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## FISCAL IMPACT REPORT

**SPONSOR** Egolf/Bash/Ortiz y Pino      **ORIGINAL DATE** 6/18/20      5/aHJC/aHF1#1/aHF1#2/  
**LAST UPDATED** 6/20/20      **HB** aHF1#3/aSJC/aSFI#1

**SHORT TITLE** NM Civil Rights Commission      **SB** \_\_\_\_\_

**ANALYST** Dick-Peddie/Rabin

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

	FY20	FY21	FY22	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	\$0.0	\$0.0-\$150.0	\$0.0	\$0.0-\$150.0	Nonrecurring	Unknown*

(Parenthesis ( ) Indicate Expenditure Decreases)

\*The sponsor of this bill has stated the intention that the costs of the bill be funded from legislative cash balances; however, the text of the bill does not specify the source of the funding.

### SOURCES OF INFORMATION

LFC Files

#### Agency Response Received

New Mexico Attorney General (NMAG)  
 Commission for Deaf and Hard-of-Hearing Persons (CDHH)  
 Administrative Office of the Courts (AOC)  
 Administrative Office of the District Attorneys (AODA)  
 Office of African American Affairs (OAAA)  
 Indian Affairs Department (IAD)  
 Commission for the Blind (CB)  
 Governor's Commission on Disability (GCD)  
 Aging and Long-Term Services Department (ALTSD)

#### No Response Received

Martin Luther King Commission (MLKC)  
 Developmental Disabilities Planning Commission (DDPC)

### SUMMARY

#### Synopsis of SFI#1 Amendment

Senate floor amendment #1 amends the title of House Bill 5 to reflect prior amendments.

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment includes requires at least one member of the New Mexico Civil Rights Commission have law enforcement experience. The amendment further alters the directions to the commission, directing the directing the commission to examine laws regarding the use of qualified immunity by public employees, rather than to develop and propose policies for prohibition or limitation of the use of qualified immunity by public employees.

Synopsis of HFI#3 Amendment

House floor amendments #3 add requirements regarding the makeup of the New Mexico Civil Rights Commission, requiring the commission have no more than five members from the same party and requiring the appointing authorities to make every effort to ensure economic, geographic, gender, cultural, and racial diversity.

Synopsis of HFI#2 Amendment

The House floor amendment #2 changes language stating that “The commission shall hire or contract for appropriate staff” to state that “The commission may hire or contract for appropriate staff.”

Synopsis of HFI#1 Amendment

The House floor amendment #1 changes the deadline for the New Mexico Civil Rights Commission to issue its report of findings, recommendations, and proposed legislation to the governor, the Legislative Council, and the interim Courts, Corrections, and Justice Committee from March 31, 2021 to November 15, 2021.

Synopsis of HJC Amendments

The House Judiciary Committee amendment to House Bill 5 extends the commission through March 31, 2021, an additional four months. The amendment also changes the deadline for the commission to issue its report of findings, recommendations, and proposed legislation to the governor, the Legislative Council, and the interim Courts, Corrections, and Justice Committee from November 15, 2020 to March 31, 2021.

Additionally, the HJC amendment instructs the commission to assess the need for and cost of additional insurance policies for public employees and public bodies, or for persons acting on behalf of or under the authority of public bodies, pursuant to the provisions of the bill.

Synopsis of Original Bill

House Bill 5 would create the New Mexico Civil Rights Commission for the purpose of evaluating and making recommendations regarding the creation of a civil right of action for violations of state constitutional rights, as well as developing policy proposals for laws for the prohibition or limitation of the use of qualified immunity by state actors. The bill requires the commission to submit a report to the Courts, Corrections, and Justice Committee by November 15, 2020.

This bill creates and designates nine members to the commission, six appointed by the New Mexico Legislative Council and three by the governor, as well as establishes procedures and rules for commission members.

The bill outlines the commission's duties as follows:

- Review existing policies regarding qualified immunity;
- Propose policies and legislation establishing guidelines for litigants to seek damages and other equitable relief in instances where the state or a state actor violates constitutional civil liberties;
- Review and develop policies limiting or prohibiting the doctrine of qualified immunity;
- Submit a report of findings, recommendations, and proposed legislation to the governor, the Legislative Council, and the interim Courts, Corrections, and Justice Committee;
- Hire appropriate staff for assistance in commission duties.

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

The bill does not contain an appropriation.

### **FISCAL IMPLICATIONS**

The bill, as amended, does not contain an appropriation and does not specify a source of funding for operating the proposed Civil Rights Commission.

The bill states that the commission shall hire or contract for appropriate staff and that members of the commission are entitled to per diem and mileage compensation. The bill does not specify the source of funding for the commission, but the Legislative Council Service has the authority to use legislative fund balances to contract staff for commissions such as that proposed in HB5. However, the amount available for staff expenditures (in addition to miscellaneous expenses such as supplies for members during meetings) is difficult to determine. Under the proposed solvency framework under consideration during the special session, the Legislative Council Service will be funded at about 2 percent lower than FY20 funding levels.

It is unclear how many staff the commission will require to carry out its work. The Legislative Council Service may determine that existing staff can carry out appropriate functions for the commission. The estimated additional operating expenses table reflects a range of potential nonrecurring expenses from none (should no staff be deemed necessary for the commission) to a high of \$150 thousand, or 75 percent of the annual cost of 2 FTE at \$100 thousand each (should the commission contract for highly skilled or technical assistance).

The policies proposed by the commission could have implications on public entities' and employees' civil liability, but estimating the impact of such changes is beyond the scope of this analysis.

### **SIGNIFICANT ISSUES**

The New Mexico Attorney General (N MAG) submitted the following concerns:

In Section 1(G), HB 5 proposes that the Commission to review and propose legislation to limit qualified immunity. However, in *Howlett v. Rose*, the Supreme Court held that with regard to litigation brought under federal law 42 U.S.C. § 1983, a private right of action for deprivations of rights under the U.S. Constitution and laws, and thus, any limitations of the defense of qualified immunity would have to be legislated at the federal level. *See Howlett v. Rose*, 496 U.S. 356, 377, 110 S. Ct. 2430, 2443, 110 L. Ed. 2d 332 (1990) (finding that state law may not alter either the elements or defense of a § 1983 claim and state courts may not apply state law immunity defenses to § 1983 claims).

NMAG also noted in its agency response that House Bill 5 does not specify if the commission would be subject to the Open Meetings Act or the Inspection of Public Records Act, which may reduce governmental accountability and transparency.

The Commission for the Blind notes that because the Civil Rights Commission would not be adopting policy, and would instead be functioning in an advisory capacity, the commission would likely not be subject to the provisions of the Open Meetings Act. However, the Commission will presumably acting in a manner that provides for transparency and accountability, and that members of the public will be able to attend and participate in meetings.

The Office of African American Affairs suggests that at least one member of the commission be required to have significant professional understanding of civil rights law in New Mexico or inclusion of staffing of the commission with a person with significant understanding of civil rights law in New Mexico. The office further suggests the commission provide a Racial Equity Impact Assessment to be conducted on review of existing and the development of new policies and provide opportunities for the inclusion of community input from individuals impacted and community-based groups and nonprofits impacted by recommendations.

The Commission for the Blind notes that the Civil Rights Commission will need a budget to cover meeting costs, including costs of mileage and per diem, telecommunication and virtual meeting costs, printing costs, interpreter costs, costs for publishing meeting notices, and costs associated with providing reasonable accommodations for members of the public who are persons with disabilities who might require auxiliary aids or services to attend or participate in meetings. The Commission for Deaf and Hard-of-Hearing Persons also notes that there will be costs related to provide appropriate and effective accommodations for the Civil Rights Commission and its staff to act without violating national and state civil and accessibility right laws. The Commission for Deaf and Hard-of-Hearing Persons notes these costs could be very significant. The Commission for the Blind suggests the Civil Rights Commission be administratively attached to another state agency or that it develop an agreement with another agency to provide administrative support.

## **OTHER SUBSTANTIVE ISSUES**

The Aging and Long Term Services Department points out that the creation of a temporary commission may be unnecessary, as other commissions and committees already exist which could be directed to focus on the specific issues outlined in HB5 and provide recommendations on the same. The department notes that the Human Rights Commission has the authority to provide recommendations on ways to eliminate prejudice its harmful effects and its incompatibility with principles of fair play, equality and justice (per Section 28-1-3(B)(4) NMSA 1978). The department adds that many other states have long standing civil rights commissions that hold the same authority as New Mexico's Human Rights Commission (including Hawaii, Ohio, Michigan, Iowa, Maryland, and Indiana) and are studying issues raised in HB5.

The Commission for the Blind states that the receipt of per diem would subject the members of the Civil Rights Commission to the Governmental Conduct Act.

The Indian Affairs Department expresses concerns the bill does not establish specific provisions for the appointment process, appointment deadlines to ensure appointments are made in a timely manner, and diversity appointment security. According to the department, "These oversights may

significantly delay how soon the Commission can begin its work as well as exclude necessary representation, particularly from the state's minority communities, including the state's Nations, Tribes, and Pueblos and the African American community.”

The Office of African American Affairs asks the following questions:

- Does this Civil Rights commission have a mandate to work in collaboration with the Governor's newly announced Advisory Council on Racial Justice or the existing Ethics Commission?
- Does the membership and/or staffing of the Civil Rights Commission necessitate the outlining of a requirement that there is at least one member and/or staff member that has a professional understanding of civil rights law in New Mexico?
- Policies that include those of civil rights violations by a public body may harm communities, as well as individuals, will the commission provide opportunity for the inclusion of information on the impacts to racial/ethnic communities and/or other communities that may be harmed by the unjust application of civil rights?
- Will the appointment decision the nine individuals and hired or contracted staff provide for consideration of the inclusion of representation of the multiple communities, racial/ethnic, geography and/or age, which are impacted by the actions of the commission?

ADP/ER/rl/al