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

ORIGINAL DATE 01/28/11
SPONSOR Sapien **LAST UPDATED** 02/02/11 **HB**

SHORT TITLE Create State Inspector General Office **SB** 83

ANALYST Archuleta/Sallee

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
PED	NA	($955.9)	($955.9)	($1,911.8)	Recurring	General Fund
HED	NA	($76.7)	($76.7)	($153.4)	Recurring	General Fund
HSD	NA	($1,431.1)	($2,862.2)	($4,293.3)	Recurring	GF/OSF/FF*
CYFD	NA	($61.8)	($136.6)	($198.4)	Recurring	General Fund
NMCD	NA	($72.9)	($145.8)	($218.7)	Recurring	General Fund
DFA-OEA	NA	($457.4)	($457.4)	($914.8)	Recurring	General Fund
DOH	NA	($167.3)	($334.6)	($501.9)	Recurring	General Fund
OGA	NA	$3,223.1	$4,969.2	$8,192.3	Recurring	GF/OSF/FF**
LFC	NA	NFI	NFI			
Total		$0	$0	$0		

(Parenthesis ( ) Indicate Expenditure Decreases)
*13.8 percent GF, 27.1% OSF, 59.1 percent federal funds.
**50 percent GF.

SOURCES OF INFORMATION

LFC Files

Responses Received From
Attorney General's Office (AGO)
Office of the State Auditor (OSA)
Department of Finance and Administration (DFA)
Human Services Department (HSD)
Corrections Department (NMCD)
Department of Transportation (NMDOT)
Public Education Department (PED)
Higher Education Department (HED)

No Reponses Received From
Taxation and Revenue Department (TRD)
Department of Health (DOH)
Children Youth and Families Department (CYFD)

SUMMARY

The Legislative Finance Committee endorsed Senate Bill 83 at its January 17, 2011 meeting.

Synopsis of Bill

Senate Bill 83 includes three components related to government accountability: establishing an Office of Government Accountability through a consolidation of existing functions; clarifying the Legislative Finance Committee program evaluation duties and authority; and updating portions of the Accountability in Government Act.

Office of Government Accountability and State Inspector General.

Senate Bill 83 creates the Office of Government Accountability (OGA) as an adjunct agency as provided in the Executive Reorganization Act. The Act establishes the State Inspector General (SIG) as head of the Office of Government Accountability and establishes qualifications for the State Inspector General, appointment by the Governor, with consent of the Senate, and shall serve for six years, and may be reappointed by the governor for succeeding six-year terms. The bill provides that the SIG can only be removed for incompetency, malfeasance or willful neglect of duty. However, the Governor must notify the legislature of the reason for removal and a two-thirds majority of the Senate must approve the removal of the SIG.

The bill establishes the authority and duties of the SIG to include:

- general oversight authority over the executive branch's implementation of the Accountability in Government Act (AGA) and the State Inspector General Act, including the authority to conduct internal audits and investigations;
- audit and investigate executive branch agencies and programs, school districts, state educational institutions and all other recipients of state funding, including government contractors, to ensure efficient and effective operations, the proper use of public funding and the detection and prevention of fraud, waste and abuse;
- plan and coordinate the work of the office of the state inspector general and the work of inspectors general from individual agencies with the legislative finance committee and report the results to the governor, the legislative finance committee and the legislature;
- act as inspector general to conduct internal audit and accountability functions of the public education department, the higher education department, the department of health, the human services department, the corrections department and the children, youth and families department.
- review and approve work plans and reports relating to the inspector general, internal audits and accountability functions in the workforce solutions department, the taxation

and revenue department and the department of transportation, including approving the hiring of inspectors general and staff; and

- coordinate activities with the Medicaid fraud and elder abuse division of the attorney general's office among others.

The bill requires the SIG to report the results of its work to the LFC, the Legislature and the public.

The bill provides for the transfer of appropriations, personnel, functions, etc., of the inspector general, internal audit and other accountability functions from the:

- Public Education Department, Office of Education Accountability, and Higher Education Department on July 1, 2011; and
- from the Department of Human Services, Department of Health, Children, Youth and Families Department and Corrections Department no later than July 1, 2012 to the OGA.

Legislative Finance Committee – Program Evaluation Duties (Reflects SB531 that was passed and pocket vetoed in 2009).

The bill requires LFC to establish a "Program Evaluation Division" to conduct program evaluations, information technology evaluations and special reviews for the purpose of providing policymakers with objective, independent and credible assessments of agencies to allow them to determine whether expenditures of public funds are producing desired results; determine whether agencies are complying with state and federal procedures relevant to their operation and funding; determine whether policy alternatives could improve operations and save money; and assess the effect of agency operations on state finances.

The bill also requires agencies to provide requested information to LFC and provides that information provided by an agency under the Section that is confidential by law or exempt from public inspection under the Inspection of Public Records Act shall not be disclosed by members of the committee, its director or staff.

Accountability in Government Act Updates.

Lastly, the bill updates provisions of the AGA to require agencies, as part of their budget requests, submit a status report to implement previous recommendations made by LFC or the SIG and clarify that nothing in the AGA prevents the legislature from changing an agency's appropriation pattern or performance measures.

FISCAL IMPLICATIONS

Office of Government Accountability and State Inspector General.

SB83 does not include a direct appropriation. The bill requires the transfer of resources assigned to the agencies identified above to the Office of Government Accountability. Future appropriations for personal services and employee benefits, audit services, information technology services, and other general operating expenses including office supplies, furniture, equipment, travel, and training would be directed toward the OGA.

Based on available information, 69 authorized FTE's perform functions that would be transferred to OGA with a total estimated personal services/benefits of $4.5 million and $0.45 million in other costs that are assumed to exist currently, including GSD rates, contracts, travel, legal, printing and supplies and training among others. Due to cost allocation across non-general fund programs currently, it is assumed that $2.5 million of the total $4.96 million would be from the general fund. Currently, Human Services Department program support, which includes the Inspector General, Internal Audit, Investigations and Restitutions bureaus has a cost allocation of 13.8 percent general fund, 27.1 percent other state funds and 59.1 percent. Given the OGA's responsibilities in the health and human services agencies, it is assumed these functions would continue to be part of the state's cost allocation plan for purposes of federal and other state funded programs.

DFA estimates that the number of staff associated with the various departments may total 84 FTE. However, no estimates were provided for the associated salary and indirect administrative costs.

The bill provides time for a full transition of functions in FY12, starting with a transfer of PED Inspector General and Quality Assurance bureaus, HED and OEA functions at the beginning of the fiscal year. It is assumed that within six months the remaining functions would transfer to the OGA. As a result, it is estimated OGA would incur almost $2.5 million in FY12. However, FY13 would mark the first year of direct appropriations to OGA estimated to be $4.9 million (this amount could change).

The Executive would need to work with the respective agencies to transition functions to the new OGA, including identifying office space and the process for transitioning personnel. Depending on how this transition is carried out, the financial impact of this bill could change, particularly as it relates to personnel and office space. For example, an estimated 44 FTES currently occupy leased office space, and the remaining 25 appear to work in state owned space. If the OGA cannot be accommodated in state owned space additional funding may be needed. Additionally, these estimates assume funding exists for the estimated 22 vacant FTEs at the mid-point for an internal auditor ($20/hr) and would be transferred to the OGA. It is assumed positions and existing salary levels would transfer, but personal service/benefit costs could be less depending on how the transition is carried out. Finally, though not significant, additional expenses associated with starting a new agency are likely in FY12, but could be offset through vacant positions. These estimates may change depending on how the bill is implemented and FY12 appropriation levels for the various agencies.

HSD would be required to transfer budget, staff and equipment to the new Department. It is important to note that more than half of the budget for the Inspector General's office in HSD is from Federal sources. In order for the new agency to have access to those federal funds an approved cost allocation plan would have to be submitted to and approve by the Division of Cost Allocation within the Federal Government.

NMCD indicates difficulty in determining the exact fiscal impact and concern over potential cost of potentially responding to fiscal or program deficiencies found by the OGA or LFC program evaluation division and the potential amount of labor and manpower expended by NMCD staff to respond to investigations and inquiries.

Legislative Finance Committee – Program Evaluation Duties

No fiscal impact. The LFC currently carries out these duties.

Accountability in Government Act Updates.

No fiscal impact. Agencies, in their annual budget requests, would be required to include an update on the implementation status of recommendations made by OGA and LFC. This process would eliminate the need for separately submitted implementation status reports typically requested by accountability organizations.

SIGNIFICANT ISSUES

Over the last several years, there has been an increasing call for greater transparency, accountability and oversight across state government. SB 83 attempts to provide for this by creating the State Inspector General and the Office of Government Accountability. This new body would be assembled by moving staff, appropriations, money, property, contracts and references from several existing agencies, and creating a position of State Inspector General that would be appointed by the Governor.

NMDOT suggests that the requirement that removal of an IG is subject to approval by a two-thirds vote of the Senate may be unconstitutional as an impermissible encroachment by the legislature into the executive branch. As head of an adjunct agency, the OGA, is an executive officer. SB 83 further authorizes the Governor to appoint an IG with the consent of the Senate. The separation of powers doctrine, as embodied in the New Mexico Constitution prohibits one government branch from exercising powers “properly belonging” to another.

PED identified the following significant issues:

- The bill only consolidates the inspector general, audit, and accountability responsibilities of the PED and HED in July 2011, and then to include the inspector general and audit responsibilities of a few more agencies (DOH, HSD, the NMCD and CYFD) by July 2012. Notably, it does not attempt to consolidate the inspector general, internal audit, and accountability functions of all state agencies, including those of the Department of Workforce Solutions (DWS), TRD, and NMDOT

- SB 83 states that it would “review and approve” the work plans and reports of DWS, TRD, and the NMDOT, including “approving the hiring of inspectors general and staff”, implying that inspector general and audit functions of at least those three agencies will continue to reside within those agencies.

- The State Inspector General Act gives the Office of Government Accountability the “authority to audit and investigate executive branch agencies and programs… to ensure efficient and effective operations, the proper use of public funding and the detection and prevention of fraud, waste and abuse.” Thus, the Office of Government Accountability appears to create redundancy in functions with some state agencies and therefore require the expenditure of state funds on functions and tasks already being done.

- Additional duties of the Office of Government Accountability include assisting state agencies in resolving audit findings and reviewing performance measures, gathering agency information and analyzing and validating the information, and performing other duties that may be assigned by the governor. These provisions would require an appropriation.

- Further, there is no discussion as to what standards would be used for the SIG and his staff. According to the PED Inspector General, there should be mention in the Act of the "Principles and Standards of Offices of Inspector General", which is the publication of standards which an office of government accountability should be governed by.

- This bill also creates the Program Evaluation Division under the LFC. Some of the duties of the new division appear to duplicate duties of the proposed Office of Government Accountability and duties of any remaining agency inspectors general of other state agencies. For example, the new division must conduct program evaluations and special review of agencies to allow policymakers to determine "whether agencies are complying with state and federal procedures relevant to their operation and function" and to "assess the effect of agency operations on state finances."

- The requirement that the new Office of Government Accountability plan and coordinate its work with the LFC detracts from its independence as an Executive Branch "watchdog agency" and implies it cannot audit/investigate the same issue of the LFC, which is part of the Legislative Branch of government. This implicates the Separation of Powers provision contained in Article III, Section 1 of the New Mexico Constitution.

- The provision on page 11, lines 6-9 of the bill that address performance-based program budget requests in which agencies must comply with instructions imposed by the State Budget Division of DFA, essentially requires state agencies to comply with recommendations made by the Program Evaluation Division—*which is in the Legislative Branch of government*. This would have the effect of the Executive Branch of government being subject to the supervision and/or control of the Legislative Branch of government, contrary to Article III, Section 1 of the New Mexico Constitution.

The State Auditor cites concerns with Section 6 which could require the OSA to disclose to confidential audit reports and documentation (such as audit work papers). The Audit Act requires that the OSA conduct audits "in accordance with generally accepted auditing standards and rules issued by the state auditor." Currently, the public disclosure of audit reports and audit documentation is governed by certain provisions of the Audit Act. The required disclosure of confidential audit reports and audit documentation described above may impair the independence of the OSA when conducting audits and may have a chilling effect on the willingness of public citizens to report suspected fraud, waste and abuse to the OSA. The bill does not provide that the OGA and SIG must adhere to professional standards when carrying out their functions. In accordance with these standards and guidance, it is vital that the OGA be free from organizational impairments to its independence.

PERFORMANCE IMPLICATIONS

The bill's section regarding LFC reflects the recommendation of the Legislative Structure and Process Study Task Force (Task Force) from the 2007 interim. The Task Force recommended that the LFC's existing program evaluation function be put into statute and that LFC have the ability to receive confidential information. According to the Task Force final report "The Legislative Council created the Task Force to develop recommendations to help the legislature conduct its work and perform its duties more effectively." In addition, this portion of the bill reflects SB531, which passed in 2009, but was pocket vetoed.

Since 1991, the LFC has conducted program evaluations and reviews (formerly called performance audits) of government entities under existing statutory authority (Section 2-5-3 NMSA 1978) which provides broad oversight authority to examine and report not only the cost, but the operation and functioning of government under the laws. The bill would establish the existing program evaluation and review function in statute.

ADMINISTRATIVE IMPLICATIONS

With regard to NMDOT, which has its own agency Inspector General, the OGA shall approve the hiring of NMDOT's Inspector General and staff and shall review and approve work plans and reports relating to NMDOT's Inspector General. NMDOT's Inspector General will be required to report to the IG. On a practical level, many aspects of NMDOT's Inspector General's work would be unchanged. For instance, NMDOT's Inspector General already provides an annual audit plan which, along with audit reports, is provided to the State Auditor. In addition, NMDOT maintains a readily available list of all its investigations which have been reviewed by the State Auditor and Federal OIG.

Due to the reporting and approval requirements under this bill, NMDOT executive managers would no longer be able to dictate when or how NMDOT's own OIG investigations are conducted. This is in keeping with the clear intent of the Bill to provide greater objectivity by moving the IG function into a "neutral" body separate from any individual agency. The only countervailing risk is that a large, complex agency such as NMDOT, controlled by a myriad of intersecting federal and state statutes, rules, funding requirements and restrictions, may lose its ability to use its expertise to quickly assess the need for investigations.

PED expressed concern that the bill would require the dedication of substantial staff to accommodate the Inspector General's Office, the Program Evaluation Division, and the other offices of the LFC's requests for data, documentation, and general assistance in order for these entities to conduct their audits and reviews to satisfy the accountability scope of this bill and existing laws. Further, since PED already works, as required by statute, with the LFC, it is unclear whether the proposed Program Evaluation Division would create another layer of accountability or whether it would simply be redundant of existing cooperation with the LFC.

HSD cites Section 3, item H, discusses recovery of misspent public funding and it is not clear if the Restitution Services Bureau (RSB) of the HSD Office of Inspector General would be incorporated into the new office or if RSB would remain with HSD and perform collections functions related to overpayments of public assistance funds. The bill assumes this function would transfer to the new office.

CONFLICT, DUPLICATION, COMPANIONSHIP OR RELATIONSHIP

SB 83 is in conflict with HB 66, which is endorsed by the Government Restructuring Task Force. HB 66 proposes to amend section 9-6-2 NMSA 1978, re-tooling the Office of Education Accountability into the Educational Finance and Accountability Division of the Department of Finance and Administration.

TECHNICAL ISSUES

NMCD is concerned that the bill does not give state agencies a clear ability or avenue to substantially challenge any findings or recommendations made by the office of government accountability or the LFC's program evaluation division. It allows the legislative branch to make unfettered fiscal and program decisions regarding state agencies with little or no actual input or response from those agencies.

OTHER SUBSTANTIVE ISSUES

According to the OSA, "the Legislative Education Study Committee (LESC) endorsed a recommendation to request that the House Appropriations and Finance Committee consider including in the *General Appropriation Act of 2011* the transfer of the six positions in the Public Education Department Office of Inspector General to the Office of the State Auditor. The recommendation further requested that those positions be dedicated to education-related reviews. The request is a recommendation of the LESC School Finance Work Group, which the LESC convened during the 2010 interim to evaluate the adequacy and effectiveness of New Mexico's laws and regulations relating to public school finance. In a presentation to the work group from PED on the duties of the OIG, then-Secretary Susanna Murphy reported that all but two of the six positions were vacant and that the department has had difficulty filling the vacant positions. Representatives from both PED and OSA agreed that the six positions may be better utilized at OSA to provide further audit oversight of both public schools and institutions of higher education."

HSD indicates there is a potential conflict with the Code of Federal Regulations (CFR) in that HSD must retain the some of the restitutions functions of the current HSD Office of Inspector General for the Supplemental Nutritional Assistance Program (SNAP). Federal regulations states provide that the "State Agency" must establish and collect any claim within the SNAP regulations. See 7 CFR 273.18(a) (2). The federal regulations define as state agency as " The agency of State government, including the local offices thereof, which is responsible for the administration of the federally aided public assistance programs within the State, and in those States where such assistance programs are operated on a decentralized basis, it includes the counterpart local agencies which administer such assistance programs for the State agency…determined by the Department to be capable of effectively administering a Food Stamp Program (currently the SNAP program) or a Food Distribution Program in accordance with provisions of the Food Stamp Act of 1977." 7 CFR 271.2.

NMCD currently has an Internal Audit and Standards Compliance Bureau. It consists of six employees at Central Office, four contract monitors located at the private prisons, and ten quality assurance managers working at the various state prisons located throughout the state. These twenty employees promulgate or circulate NMCD policies, oversee and ensure American Correctional Association (ACA) compliance to maintain department-wide ACA accreditation, oversee and monitor the contracts with the private prisons, and perform traditional internal audit functions, and do so on a day-to-day, even minute-to-minute basis. The bill would appear to require two of the twenty employees to move to and work for the office of government accountability. This would leave the remainder of the employees to conduct monitor functions in order to maintain the ACA accreditation.

ALTERNATIVES

According to the OSA, "Subsection B of Section 3 of the bill provides that the OGA shall "have the authority to audit and investigate" certain agencies and programs. That provision does not specify the type of "audit" which the OGA may conduct. Like other parts of the bill, the language should specify that the OGA has the authority to conduct "internal audits."Subsection I of Section 3 provides that the OGA shall "refer potential criminal matters to the attorney general or local district attorneys." The OGA would also be required to report violations of criminal statutes in connection with financial affairs to the State Auditor pursuant to Section 12-6-6 NMSA 1978. Subsection M of Section 3 provides that the OGA has the authority to "contract for special audits and investigations." Given the OGA's authority to conduct internal audits, this provision should be clarified that the OGA has the authority to contract for internal audits rather than special audits.

NMCD suggests the bill should be amended to remove any and all language allowing the LFC any access or right to requested documents designated as confidential (or not subject to disclosure) under state or federal law; amend the bill to make it clear that CD can maintain its own internal audits/compliance staff which then works with staff at the office of government accountability as needed.

DOT indicates that to the extent the provision providing for the removal of an IG being subject to approval by a two-thirds vote of the Senate may be unconstitutional as an impermissible encroachment by the legislature into the executive branch, that provision may be deleted. Another alternative, which would likely be constitutional, would be to provide that the IG may only be removed after a hearing in which a finding is made of incompetency, malfeasance or willful neglect of duty.

Also, because the intent of SB 83 is to improve agency accountability, an alternative to the State IG unilaterally selecting the NMDOT Inspector General and staff would be to subject the hiring of said individuals by the State IG to State Personnel Office guidelines. The State IG could then be permitted to sit on the selection/hiring panel. This would avoid the potential for, or the appearance of any impropriety in the hiring of state agency Inspectors General.

According to HSD, the State Inspector General provides oversight of the investigative and audit functions of key or larger state agencies. Deputy IGs could be established in key or larger agencies who report to the State Inspector General rather than to an agency head.

DA/mew :bym