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## F I S C A L   I M P A C T   R E P O R T

SPONSOR	Kernan	ORIGINAL DATE	2/2/17	LAST UPDATED	2/23/17	HB	
SHORT TITLE	Long-Term Care Ombudsman Act Changes					SB	171/aSPAC
						ANALYST	Chenier

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

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		See fiscal implications	See fiscal implications	See fiscal implications		

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General's Office (NMAG)  
Regulation and Licensing Department (RLD)  
Medical Board (MB)  
Board of Nursing (BN)  
Aging and Long-Term Services Department (ALTSD)  
Children Youth and Families Department (CYFD)

### SUMMARY

#### Synopsis of SPAC Amendment

The Senate Public Affairs Committee amendment to Senate Bill 171 would newly define informed consent and would add clarifying language outlining the duties of ombudsman to report on suspected or witnessed abuse. The amendment would set standards by which ombudsman are required to report suspected abuse based on whether a resident of a long-term care facility can provide informed consent. Further standards would be set in cases where the resident is unable to provide informed consent and when there is no surrogate decision-maker.

#### Synopsis of Bill

Senate Bill 171 would, within the Long-Term Care Ombudsman Act, expand the definition of surrogate decision-maker to include guardians, legal representatives, fiduciaries authorized by law to act on the resident's behalf, and individuals chosen by the resident to act on their behalf.

The bill also adds a division of the general services department and of the human services department as well as the office of the attorney general to the list of agencies tasked with acting on complaints filed by the office. The bill would also update the act and make technical corrections.

## **FISCAL IMPLICATIONS**

ALTSD provided the following:

The federal Older Americans Act (OAA) was signed into law on April 19, 2016, with a Final Rule effective date of July 1, 2016. Although many of the duties and responsibilities of the ombudsman program remain the same, there are new provisions in the Final Rule that bring the state Long-Term Care Ombudsman Act (Act) out of compliance with the OAA. These sections of the Act include Section 28-17-3 NMSA 1978 (Definitions); Section 28-17-9 NMSA 1978 (Referrals); and Section 28-17-13 NMSA 1978 (Access to Records). The bill brings the Act into compliance with the OAA.

The Aging and Long-Term Services Department's (ALTSD) liaison from the Administration on Community Living (ACL), a division of the federal Health and Human Services Department, did an onsite visit and comprehensive review of the act and corresponding regulations making the determination that the act was out of compliance with the OAA.

Failure to comply with the OAA could jeopardize federal funding received by the state under the OAA, which totals \$11.2 million and supports not only the Long-Term Care Ombudsman program but senior services throughout the state.

## **SIGNIFICANT ISSUES**

In response to the amendment ALTSD provided the following:

The Aging & Long-Term Services Department (ALTSD) supports adding the definition of “informed consent” since this term is used repeatedly in the law and is not defined elsewhere. ALTSD believes that defining “informed consent” for reference purposes is necessary, particularly as it clarifies that a resident may give “informed consent” through “writing or through the use of auxiliary aids and services or communicated by a resident or a resident’s surrogate decision-maker orally, visually or through the use of auxiliary aids and services and such consent is documented contemporaneously by a representative of the office.” An analogous definition is in the OAA.

ALTSD further supports the amendment as it clarifies the process necessary for referring a resident complaint of abuse, neglect or exploitation while protecting resident confidentiality. The OAA and the final rule prohibit disclosure of the identity of any resident by the ombudsman unless the resident or the resident’s surrogate-decision maker provides informed consent to the disclosure. This standard conflicts with the Act, which contains mandatory reporting requirements for individuals (including ombudsman) who know or suspect adult abuse, neglect or exploitation. Although SB 171, as originally written, addresses this issue; ALTSD believes that the amendment simplifies the law by delineating the three separate circumstances that an ombudsman may encounter when

responding to a report of abuse, neglect or exploitation of a resident. It also remedies the conflict between the Act's mandatory reporting requirements by protecting resident confidentiality necessary for compliance with the confidentiality provisions of the OAA and Final Rule.

ALTSD also stated that:

With regard to Section 28-17-13 NMSA 1978 (Access to Records), the paragraph on consent conflicts with the Final Rule in that it permits oral consent be given only in the presence of a third party. The ACL believes that this requirement is an undue burden on the resident and conflicts with the OAA.

EC/jle/al/jle