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FISCAL IMPACT REPORT

SPONSOR <u>Townsend/Pettigrew/Terrazas/Mason</u>	LAST UPDATED <u>2/3/23</u>
	ORIGINAL DATE <u>2/2/23</u>
SHORT TITLE <u>Reinstating Qualified Immunity</u>	BILL NUMBER <u>House Bill 98</u>
	ANALYST <u>Torres, J</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	No fiscal impact	Indeterminate but minimal	Indeterminate but minimal			

Duplicates House Bill 203
Relates to House Bill 87

Sources of Information

LFC Files

Responses Received From

Department of Public Safety (DPS)
Law Office of the Public Defender (LOPD)
Administrative Office of the Courts (AOC)
Administrative Office of the District Attorneys (AODA)
New Mexico Attorney General (NMAG)

SUMMARY

Synopsis of House Bill 98

This Bill repeals the Civil Rights Act (NMCRA) Section 41-4A-4 NMSA 1978 which prohibits the qualified immunity defense. It also amends Section 41-4A-10 NMSA 1978 to reinstate that defense. Subsections 41-4A-13(B) and (C) NMSA 1978 are amended to clarify that their notice requirements apply to claims for which sovereign immunity has been waived.

NMAG states:

HB98, if enacted, would reverse a key provision of the 2021 NMCRA and enable public bodies as defined in Section 41-4A-2 to assert the judicially-created defense of qualified immunity as a defense to claims brought for deprivation of rights under the NMCRA. Akin to federal claims against federal officials under Section 1983, such public bodies would be immune from suit if they can show that the actions of their employees did not violate clearly established statutory or constitutional rights. *See, e.g. Chavez v. Board of County Commissioners of Curry County*, 2001-NMCA-065, ¶14 (describing the qualified immunity doctrine pre-NMCRA).

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

DPS states:

If enacted, the savings to the State as a whole would be significant, in all likelihood in the many millions of dollars. The full impact would be felt by General Services Department's Risk Management Division (RMD), which must account for NMCRA losses, or its failure to prevail at the outset via motions based upon qualified immunity.

Qualified immunity is not immunity from having to pay money damages, but rather immunity from having to go through the costs of a trial at all. Currently, one of the biggest expenses faced by the RMD, and its agencies through the equivalent of their insurance experience ratings, is the mere cost of defense, i.e., attorney's fees, much of that resulting from discovery practice such as depositions or document production. During the pendency of a qualified immunity motion, discovery is stayed. Discovery is often very expensive for any litigant, whether it eventually wins or loses the case. If the State will not be eventually held liable for alleged conduct, it is saved the entire cost of litigation discovery practice plus the eventual trial.

The DPS is unable to give a definitive answer based upon experience of how much it will save if HB98 is enacted because the NMCRA only became applicable to cases arising since July 1, 2021. To date DPS has been sued under NMCRA only a few times, and only in cases to which it was inapplicable, or which have not progressed sufficiently to estimate to determine the eventual resolution or cost. Currently, FY23 civil rights-based liability premiums amount to about \$1.5 million, or just over 9 percent of the DPS' entire liability-based premiums paid to RMD. Those premiums also increased by about 9 percent in cost (from about \$1.385 million) from FY22, with no NMCRA case experience. Most of that amount will be attributable to the cost of attorney's fees defending the civil rights suits, whether meritorious or not.

Given the fact that the current cap in State courts under the New Mexico Tort Claims Act is \$750,000, with no attorney's fees allowed, and the initial NMCRA cap was set at \$2 million, including permitted "reasonable attorney fees" (only allowed for plaintiffs), it seems reasonable to expect that DPS' current RMD civil rights coverage premiums will at least double within the next few years, just in order to cover the cost of defense¹. Plus, if a case is lost or settled, Plaintiff attorneys seem to routinely ask for about \$200,000-250,000 in fees, even prior to trial. The courts rarely reject fee requests as unreasonable, even if the State's highly qualified outside counsel are often paid about half or less of the hourly rate the plaintiffs' attorneys claim.

The expected cost to the State is even more likely given that the NMCRA cap increases by the Consumer Price Index cost of living increase as of July 1 each year, a practice which began on July 1, 2022. The CPI as of that date was 8.5 percent.

¹ DPS' operating budget impacts are estimates of saving which HB98 may contribute based upon an anticipated incremental increase in premiums as NMCRA claims become more prevalent.

<https://www.bls.gov/opub/ted/2022/consumer-price-index-unchanged-over-the-month-up-8-5-percent-over-the-year-in-july-2022>. Therefore, the current maximum liability for every State civil rights case is likely \$2.17 million, and will go up by another significant percentage this coming July 1, 2023, and every year thereafter. With those increases caused by inflation, jury and attorney’s fees awards are also likely to rise when the State does lose.

SIGNIFICANT ISSUES

AOC states:

During the 2021 legislative session, when HB4, creating the NMCRA, was moving through the legislative process, concerns were raised that the prohibition on the use of qualified immunity as a defense would lead to increased costs to state and local governments if the NMCRA’s provisions resulted in more litigation against governmental entities and public employees. The argument was that the prohibition against qualified immunity as a defense would make it more likely that a person with a civil rights claim would prevail in a court case.

The Civil Rights Commission (CRC), on the other hand, reported that cost increases would be limited. In the FIR for 2021’s HB4, it was stated that [W]ith respect to the discontinuation of qualified immunity, the CRC noted that a review of 1,691 federal civil rights cases filed in the District of New Mexico, qualified immunity motions were filed in 257 cases and motions were granted in 147, or 9 percent, of total cases. Where qualified immunity was granted, 85 cases, or 5 percent of total cases, were dismissed solely based on qualified immunity.

The CRC Final Report stated that the contemplated civil right of action would be limited in scope and this narrow scope would contain cost increases. The CRC reported:

The cost concerns the Majority has heard do not account for the fact that the New Mexico Civil Rights Act fills a narrow gap in the laws under which the state and local governments already can be sued.[...] A limited subset of state constitutional claims are actionable under the New Mexico Tort Claims Act, but only against law enforcement for certain types of injuries. Adding a remedy for misconduct that violates the New Mexico Constitution makes meaningful the fundamental rights that document protects without fundamentally changing the litigation landscape.

See FIR for 2021’s HB 4,

<https://www.nmlegis.gov/Sessions/21%20Regular/firs/HB0004.PDF>

The CRC’s final report noted that the actual costs of a NMCRA are difficult to quantify. The effective date of the NMCRA was July 1, 2021. Given the short amount of time – a year and a half – that has elapsed since the passage of the NMCRA, meaningful information regarding the costs to state and local governments related to the prohibition of the use of qualified immunity as a defense may not yet be available for use as evidence to support the reinstatement of the defense of qualified immunity.

DPS states:

With the advent of the NMCRA, and its abolition of qualified immunity (QI) it is anticipated that fewer and fewer cases will be brought based upon federal constitutional

claims under 42 USC §1983, and therefore will not be removable to federal District Court, which has a well-developed body of related law. As discussed above, the NMCRA abolition of qualified immunity eliminates the stay of discovery prior to decision of any motion for judgment, thus adding to the cost of unmeritorious cases.

The short period of time since New Mexico abolished qualified immunity under the 2021 NMCRA does not allow for a significant amount of statistical evidence regarding its associated costs. As stated by DPS, House Bill 98 may increase litigation costs due to increased costs of professional liability insurance and the likelihood of increased NMCRA case filings because of its higher damages cap and potential for awarding plaintiffs' attorney fees.

JT/al/ne