER SUBSTANTIVE ISSUES

NMAG notes that to access its power bring a civil action pursuant to the proposed bill, the attorney general needs “reasonable cause”, but since HB14 is a criminal law, the burden of proof required to bring criminal charges is “probable cause”. NMAG notes that it is unclear what the definition of reasonable cause is within HB14 and whether it is supposed to have the same definition as probable cause in the criminal context.

NMAG also notes that to the extent a civil injunction is sought and obtained under the proposed bill that prohibits certain speech activities, the injunction may face legal challenge under the First Amendment as a prior restraint on speech, citing *City of Farmington v. Fawcett*, 1992-NMCA-075, ¶ 8, 114 N.M. 537, 540, in which, “Prior restraint means only that the government may not enjoin or restrain a particular expression prior to its judicial review, even though the same expression could constitutionally be subject to punishment afterwards.”

Available: <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/04/Prohibiting-Private-Armies-at-Public-Rallies.pdf>.

² Phillips, K. (November 3, 2020). All states prohibit ‘militia extremists’ and paramilitary activities. So why aren’t they stopped? *USA Today*. Available: <https://www.usatoday.com/story/news/politics/2020/11/03/all-states-prohibit-paramilitary-militia-extremists-but/6123774002/>.

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