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FISCAL IMPACT REPORT

ORIGINAL DATE 02/17/21

SPONSOR Roybal Caballero LAST UPDATED _____ HB 263

SHORT TITLE Police Use of Force Reporting SB _____

ANALYST Rabin

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY21 | FY22 | FY23 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--|-------------------------|-----------|-----------|----------------------|------------------------------|------------------------------|
| DPS | NFI | \$499.4 | \$499.4 | \$998.9 | Recurring | General Fund |
| District Attorneys and Other State Agencies | See Fiscal Implications | | | | Recurring | General Fund |
| Counties | NFI | \$2,510.4 | \$2,510.4 | \$5,020.8 | Recurring | County Operating Funds |

(Parenthesis () Indicate Expenditure Decreases)

Duplicates House Bill 254, Senate Bill 274
Relates to Senate Bill 220, Senate Bill 227

SOURCES OF INFORMATION

LFC Files

Responses Received From

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

Responses Received on Duplicate Bill From

Administrative Office of the Courts (AOC)
Energy, Minerals and Natural Resources Department (EMNRD)
New Mexico Counties

SUMMARY

Synopsis of Bill

House Bill 263 (HB263) establishes a policy 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. The policy also applies in the occurrence of other death (except that of natural causes) while a person is in custody. For purposes of this bill, "deadly force" is defined as force that is reasonably likely to cause death or great bodily harm and that is the direct cause of death or great bodily harm and not merely a contributing factor in the death of person with a preexisting condition. "Great bodily harm" is defined as an injury to a person from use of deadly force by a peace officer that creates a high probability of death or results in permanent loss or impairment of the function of any organ in the body.

In such a case, the sheriff or chief of police within whose district the incident occurred is mandated to report the incident to the jurisdictional district attorney within 24 hours of the incident, who in turn must report it to the attorney general and the governor within 24 hours of being notified. Under the provisions of the bill, the governor is required to maintain a record of such reports, which is considered a public record and subject to the Inspection of Public Records Act (IPRA).

The bill further provides that the relevant prosecuting authority shall represent the state at a probable cause hearing at which the special prosecutor shall present evidence of the peace officer's use of excessive or deadly force and evidence of criminal offenses committed by the officer, including but not limited to first and second degree murder, voluntary and involuntary manslaughter, aggravated assault, assault with intent to commit a violent felony, and aggravated battery. Notably, the bill does not specify when this hearing will occur, explain how the relevant prosecuting authority is determined, or provide for the selection of a special prosecutor.

The Department of Public Safety (DPS) is the primary agency charged with investigating instances of peace officers using deadly force or any other in-custody death and may request assistance from other agencies as part of a task force agreement but remains the primary agency. The agency involved in the use of force may assist in the investigation but may not have any type of lead role in the investigation, unless the agency involved in the use of force is DPS, in which case members of an outside agency must assist but it is required that DPS remain the lead investigative agency.

The bill proposes the costs of investigation shall be paid out of the general fund of the county in which the investigation is made, and the costs of prosecution shall be paid "as are the costs in cases presented by district attorneys." Declinations to prosecute must be documented in detailed reports provided to the attorney general, the relevant district attorney, and the governor, and are considered public record and subject to IPRA.

The bill specifies that the attorney general has concurrent authority to prosecute unlawful uses of force resulting in great bodily harm or death and to prosecute any unlawful use of force involved in a failure to comply with the requirements for electronic recordings of custodial interrogations (pursuant to Section 29-1-16 NMSA 1978) or a failure to record the incident by using a body-worn camera approved by DPS.

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

FISCAL IMPLICATIONS

The primary fiscal implication of the bill for the state is the cost of prosecuting peace officers for criminal liability resulting from alleged use of deadly force resulting in great bodily harm or death or other in-custody deaths. The bill specifies that these costs “shall be paid as are the costs in cases prosecuted by district attorneys.”

The average general fund cost of prosecution by a district attorney is about \$1,000 per case, although it is likely prosecutions of law enforcement officers, which are generally complex, would require more resources. The total number of incidents that will be prosecuted is more difficult to determine. It is unclear if or to what extent this law will result in more peace officers being prosecuted for such incidents than under current law, making the actual fiscal impact of the bill difficult to estimate.

Under this bill, costs to investigate incidents of peace officer use of force resulting in great bodily harm or death are born by counties and would not have a direct fiscal impact on the state; however, it is likely DPS would be required to obtain these funds on a reimbursement basis. DPS notes that New Mexico State Police (NMSP) investigations can take years to complete, and if reimbursement were only requested at the end of the investigation, DPS could be forced to cover significant upfront costs. Additionally, to avoid impacting the department’s ability to adequately fulfill its other duties, the agency anticipates it will need to hire additional staff. Staffing costs not directly related to investigations (such as training) and for hours not directly dedicated to specific investigations would need to be covered by the department. Estimates below are based on the total cost the agency expects will be incurred, with the understanding that some or all of these costs will be reimbursed.

NMSP currently investigates the majority of officer involved shootings (OIS) throughout the state and averaged 41 OIS investigations per year between 2018 and 2020. NMSP participates in a joint law enforcement task force to investigate OIS in Albuquerque and Las Cruces, which DPS estimates account for about half of all OIS statewide. Because the bill would require NMSP to be the primary investigative agency and would not allow those agencies to take a leading role, NMSP believes it would require dedicated teams of officers (many of whom would need to have significant law enforcement experience) in each district whose primary responsibility is to be on call to respond and conduct these investigations. Using its average costs for OIS investigations as a baseline, DPS estimates the following cost increases under this bill:

DPS Anticipated Cost Increases for Investigations

| Expense | Baseline Cost (average from 2018 - 2020) | Estimated Cost Increase for FY22 and FY23 |
|---|--|---|
| Investigation cost | \$107.7 | \$80.8 |
| Investigator personnel (4 supervisors) | \$104.5 | \$418.0 |
| Crime scene technician personnel (18 investigators/technicians) | \$91.5 | \$1,647.0 |
| Training (all) | \$12.0 | \$264.0 |
| Additional hours for great-bodily-harm investigations not currently provided by NMSP | \$0.0 | \$600.0 |
| Equipment (cars, uniforms, etc.) | \$464.9 | \$0.0 |
| Total | \$780.6 | \$3,009.8 |

Source: DPS

Assumptions underlying DPS's analysis:

- Cost of OIS investigations will increase by 75 percent with DPS taking a lead role in all investigations;
- NMSP will require an additional 18 investigators and technicians and 4 supervisors to complete this work;
- All new staff will require about \$12 thousand of training every year; and,
- NMSP will investigate 50 uses of force resulting in great bodily harm per year (which it does not currently investigate), requiring an average of 300 hours per investigation at a rate of \$40 per hour.

For purposes of this analysis, it is assumed that counties would reimburse DPS for all investigation costs and additional hours for great-bodily-harm investigations, while DPS would be responsible for all training costs. It is assumed that 75 percent of the remaining staffing costs (supervisors and crime scene technicians) would be reimbursed by counties, while 25 percent would be paid by DPS for times when those personnel were not directly working on a reimbursable investigation. This would result in an average annual cost increase to counties of \$2.2 million and to DPS of \$780.3 thousand.

However, it appears likely that counties would also be required to reimburse DPS for the investigations currently in its purview, including investigations of incidents involving NMSP officers. For purposes of this analysis, it is assumed that counties would reimburse DPS for all baseline investigative costs, DPS would be responsible for all baseline training and equipment costs, and 75 percent of staffing costs would be paid by counties while 25 percent is paid by DPS. This would result in an average annual cost increase to counties of \$280.8 thousand and a corresponding \$280.8 thousand annual cost reduction to DPS.

Accounting for increased workload under this bill and changes in baseline cost distributions, this analysis estimates a \$2.5 million increase in costs to counties and a \$499.4 thousand increase in costs to DPS.

There may be some additional costs related to staff time (from police departments, sheriffs' offices, district attorneys' offices, the office of Attorney General, and the office of the Governor) necessary to comply with the reporting requirements of this bill. Additionally, while prosecution costs may be paid by district attorneys' offices, cases that are prosecuted by assistant attorneys general could have an impact on the office of Attorney General's (NMAG) workload. NMAG notes that its Special Prosecutions Division (SPD), which currently deals with prosecutions related to law enforcement use of force, has 11 full-time attorneys and four full-time support staff. According to the agency, district attorneys are increasingly reaching out to NMAG to assist in or lead the prosecution of some of their most difficult, challenging, and resource-intensive cases. While this bill would grant NMAG broad authority to investigate uses of force and in-custody deaths, the agency notes it does not provide an appropriation to hire additional staff to do so. Notably, NMAG requested a \$4 million special appropriation for FY22 for extraordinary litigation, including officer misconduct cases; this appropriation was supported by the executive recommendation, but not the LFC recommendation.

It is unclear if or to what extent this law would result in more peace officers being convicted of crimes and incarcerated within county jails or the state prison system. To the extent that the bill

increases the prison population, the Corrections Department (NMCD) would incur additional costs. NMCD reports the average cost to incarcerate a single inmate in FY20 was \$44.8 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 \$23.3 thousand per inmate per year across all facilities.

The Public Defender Department (PDD) notes that by allowing access to impeachment materials concerning officers, this bill could likely decrease litigation costs. The agency notes that transparency provisions could also prevent and lead to fewer prosecutions of officer-provoked or officer-escalated incidents. While there is a potential that the provisions would lead to increased criminal prosecutions of officers, PDD expects it is unlikely to experience an increased caseload, as law enforcement officers rarely (if ever) rely on indigent defense services when facing litigation for duty-related conduct.

The Administrative Office of the Courts (AOC) states there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions, and appeals from convictions. Prosecutions for crimes with severe penalties will result in more trials and jury trials, requiring additional judge time, courtroom time, courtroom availability and jury fees. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

HB263 contains numerous technical issues that make its effect unclear and may prevent it from having the intended effect. Those issues are outlined in detail under Technical Issues, below. Most crucially, the definitions of “deadly force,” “great bodily harm,” and “in-custody death” are reliant on facts that cannot be established without investigation, but the provisions of this bill requiring notification and investigation (indeed, the entirety of the bill’s applicability as set out in Subsection A) are premised upon the occurrence of an event that relies upon these definitions: either an instance of “deadly force” resulting in “great bodily harm” or death, or an “in-custody death.”

Police Uses of Force. New Mexico has 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

Very few incidents of police killings in New Mexico have resulted in the prosecution of the officer or officers involved. As of this writing, the most recent completed prosecution of police officers for death or great bodily harm of a civilian LFC staff could identify was the 2016 prosecution of

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.

the officers involved in the killing of James Boyd, which occurred in 2014, although in June 2020 an officer with the Las Cruces Police Department was charged with involuntary manslaughter related to an incident that occurred in February 2020. Whether the procedures outlined in this bill will result in additional prosecutions is unknown.

The Sentencing Commission (NMSC) notes that reforming officer-involved shooting investigation procedures has been at the forefront of recent initiatives to examine present police practices around the country. The agency believes the proposals in this bill are in line with proposals elsewhere in the country.

Reporting Requirements. It is unclear if the reporting requirements contained in this bill will be sufficient to ensure accurate reporting by law enforcement agencies. For over a decade, state statute has required law enforcement agencies to report uniform crime data to DPS; however, DPS has historically had problems ensuring complete reporting. The bill does not specify what (if any) consequences law enforcement agencies will face if they fail to report as required by the bill.

Other Impacted Agencies. The State Parks Division of the Energy, Minerals and Natural Resources Department (EMNRD) employs up to 82 park rangers and other employees who are vested with police powers within state parks and recreation areas. This bill requires all law enforcement agencies to fully cooperate with and promptly respond to requests for information from the relevant prosecuting authority and the law enforcement agency or independent investigator charged with authority over the investigation. EMNRD notes that the statutory requirement for law enforcement officers to use body-worn cameras (Section 29-1-18 NMSA 1978) only applies to municipal police departments, sheriffs' offices, and state police, but does not apply to state park officers. Notably, while HB263 also applies to correctional officers, those officers are similarly not considered law enforcement officers for purposes of the body-worn camera requirement.

Investigation Costs. The bill states that “[t]he costs of the investigation shall be paid out of the general fund of the county in which the investigation is made,” which would require county governments to cover the costs of investigations into use of force incidents resulting in death or great bodily harm involving law enforcement officers from other jurisdictions. This could result in a disproportionate distribution of costs for counties that include large municipalities with significant police forces. For example, the City of Albuquerque’s general fund budget is almost 50 percent greater than Bernalillo County’s, and between 2016 and 2020, the Albuquerque Police Department (APD) was responsible for almost three times as many deaths as the Bernalillo County Sheriff’s Office.² As written, the bill would require Bernalillo County to cover the costs to investigate all use of force incidents resulting in death or great bodily harm involving APD officers.

These provisions also require counties to bear the costs of investigations into use of force incidents resulting in death or great bodily harm involving NMSP officers as well as other law enforcement agencies operating within its boundaries. It may be desirable to instead require investigation costs be paid by the law enforcement agency that employs the peace officer involved in the incident; however, it may not be possible to enforce such provisions for federal law enforcement agencies.

² According to data from Mapping Police Violence, APD was responsible for 22 deaths between 2016 and 2020, while the Bernalillo County Sheriff’s Office was responsible for eight. One additional death was listed as the responsibility of both agencies, while another additional death was listed as the responsibility of APD and NMSP.

PERFORMANCE IMPLICATIONS

Establishing performance measures related to the incident reporting system as well as the investigation and prosecution procedures outlined in this bill could help ensure transparency and accountability within the system.

AOC notes the courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

ADMINISTRATIVE IMPLICATIONS

Law enforcement agencies, district attorneys' offices, the office of Attorney General (NMAG), and the Office of the Governor would need to establish procedures for complying with the provisions of this bill, including procedures related to the bill's reporting requirements and procedures applicable to prosecutions. DPS already handles many investigations into officer-involved-shootings; however, it may need to establish procedures specific to the requirements of this law. Under the bill, both DPS and NMAG could see their workloads increase, so potential staffing shortages and recruitment difficulties could pose challenges to those agencies in taking on increased workloads.

EMNRD notes that its State Parks Division operates across 26 counties within park jurisdiction and will have to create internal administrative policies and procedures for notifying sheriffs and/or chiefs of state police or other designees of such an incident occurring within a state park.

NMCD notes that it will need to make arrangements with local sheriff's offices and/or municipal police department for timely reporting of great bodily harm or death by those entities as required by this bill, as well as providing any task force coordination required for investigations where DPS requests assistance.

DUPLICATION, RELATIONSHIP

HB263 duplicates House Bill 254 and Senate Bill 274.

HB263 relates to Senate Bill 227, which also provides for reporting and investigating law enforcement officer uses of force. While the provisions of SB227 do not appear to directly conflict with those of HB263, enactment of both bills as currently written would likely result in some redundant systems. SB227 also modifies 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 HB263.

HB263 relates to Senate Bill 220, which provides an exception to the requirements for law enforcement officers to wear body cameras and record their activities while responding to calls for service and during any other law enforcement or investigative encounters with the public. Under SB220, officers cannot be required to record death notifications or undercover operations sanctioned in advance by a law enforcement agency. Because body camera recordings may be used as evidence in an investigation pursuant to HB263, any exceptions to the requirement that law enforcement officers record their activities may impact available evidence for these

investigations.

TECHNICAL ISSUES

Subsection A states that the provisions of this bill apply in the event of “any other death that occurs while a person is in custody that is not the result of natural causes.” However, this does not match the later definition of “in-custody death,” which requires the death be “the result of specific action taken by a peace officer or a breach of policy by a peace officer”. Many of the provisions of the bill (including those in Subsections E, F, and H, which establish procedures for investigations and prosecutions) apply solely to in-custody deaths, and would not apply to all deaths covered by the language in Subsection A. This does not seem to align with the intended applicability of the bill as established in Subsection A.

Subsections B and C establish notification requirements that must occur within 24 hours of the event (Subsection B) or of receiving written notice pursuant to Subsection B (Subsection C). However, Subsection B states that notification must occur within 24 hours “of a person suffering great bodily harm or death as a result of a peace officer’s action” and does not specify that such notification occur in the event of “any other death that occurs while a person is in custody that is not the result of natural causes.” Notably, it may be difficult to establish cause of death (and thus establish whether a death was or was not the result of natural causes) within 24 hours, but the exclusion of this type of death from Subsections B and C removes any notification requirements regarding such deaths, which may not be the intent of the bill and does not seem to align with the applicability specified in Subsection A.

The Administrative Office of the District Attorneys (AODA) states that Subsection C of the bill conflicts with IPRA provisions that exempt parts of law enforcement records involving a person accused but not charged with a crime from public release. NMSC states that specifying the precise information to be collected could help ensure there is no conflict between this bill and IPRA.

Subsection D establishes that the “relevant prosecuting authority shall represent the state at a probable cause hearing at which the special prosecutor shall present evidence of the peace officer’s use of excessive or deadly force,” however, the bill does not specify when this hearing will occur, explain how the relevant prosecuting authority is determined, or provide for the appointment of a special prosecutor. Further, the bill is not stated at any point to apply to *excessive* force, nor is excessive force defined within the bill.

Both DPS and PDD note that Subsection D seems contradictory in both requiring the prosecution to represent the state at a probable cause hearing at which the prosecutor shall present evidence of the peace officer’s use of excessive or deadly force, but also stating that “nothing in this subsection shall be construed to limit the prosecutorial discretion of the relevant prosecuting authority.” If the intent of this provision is to state a preference for preliminary hearing over grand jury, that should be clarified.

PDD notes that the language of Section E could be read to regulate investigations once opened, rather than actually requiring an investigation whenever there is an officer use of deadly force.

Subsection E states that the agency involved in the use of force shall not have any type of lead role in the investigation; however, if the agency involved in the use of force is DPS, it is required that DPS remain the lead investigative agency. These provisions appear contradictory, although it may

be the intent that DPS is an exception to prohibition on having a lead role in the investigation of its own use of force, in which case the exception should be clarified.

Subsection E makes reference to an “independent investigator charged with authority over the investigation,” but the bill does not define “independent investigator” or provide for such an investigator to be selected or charged with authority over the investigation.

Subsection F states that “[t]he costs of an investigation shall be paid out of the general fund of the county in which the investigation is made.” The investigation referenced is unclear, and may be intended to refer only to an investigative grand jury established pursuant to Subsection F, but as written appears to apply to the investigations conducted by DPS and other law enforcement agencies pursuant to Subsection E. New Mexico Counties has expressed concerns with such an arrangement, which are detailed under Other Substantive Issues, below. If the intent is solely to apply to grand jury investigations, that should be clarified.

AODA states that giving concurrent jurisdiction to the attorney general in all of these cases (Subsection H) sets up a potential conflict with district attorneys regarding which agency will prosecute these cases. AODA notes that district attorneys currently have original jurisdiction in all these cases but may decline to prosecute a case, allowing the attorney general to proceed.

Subsection H specifies that the attorney general has concurrent jurisdiction to prosecute “to prosecute any unlawful use of deadly force involved in a failure to comply with the requirements for electronic recordings of custodial interrogations pursuant to Section 29-1-16 NMSA 1978 or a failure to record the incident by using a body-worn camera approved by the department of public safety.” PDD and DPS note that Section 29-1-16 NMSA 1978 is not a crime and a violation of that statute would not generally be a prosecutable offense. Additionally, DPS does not approve body-worn cameras for other law enforcement agencies and has no statutory basis to do so.

Subsection I includes three definitions that pose a number of issues and create ambiguity as to the bill’s applicability:

- “deadly force” is defined to mean “a degree of force that is reasonably likely to cause death or great bodily harm and that is the direct cause of death or great bodily harm and is not merely a contributing factor in the death of a person with a preexisting conditions;”
- “great bodily harm” is defined to mean “an injury to a person from use of deadly force by a peace officer that creates a high probability of death or results in permanent loss or impairment of the function of any organ in the body;” and,
- “in-custody death” means a death that occurs while an individual is being detained and is the result of specific action taken by a peace officer or a breach of policy by a peace officer, but does not include a death that is the result of natural causes”.

These definitions pose the following issues:

- “Great bodily harm” is used in the definition of “deadly force,” but “deadly force” is also used in the definition of “great bodily harm.” Such circular definitions are incredibly unclear and ambiguous. The provisions of this bill rely heavily upon these definitions, and such ambiguity poses significant issues for interpreting the applicability of its provisions.
- “Deadly force” is required to be “the direct cause of death or great bodily harm and is not

merely a contributing factor in the death of a person with a preexisting conditions.” Establishing that a use of force meets these conditions requires investigation; however, the bill’s provisions regarding investigation apply only in cases in which deadly force was used. It is unclear how this will be established.

- “In-custody death” must be the result of an action taken by a peace officer or a breach of policy and does not include death due to natural causes. Many of the provisions of the bill (including those in Subsections E, F, and H, which establish procedures for investigations and prosecutions) apply solely to in-custody deaths, but it is unclear how it would be established that a death was due to an officer’s action or breach of policy and not natural causes without investigation.

NMAG notes the following technical issues:

HB263 makes clear the NMOAG has concurrent jurisdiction with local district attorneys to prosecute these types of cases; however, the aforementioned non-specific references to “relevant prosecuting authority” and “special prosecutor” make it somewhat unclear precisely which entity will ultimately be responsible for these prosecutions – whether it be the local DA, the NMOAG, or a special prosecutor appointed by one of these two entities.

HB263’s definition of GBH, *see* Section 1(I)(2), differs from the definition of GBH already memorialized in the Criminal Code. *See* NMSA 1978, § 30-1-12(A). The proposed definition does not include acts “which causes serious disfigurement”; acts which cause mere “protracted loss or impairment” of a bodily function; and acts affecting a “member” of the body.

The proposed definition of “peace officer”, *see* Section 1(I)(4), is more expansive than is currently defined in the Criminal Code. *See* NMSA 1978, § 30-1-12(C). As proposed, the term would now include “a correctional officer employed by a privately operated correctional facility.” That being said, the definition is still arguably under-inclusive of public employees allegedly responsible for recent civilian deaths and injuries, such as detoxification police-service aides, who are formally recognized as peace officers but who do not ordinarily charge people with crimes and do not have a duty to maintain public order. *See* NMSA 1978, § 43-2-19.

OTHER SUBSTANTIVE ISSUES

District Attorney Panels. Currently, district attorneys can ask the state District Attorneys Association to appoint a panel of three other district attorneys to review police shooting cases. However, these panels are not statutorily established and district attorneys are not required to follow their recommendations. As of August 2019, only four district attorneys used this system, which had reviewed six cases and recommended the officers be cleared in each case. It is unclear if the bill would affect the existence or use of such panels.

Peace Officers. The bill defines a peace officer as “any public official or public officer vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes,” including correctional officers employed by private correctional facilities. Such a definition would appear to be inclusive of law enforcement officers beyond those employed by police departments, sheriffs’ offices, and correctional facilities, including law enforcement officers employed by other state agencies and officers employed by

federal law enforcement agencies, such as Border Patrol agents. At the time of this writing, it was not known if all law enforcement agencies operating within the state employ policies and procedures that would require all such incidents be reported to the relevant sheriff's office or police department, although such policies and procedures would seem essential. Furthermore, it is unclear to what extent federal law enforcement agencies can be compelled to "fully cooperate with and promptly respond to requests for information from the relevant prosecuting authority and the law enforcement agency or independent investigator charged with authority over the investigation."

Incidents Involving Incarcerated Persons. Uses of force resulting in death or great bodily harm that occur within publicly-operated state prisons and county jails are covered by the provisions of this bill, as statute gives the power of a peace officer with respect to arrests or enforcements of law within such facilities to employees of the Corrections Department (Section 33-1-10 NMSA 1978) and local jails (Section 33-3-28 NMSA 1978) who have the custodial duties or responsibilities. Section 33-3-28 NMSA 1978 also provides these powers to "persons employed by private independent contractors who have been designated as jailers by the sheriff." Additionally, this bill specifically includes correctional officers employed by private facilities in the definition of peace officer.

It is unclear whether the bill would apply to incidents that occur within federal detention facilities, whether publicly- or privately-operated. As the state is not responsible for conferring powers upon the individuals operating such facilities, determining if those individuals meet the definition of peace officer as provided in this bill would require a review of federal laws and policies that is not feasible at the time of this writing. However, even if all the individuals working in such facilities met this definition of peace officer, the state's authority to compel such facilities to report incidents or cooperate with investigations remains unclear.

Prosecution Costs. The bill also states that "the costs of any prosecution arising out of the investigation shall be paid as are the costs in cases prosecuted by district attorneys." This language is somewhat nonspecific, but appears to imply that the costs of prosecutions led by the judicial district attorney, assistant attorney general, or special prosecutor would be paid by the judicial district attorney's office in which the incident occurred. However, the ambiguity of the language could cause confusion in cases where a district attorney from another judicial district is assigned as prosecutor. The language does not make clear whether costs related to that prosecution would be paid by the office of the district attorney in which the incident occurred or the office of the district attorney conducting the prosecution. More specific language could resolve this discrepancy.

Great Bodily Harm. This bill defines great bodily harm as "an injury to the person that creates a high probability of death or that causes serious disfigurement or that results in permanent loss or impairment of the function of any member or organ of the body." This definition raises questions regarding what constitutes a "high probability of death" and what constitutes a "serious disfigurement." It is unclear how differing interpretations of whether an incident constitutes great bodily harm will be handled.

Victim and Officer Information. The bill requires the log of peace officer use of force incidents resulting in death or great bodily injury include "victim information," but does not specify what type of information is required. With researchers and policymakers increasingly focusing on demographic disparities in incidents of police violence, it may be desirable to specify certain victim demographic information be recorded.

The bill requires reports and logs of the incidents to be public records, and it may be desirable to add a provision to protect the privacy of the victims and witnesses and to make sure that sensitive, medical, or identifying data is redacted from such reports. DPS raises concerns that officer names would not normally be disclosed under IPRA until the conclusion of the investigation, and the immediate disclosure of the name could compromise the investigation. The agency suggests the bill require the identity of the officer be posted once the incident reports are sent to the prosecuting agency.

AMENDMENTS

NMSC suggests that, in Subsection G of the bill, where declination of prosecution is to be documented, it would be advisable to consider adding the reasoning for the declination of prosecution as a required element of the report.

ER/sb