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## FISCAL IMPACT REPORT

SPONSOR O'Neill LAST UPDATED 2/3/23  
ORIGINAL DATE 1/20/23  
SHORT TITLE Medical and Geriatric Parole BILL NUMBER Senate Bill 29  
ANALYST Rabin

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

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
NMCD	\$0.0	Up to (\$1,100.0)	Up to (\$1,100.0)	Up to (\$2,200.0)	Recurring	General Fund

Parentheses ( ) indicate expenditure decreases.

\*Amounts reflect most recent version of this legislation.

Relates to Senate Bill 84

### 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)  
New Mexico Attorney General (NMAG)  
Sentencing Commission (NMSC)  
Parole Board (APB)  
Corrections Department (NMCD)

## SUMMARY

### Synopsis of Senate Bill 29

Senate Bill 29 (SB29) repeals the existing statute governing the state's system of medical and geriatric parole (Section 31-21-25.1 NMSA 1978), in which the Parole Board is primarily responsible for determining whether an inmate is eligible for the program, and replaces it with a new system of medical and geriatric parole that transfers much of this authority to the Corrections Department (NMCD).

The program of medical and geriatric parole established by SB29 applies to geriatric, permanently incapacitated, and terminally ill inmates, which the bill defines. Notably, the minimum age at which an inmate can be considered geriatric under the terms of this bill is 55, while the minimum age in current statute is 65 (age is not the sole qualifier for considering an

inmate to be geriatric). Inmates who have not served their minimum sentence may be considered eligible for the program, but inmates convicted of first degree murder are not eligible. Medical and geriatric parole shall be in addition to any other parole for which a given inmate is eligible.

Under the provisions of this bill, eligible inmates (or their representatives) submit applications for medical and geriatric parole to NMCD, and the department determines whether to recommend the applicant be granted parole under the medical and geriatric parole program. The bill requires NMCD consider the totality of circumstances when determining its recommendation, including an inmate's age, severity of illness, comprehensive health evaluation, institutional behavior, and current level of risk for violence, as well as any alternative to maintaining the inmate in a traditional setting. The department may request reasonable medical and mental health examinations be conducted to aid in making these decisions. All applications, regardless of NMCD's recommendation, must be processed and forwarded to the Parole Board.

The bill creates a rebuttable presumption that inmates who are geriatric, permanently incapacitated, or terminally ill do not constitute a danger to themselves or society and are, therefore, eligible for medical or geriatric parole. It requires the Parole Board to release inmates whom NMCD recommends for medical or geriatric parole absent clear and convincing evidence the inmate's release is incompatible with the welfare of society. The board may consider the totality of the circumstances, including an inmate's criminal history, but is prohibited from denying medical or geriatric parole solely based on the nature of the charge resulting in the inmate's conviction or the inmate's criminal history.

The bill requires NMCD to make a recommendation to the board within 30 days of receipt of an inmate's application and requires the board to schedule a hearing and render a decision as to the inmate's release within 15 days of receipt of NMCD's recommendation. In cases involving terminally ill inmates, NMCD must make a recommendation within 15 days, and the board must issue a decision within seven days. The department or board must document any justifications for failures to adhere to these timelines in writing.

Inmates who are not granted medical or geriatric parole may reapply if additional information is received or their condition warrants. Inmates who are denied medical or geriatric parole by the board may appeal the decision in district court. The bill requires the board to file the record on appeal with the district court (including any applicable appellee response) within 48 hours of a notice of appeal being filed, and the court must rule on the appeal within 72 hours of the record on appeal being filed.

The bill requires NMCD to promulgate rules and implement a medical and geriatric parole program (including the application form for medical or geriatric parole) pursuant to the provisions of the bill. The department must provide all inmates over 55 and all inmates in long-term care or geriatric facilities with a copy of this policy once per year and must identify geriatric, permanently incapacitated, and terminally ill inmates and notify those inmates of the opportunity to apply for medical or geriatric parole.

The effective date of this bill is July 1, 2023.

This bill was endorsed by the Sentencing Commission (NMSC), which includes stakeholders from across the criminal justice system, including NMCD and the Parole Board.

## FISCAL IMPLICATIONS

**Medical and Geriatric Parole.** A 2018 LFC program evaluation found in FY18 the Parole Board received 19 applications for medical parole and granted five, or 26 percent. Of the 19 applications, two were for inmates who were either discharged or dead. Overall, the board held 3,811 hearings; medical parole applications accounted for 0.5 percent of total activity. In 2008, the Pew Center on the States' Public Safety Performance Project identified the average cost of an older prisoner to be \$70 thousand per year. Accounting for medical inflation, the LFC evaluation estimated the state paid about \$1.1 million in FY18 for geriatric medical costs that could have been avoided.

These estimates align with current data provided by NMCD and NMSC. 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 significant fiscal impacts. 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 per inmate per year across all facilities. SB29 is anticipated to reduce the number of incarcerated individuals.

NMSC reports 649 individuals 55 years old or older are currently serving time for new offenses in New Mexico's prisons. Of these, 119 are would automatically be ineligible for the program because they were convicted of first degree murder. It is unknown how many of the 530 remaining individuals would be eligible for geriatric parole, as parolees must also suffer from a debilitating and chronic infirmity, illness, or disease related to aging, and not constitute a danger to themselves or society. However, if 10 percent of the 530 potentially eligible inmates were released to parole under this program, NMCD would experience incarceration cost reductions of \$1.4 million and increases in parole costs (\$4,755 per offender per year) of just \$252 thousand, resulting in net savings of \$1.2 million per year.

Because these current calculations align with the prior analysis, this analysis uses the prior analysis (which was conducted with more specific cost estimates) and estimates up to \$1.1 million could be saved each year under the provisions of this bill. The bill would not take effect until July 1, 2023, so no fiscal impact is expected in FY23.

**Other Potential Fiscal Implications.** Both the office of the New Mexico Attorney General (NMAG) and the Public Defender Department (PDD) note minor potential additional operating budget impacts from this bill. NMAG states because SB29 permits appeal to the district court following denial by the Parole Board, the bill could lead to a possible increase in work for its Criminal Appeals Division. PDD notes that the bill allows an "attorney" to file an application or an appeal on an incarcerated inmate's behalf, which may in some cases fall within that office's scope of representation; however, PDD anticipates these costs would be so minor as to be able to be absorbed in its operating budget.

## SIGNIFICANT ISSUES

NMSC notes this bill was developed and approved by its Reform Committee and approved by the full commission. The agency further notes the bill was developed in consultation with NMCD and the Parole Board.

PDD states:

Incarcerating non-dangerous geriatric and seriously ill individuals does not further interests in public safety. This bill would place a public safety consideration front and center by excluding those convicted of first-degree murder and requiring non-dangerousness for release eligibility. It also gives both Corrections and the parole board the ability to consider public safety at each stage of review. Clarifying that the board *must* release non-dangerous inmates *unless* certain factors are met balances the crucial interests at stake.

NMSC notes:

Age is not the sole qualification for when someone is eligible for release under the geriatric parole program, but one of many factors. The person also has to be suffering from a debilitating and chronic infirmity, illness or disease related to aging; and not constitute a danger to the person's own self or to society at the time of review. In addition, a person who is serving a sentence for first degree murder is not eligible for parole under the medical and geriatric parole program, either presently or under SB 29.

NMCD expresses concerns regarding the potential lack of a formal hearing by the Parole Board in these cases, writing:

Senate Bill 29 states that in the event the inmate is terminally ill, NMCD will determine whether to recommend an inmate for medical or geriatric parole within fifteen days of the receipt of inmate's application and the board shall issue a decision within seven days. It does not appear there will be a formal hearing held by the parole board. The New Mexico Victims' Rights Act, Section 31-226-12 requires that the NM Parole board must notify the DA's office so they may in turn notify the victim of the parole board hearing so they can submit a statement or attend the hearing to read their statement. There is concern that if the terminally ill inmate's application process is expedited in accordance with the bill, the victim would not receive proper notification or access to submit or read a statement or the opportunity to attend the hearing in accordance with the law.

The Administrative Office of the District Attorneys echoes NMCD's concerns regarding the lack of a hearing and victim notification.

NMCD also expresses concerns regarding the division of responsibilities between itself and the Parole Board:

The Parole Board is administratively attached to but independent from the New Mexico Corrections Department and has the sole power to grant, deny, or revoke parole pursuant to Section 31-21-25. In this bill, that power is substantially shifted to the New Mexico Corrections Department where the Department recommends release; the Board must then essentially rebut that finding with clear and convincing evidence to exercise its discretion and thus if passed, could create a conflict with the purpose and separation of responsibilities in the Parole Board Act (Section 31-21-22 *et seq.*).

## RELATIONSHIP

SB29 relates to Senate Bill 84, which makes changes to processes regarding violations of probation and parole conditions.

## TECHNICAL ISSUES

NMAG notes the following potential issues:

Section 31-21-17.1(B) and 31-21-17.1(E) may be inconsistent because the former requires an inmate who is geriatric, permanently incapacitated, or terminally ill to submit an application to the parole board while the latter requires the application to be submitted to an inmate's classification officer.

SB 29 may create new rights for inmates with the proposed changes to Section 2 that could increase litigation in district court through the appeals process provided for in Section 31-21-17.1(L) as well as in habeas proceedings provided for in Rule 5-802 NMRA. Section 31-21-17.1(L) also provides that the appeal be filed "in the district court in the jurisdiction where the sentence was imposed." Section 31-21-17.1(L) invokes NMSA 1978, Section 39-3-1.1 (1999) as the mechanism for filing an appeal, but Section 31-21-17.1(L) may conflict with Section 39-3-1.1 because that provision provides that an agency decision may be appealed "to the district court for the county in which the agency maintains its principal office or the district court of any county in which a hearing on the matter was conducted."

NMAG also notes:

Proposed Section 31-21-17.1(A) provides that: "The corrections department shall promulgate rules and implement a medical and geriatric parole program, including the application form for medical or geriatric parole." Proposed Section 31-21-17.1(D) then discusses a "geriatric parole policy" that must be provided to inmates. It is unclear whether this policy is contained in the department's rules, related to the rules, or something completely different.

Section 31-21-17.1(K) provides that there is a rebuttable presumption that an inmate does not constitute a danger to the inmate's self or to society, and is therefore eligible for medical or geriatric parole when the inmate meets the other requirements of the definitions prescribed in proposed Section 31-21-5. Assuming the inmate meets such requirements, he or she is presumed eligible for parole and need not make any other type of showing. However, it is unclear who or what agency is supposed to rebut this presumption, when this would occur, or what standard would apply.

Section 31-21-17.1(H) provides that the director shall consider the totality of the circumstances, and includes specific criteria when considering eligibility for medical or geriatric parole. This presumably is what factors into the director's recommendation referenced in Section 31-21-17.1(J), although Section 31-21-17.1(H) is unclear as to the timing of the recommendation. This provision does not require the director to make a determination as to the welfare of society. Yet,

Section 31-21-17.1(F) provides that the corrections department “shall determine whether to recommend an inmate for medical or geriatric parole” and “[w]hen the department recommends an inmate for medical or geriatric parole, the director shall submit a statement to the board that the inmate’s release is not incompatible with the welfare of society.”

Section 31-21-17.1(J) provides that the parole board “shall release an inmate on medical or geriatric parole upon recommendation from the director unless the board finds by clear and convincing evidence that the inmate’s release is incompatible with the welfare of society and states in writing its reason for the finding. The board may consider the totality of the circumstances including an inmate’s criminal history, but shall not deny medical or geriatric parole solely because of the nature of the charge resulting in the inmate’s conviction or the inmate’s criminal history.” Thus, it is unclear to what extent a finding related to the welfare of society factors into whether an inmate is granted medical or geriatric parole. In addition, it is worth noting that the totality of the circumstances test referenced in Section 31-21-17.1(J) may be incompatible with a clear and convincing evidentiary standard, and it may be unclear how the parole board would utilize such a standard.

Finally, NMAG suggests “NMSA 1978, Section 31-21-7 (1990), which enumerates the duties of the director, may need to be amended consistent with the new duties proposed by SB29.”

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