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## FISCAL IMPACT REPORT

**LAST UPDATED** \_\_\_\_\_  
**ORIGINAL DATE** 3/1/2023

**SPONSOR** Pope/Rubio

**BILL**

**SHORT TITLE** Law Enforcement Officer Procedures Act **NUMBER** Senate Bill 252

**ANALYST** Rabin/Gray

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

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Database software license	No fiscal impact	\$250.0	\$250.0	\$500.0	Recurring	General Fund
Database server	No fiscal impact	\$80.0	No fiscal impact	\$80.0	Nonrecurring	
New personnel	No fiscal impact	\$370.9	\$370.9	\$741.8	Recurring	
Policy and curriculum development	No fiscal impact	\$175.0	No fiscal impact	\$175.0	Nonrecurring	
<b>Total</b>		\$875.9	\$620.9	\$1,496.8		

Parentheses ( ) indicate expenditure decreases.

\*Amounts reflect most recent analysis of this legislation.

Relates to Senate Bill 265

### Sources of Information

LFC Files

#### Responses Received From

Department of Public Safety (DPS)  
 New Mexico Attorney General (NMAG)  
 New Mexico Sentencing Commission (NMSC)

## SUMMARY

### Synopsis of Senate Bill 252

Senate Bill 252 amends existing provisions related to law enforcement use of force, establishes a system for reporting and investigating officer-involved injuries and deaths, and establishes the Law Enforcement Officer Procedures Act.

**Officer-involved injuries or deaths.** The bill establishes a process for law enforcement agencies to report officer-involved injuries or deaths to the Department of Public Safety (DPS) and for DPS to report annually on all incidents to the governor, Legislature, and the public. Law

enforcement agencies that fail to comply with these reporting requirements are ineligible to apply for any state-agency-administered grants. The bill also requires law enforcement agencies to adopt and publish use of force policies that include a range of requirements. See *Significant Issues*.

**IPRA exemptions.** SB252 amends the Inspection of Public Records Act (IPRA) to clarify that law enforcement misconduct investigation records are not exempt from its provisions.

**Reporting of officer-involved injuries or deaths.** The bill further establishes a process for law enforcement agencies to report officer-involved injuries or deaths to the Department of Public Safety (DPS); for DPS to investigate any incidents resulting in emergency medical care, hospitalization, or death; and for DPS to report annually on all incidents to the governor, Legislature, and the public. Law enforcement agencies that fail to comply with these reporting requirements are ineligible to apply for any state-agency-administered grants.

**Duty to intervene.** SB252 creates an obligation for a law enforcement officer who is observing unlawful use of physical force to intervene and prevent the unlawful use of physical force, unless intervening would result in harm to the officer or another person. The intervening officer has an obligation to report the unlawful use of force, and that officer may be disciplined or terminated if they failed to intervene.

**Use of force database.** The bill requires DPS to create a database by the end of FY24 for sharing information among state, local, and federal law enforcement agencies concerning the use of force of law enforcement officers. Ownership and upkeep of the database will be the responsibility of the law enforcement certification board.

The act further creates a duty to intervene, requires law enforcement agencies to develop and publicize use of force policies and procedures in compliance with the act, and puts conditions on the serving of search warrants, including prohibiting “no-knock warrants.”

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

## FISCAL IMPLICATIONS

DPS estimates moderate fiscal impacts to comply with the provisions of SB252 which are outlined in the below table.

**DPS Estimated Costs**  
(in thousands)

Expenditure	Total Estimated Cost	Recurring/ Nonrecurring
Current system interface for use of force database	\$250	Recurring
Database server	\$80	Nonrecurring
IT positions, data analyst, and support staff	\$370.9	Recurring
Model use of force policy development (expert)	\$100	Nonrecurring
Curriculum development (expert)	\$75	Nonrecurring
<b>Total Recurring Cost</b>	<b>\$875.9</b>	

Source: DPS

The House Appropriations and Finance Committee substitutes for House Bill 2 contains a \$500 appropriation to increase IT staff by four, and the bill provides for a seven positions for the law enforcement certification board.

## SIGNIFICANT ISSUES

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).<sup>1</sup> While increased research has clarified some of the causes of police use of deadly force, effective solutions remain elusive.

NMSP investigates all of its officers’ uses of force and reports 248 uses of force in FY22, a 5.7 percent decrease compared to FY21 but 27.2 percent higher than FY20. New Mexico law enforcement agencies reported 58 officer-involved shootings in FY22, a 9 percent increase compared to FY21 and a 48 percent increase compared to FY20. At least 25 people were killed while interacting with officers

Although best practices for policing include increasing proactive interactions, focusing attention on serious offenders, and deploying more officers, these same practices may be more likely to lead to violent altercations between police and citizens. A 2015 analysis in the *American Journal of Criminal Justice* reviewed several studies of predictors of law enforcement officers’ use-of-force decisions and found more serious offenses, suspect resistance, arrests, citizen conflicts, additional officers, and police-initiated encounters are more likely to result in the use of force. Notably, whether an offender was armed did not have a significant effect on officers’ use-of-force decisions.

Minorities, males, and low-income suspects are also more likely to have force used against them. Officer race, education, and experience were not found to predict use of force, although male officers are more likely to use force than their female colleagues.

Research suggests training policies regarding encounters with suspects are more likely to reduce rates of excessive force than policies regarding hiring practices of law enforcement officers. Common trainings aimed at addressing officer behavior include implicit bias training, de-escalation training, and crisis intervention training; evaluation of these programs’ impact is limited, and initial research indicates they may not effectively alter long-term behavior without strong use-of-force policies and accountability. A new state law requires all law enforcement officers in New Mexico to wear body cameras and record much of their engagement with the

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<sup>1</sup> 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](http://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.

public; however, research on the efficacy of body-worn cameras shows limited impacts on officer and citizen behavior or citizens' views of police.

The state gives significant autonomy to local law enforcement agencies; however, it retains the authority to determine who can be certified as a police officer. Although the New Mexico Law Enforcement Academy Board, tasked with developing the standards and training required of police officers, is established as an independent entity, it does not have its own budget, and its staff are employees of the New Mexico Law Enforcement Academy, part of the Department of Public Safety (DPS). As a result, the agency responsible for police officer oversight is functionally dependent on an agency that also includes the New Mexico State Police, a potential conflict of interest. A 2005 survey conducted by the International Association of Directors of Law Enforcement Standards and Training found police officer standards and training boards operate as independent agencies in 19 states.

**Warrant enforcement.** Warrant enforcement increases the risk of violence, both for law enforcement officers and the public. In 2020, about 60 percent of federal law enforcement homicides—when a federal law enforcement officer killed a person justifiably or not—occurred during the enforcement of a warrant.<sup>2</sup> Similarly, about 6 percent of law enforcement officer deaths—when an officer was killed—occurred when serving a felony warrant.<sup>3</sup>

SB252 contemplates eliminating no-knock warrants by requiring that an officer knock and announce their presence and purpose before forcibly entering a residence. The Sentencing Commission (NMSC) notes that four states have banned “no-knock” warrants and 12 states have restricted their use.

Such unannounced entries used to be uncommon, but they grew in popularity as judicial restraint on the practice was eroded. One study estimated that no-knock warrants were used 5,000 times in 1981 but are currently utilized between 60 thousand and 70 thousand times each year.

The American Legislative Exchange Council notes that, of the estimated 20 thousand executed in the U.S. each year, about 62 percent were for drug searches and 60 percent utilized forced entry. Officers face a higher likelihood of being killed in the execution of a no-knock warrant because they are entering a person's home unannounced. The person has a reasonable right to resist that entry and may use guns or other weapons to resist that entry.

## **NMAG concerns**

**Use of force.** Analysis from the Office of the Attorney General (NMAG) notes that the provisions regulating use of force require an officer to announce their intent to use force, with an exception if giving such a warning would place the officer at significant risk of injury. However, NMAG analysis notes there is no exception for the instance when giving warnings would put another person at significant risk.

**Immediate decommissioning.** NMAG analysis notes that the bill may raise a constitutional

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<sup>2</sup> See Bureau of Justice Statistics, Federal Law Enforcement Agency Deaths in Custody Reporting Program, fiscal year 2020.

<sup>3</sup> See the National Law Enforcement Officers Memorial Fund 2022 report

issue because it requires the immediate decommission upon a finding by a court, DPS secretary, or employing law enforcement agency head that force was used in violation of the act that led to great bodily harm or death, “but does not require notice and an opportunity to be heard before this determination is made.” NMAG writes:

The right to practice a profession is a constitutionally protected property interest,” *Mills v. New Mexico State Bd. of Psychologist Examiners*, 1997-NMSC-028, ¶ 15, 123 N.M. 421, 427, and “a state cannot deprive any individual of personal or property rights except after a hearing before a fair and impartial tribunal.” *Reid v. New Mexico Bd. of Examiners of Optometry*, 1979-NMSC-005, ¶ 6, 92 N.M. 414, 416.<sup>4</sup> This bill mandates removal of law enforcement credentialing without explicit guarantees of notice and a hearing before those consequences are imposed.

## DPS concerns

**Police homicide.** DPS asserts that SB252’s definitions of police homicide are unconstitutionally vague because they establish subjective criteria to determine whether an officer failed to evaluate the totality of the circumstances provided in the bill.

Statute is unconstitutionally vague if it:

(1) fails to provide persons of ordinary intelligence using ordinary common sense a fair opportunity to determine whether their conduct is prohibited, or (2) fails to create minimum guidelines for enforcement and thus encourages subjective and ad hoc application of the law.

*State v. Duttie*, 2017-NMCA-001, P13, 38 P.3d 885.

DPS asserts the bill fails the second prong of the vagueness test. Analysis from the NMAG did not identify this as a concern.

**Police dogs.** DPS notes that the provision to disallow law enforcement officers from bringing police dogs to a protest or demonstration is that it may prevent officers from bringing bomb-sniffing dogs to protests or demonstrations, a safety measure.

**Use of chemical irritants.** The bill also disallows the use of tear gas or rubber pellets. DPS expressed concerns regarding the bills prohibition on tear gas, chemical weapons, and rubber pellets. The agency contends these techniques have legitimate law enforcement purposes, and that use of such “less than lethal” methods helps prevent lethal interactions. The agency specifically noted that these materials are utilized to address crowds which have become violent. Chemical irritants have come under scrutiny nationally, with many states and localities proposing to ban their use, especially on nonviolent protestors. In 2021, a federal judge banned the use of such materials against nonviolent protestors.

## CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

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<sup>4</sup> See also *Chronis v. State ex rel. Rodriguez*, 1983-NMSC-081, ¶ 19, 100 N.M. 342, 347 (“Under the summary suspension provision, the director is given power to summarily suspend a license and shut down a business without giving notice or requiring a hearing. We agree with the trial court that this provision violates procedural due process guarantees under the New Mexico Constitution and therefore hold that Section 103 is unconstitutional.”)

Relates to SB265 which requires investigations when peace officer use of force results in great bodily harm or death.

## TECHNICAL ISSUES

NMAG analysis notes several technical issues:

The bill’s definition of “law enforcement officer” in Section 2(K) includes the New Mexico National Guard when activated by the Governor, meaning the proposed Act would apply to the National Guard when activated by the Governor.

The bill states that a person has a right against an unlawful use of force and a right to officer intervention when an officer unlawfully uses physical force, but does not say where these rights come from. Therefore, it is not clear if the proposed Law Enforcement Procedures Act is creating a new right, codifying a right found to exist by the courts, or enforcing a right protected by the State or federal constitution. The source of the right can have practical impacts because if the source of that right is the New Mexico Constitution Bill of Rights, redress is available under the New Mexico Civil Rights Act.

Section 2(A) of the bill, part of the definitions section, defines the term “chokehold.” The definition includes “chokehold” – in other words, the word “chokehold” is used to define the term “chokehold.” Additionally, “chokehold” includes putting any part of the officer’s body *around* a person’s neck. Thus, an officer could engage in a “chokehold” under this definition without even making contact with the subject’s neck.

Section 2(D) defines “deadly weapon” in the Law Enforcement Procedures Act differently than “deadly weapon” is defined under the Criminal Code. Since the Law Enforcement Procedures Act interacts with the criminal code, the Legislature may wish to employ the same definition in both enactments. The same is true for the definitions of “great bodily harm” under the proposed Act and the Criminal Code.

The Act defines “officer-involved injury or death” in Section 2(M) for purposes of creating a uniform protocol and reporting obligations for law enforcement in Section 11. This definition is broad, and encompasses events in which law enforcement engage in a physical altercation with a member of the public who merely *requests* medical care as a result. An injury-free scuffle could therefore be considered an ‘officer-involved injury’ under the proposed legislation. Note in practice there are many reasons why subjects/arrestees would request medical care after an incident that are wholly unrelated to the physical altercation itself, such as seeking to be taken to the hospital as opposed to incarcerated.

The use of “and” and “or” in the subsections of Section 3(C) is potentially confusing. Subparagraphs 1, 2, 3, and 4 are separated only by a semicolon. An “or” appears at the end of subsection 4, but an “and” appears at the end of subsection 5. Often, using “or” indicates any one of the options listed will suffice, while “and” often indicates both conditions must be satisfied, though this is certainly not a hard and fast rule. If both conditions are required, it would assist clarity if both requirements were included in the same subsection.

The limitation of stun gun and police dog use in Section 4(A)(6) are written to say these means can not be used in two situations: when a suspect is suspected of a non-violent crime only and when a person does not pose a threat of imminent harm. If a person suspected of a non-violent crime is posing a threat of imminent harm, is a stun gun authorized? If a person is not posing an imminent threat but is suspected of murder, is a stun gun authorized? It may be clearer to state the few time when use is authorized.

Section 4(B) places restrictions of “deadly force”, but that term is not defined by the Act; the Act defines the term “deadly physical force.” Thus, as currently drafted, “deadly force” is an undefined term.

Section 4(B) raises questions about surplus language. Courts try to read statutes so that every part of the statute has meaning and no part is duplicative or “surplusage”.<sup>5</sup> Section 4(B)(1) prohibits use of deadly force “upon another person” absent the existence of certain requirements. The other subsections prohibit use of deadly force in other situations: when the use of deadly force risks serious physical injury to a third person, when a person is a danger only to themselves, when only property is being protected, or when an officer is in the path of a moving vehicle. Consider the prohibition on using deadly force to protect property. Every time an officer would use deadly force against a person in an attempt to protect property, the use of force will violate both subsection 1 and 4. That would make subsection 4 unnecessary, unless deadly force can be used against something other than a human. But if deadly force can be used against something other than a human so that subsection 4 applies sometime when subsection 1 does not and is therefore not surplusage, then officers could not shoot a stray dog solely to protect property – but as drafted the Act does not seem to be addressed to use of force against non-humans.

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<sup>5</sup> See *T.W.I.W., Inc. v. Rhudy*, 1981-NMSC-062, ¶ 14, 96 N.M. 354, 357 (“Statutes must be construed so that no part of the statute is rendered surplusage, if possible.” (citations omitted)).