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## FISCAL IMPACT REPORT

SPONSOR Cadena/Maestas/ ORIGINAL DATE 02/09/21  
Chasey LAST UPDATED 03/09/21 HB 191/aHAFC

SHORT TITLE Corrections Ombudsman Act SB \_\_\_\_\_

ANALYST Rabin

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

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
LFC	\$0.0	\$250.0	\$250.0	\$500.0	Recurring	General Fund
NMCD	\$0.0	Up to \$228.0	Up to \$228.0	Up to \$456.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

National Conference of State Legislatures (NCSL)

#### Responses Received From

Sentencing Commission (NMSC)

Public Defender Department (PDD)

Corrections Department (NMCD)

### SUMMARY

#### Synopsis of HAFC Amendment

The House Appropriations and Finance Committee (HAFC) amendment to House Bill 191 removes the \$250 thousand recurring, general fund appropriation to the Legislative Finance Committee for the Office of the Corrections Ombudsman to implement the provisions of the Corrections Ombudsman Act. There is no corresponding appropriation in the HAFC substitute for House Bill 2.

#### Synopsis of Original Bill

House Bill 191 establishes the Corrections Ombudsman Act for the purpose of providing independent and impartial assistance in strengthening procedures and practices that lessen the possibility of actions occurring within the Corrections Department (NMCD) that may adversely impact the health, safety, welfare, and rehabilitation of offenders and effectively reducing the exposure of NMCD to litigation.

The act creates the Office of the Corrections Ombudsman (“the Office”) and the position of corrections ombudsman within the Legislative Finance Committee (LFC) to ensure NMCD’s compliance with relevant rules and laws, identify systemic issues, provide information to inmates, and promote public awareness of the rights and responsibilities of people under NMCD’s control. The corrections ombudsman is appointed by the Legislative Council for a three-year term and may only be removed by the Council for neglect of duty, misconduct, or inability to perform duties.

The primary duties of the Office include:

- Providing information and technical assistance to offenders in NMCD’s control, their families and representatives, and department employees and others regarding offenders’ rights;
- Monitoring NMCD’s compliance with all applicable federal, state, and local laws, rules, regulations, and policies related to the health, safety, welfare, and rehabilitation of offenders;
- Receiving complaints and inquiries;
- Conducting and resolving investigations regarding abuse or neglect; actions and decisions of NMCD and its employees, contractors, and volunteers; NMCD policies, rules, and procedures; and alleged violations of law by NMCD;
- Auditing NMCD’s financial expenditures; and,
- Monitoring department operations.

The ombudsman is also charged with eliminating corruption in NMCD, such as embezzlement, sexual exploitation, theft of inmate property, unlawful and unnecessary contracting, substandard medical care, waste of taxpayer resources, and overuse of solitary confinement, overtime, or force.

The act states that the ombudsman shall be given reasonable access to NMCD—including its facilities, employees, inmates, and records—as needed to carry out the duties of the Office. The act grants civil immunity to employees of the ombudsman for good-faith performance of their duties, and provides that discriminatory, disciplinary, or retaliatory action shall not occur against NMCD employees, contractors, volunteers, or offenders.

Notably, the ombudsman’s role is limited to monitoring, investigating, inspecting, reporting, recommending, and advising. The ombudsman is not empowered to direct the actions of NMCD or any of its employees, contractors, or volunteers.

HB191 appropriates \$250 thousand from the general fund to LFC for the Office to implement the provisions of the Corrections Ombudsman Act.

The effective date of this bill is July 1, 2021.

## **FISCAL IMPLICATIONS**

The HAFC amendment to HB191 removes the \$250 thousand recurring, general fund appropriation to LFC. Because HB2/HAFCS does not include a corresponding appropriation, this is now anticipated to be additional operating budget impact. LFC anticipates any further costs to implement the provisions of this act can be absorbed by its existing operating budget.

NMCD states that complying with an unknown number of information requests from the office may require additional staffing resources costing up to \$228 thousand per year.

### **SIGNIFICANT ISSUES**

The Sentencing Commission (NMSC) indicates that a number of states have had the equivalent of a corrections ombudsman going back to the 1970s, and creation of such a position has been recommended by advocates and scholars for decades. NMSC notes Washington recently passed a law creating an ombudsman position, and New Jersey passed a law to expand powers of the ombudsman to include facility inspection and confidential interviews with inmates. The National Conference of State Legislatures (NCSL) finds that similar ombudsman offices have also recently been established in Alaska and Michigan.

The duties for the ombudsman described in the bill potentially fit under the umbrella mission of the LFC whose purpose is to provide the legislature with objective fiscal and public policy analyses, recommendations and oversight of state agencies to improve performance and ensure accountability through the effective allocation of resources for the benefit of all New Mexicans. Along these lines, over the last 15 years, numerous LFC staff reports have identified instances of miscalculation of release dates, poor program implementation, issues with classification of prisoners, overpayments of program resources to contractors, and lack of analysis and evaluation of prison programs at NMCD. While previous LFC program evaluations have recommended the agency routinely review and evaluate its programs to determine if they are properly implemented or achieving anticipated results, recent efforts by NMCD to include such accountability have been mixed. Most recently, NMCD reported persistent errors in reporting significant performance measures related to in-house parole, inmate drug use, correctional education programs, and sex offender recidivism, which have only been partially resolved. The agency has not provided corrected data for previous years' reports, making it impossible for the Legislature or the public examine performance or trends in these key areas.

An independent oversight body would provide an additional resource to monitor NMCD's performance, review the efficacy of its programming, and help ensure institutional accountability. Although the bill does not impose any consequences if NMCD does not cooperate with the ombudsman or the requirements of the bill, the umbrella authority provided to LFC by Section 2-5-3 NMSA 1978 to examine and evaluate the finances and operation of all departments, agencies, and institutions of New Mexico and all of its political subdivisions would apply to the newly created office.

NMCD expresses the following concerns:

- The agency notes that the ombudsman should be an independent office and states that placement within LFC may raise budget conflicts.
- NMCD notes the bill does not provide for additional staff for the agency to aid in complying with its requirements.
- NMCD notes the bill does not specify the qualifications of the Ombudsman.
- NMCD is concerned the position of ombudsman would replace executive branch officials, such as the cabinet secretary, with a legislative staffer.
- The agency believes this bill will cause litigation to increase due to potential increased complaints and investigations.

## ADMINISTRATIVE IMPLICATIONS

The Public Defender Department states that its Habeas Unit currently provides representation in qualifying habeas petitions challenging conditions of confinement. To the extent that the ombudsman would address issues that currently require habeas litigation, this Act could reduce the workload of the unit or permit the reallocation of resources to other matters that are currently underserved.

## TECHNICAL ISSUES

While the Office of the Corrections Ombudsman is created within LFC, and the corrections ombudsman reports directly to the LFC director, the ombudsman is appointed by the Legislative Council for a three-year term and may only be removed by the Council for neglect of duty, misconduct, or inability to perform duties. Such a structure places a position within LFC that reports to its director but is not appointed by or accountable to the director or the committee, which may restrict LFC's ability to manage its own staff. This issue could be resolved by having the position of corrections ombudsman be appointed by (and able to be removed by) LFC or by placing the office within the Legislative Council Service.

The act uses the term “ombudsman” throughout. Per Section 2-3-13.1 NMSA 1978, gender-neutral language should be used in legislation and legislative documents unless the language is intended or required to be gender-specific or the intended meaning of language would otherwise be altered. It may therefore be preferable to use the gender-neutral “ombudsperson.”

## ALTERNATIVES

According to a report from NCSL to the Criminal Justice Reform Subcommittee of the legislative Courts, Corrections and Justice Committee in 2020, several states use models other than an ombudsperson to provide corrections oversight, including legislative committees with inspection responsibilities, general government auditing bodies, governmental agencies or commissions, inspectors general, advocacy groups with formal rights of access, citizens' boards or advisory committees, and protection and advocacy organizations focused on prison issues. According to a [2010 article in the Pace Law Review](#), ombudspersons' offices and general government auditing bodies were the most common models of formal, external prison oversight used by states, while governmental agencies or commissions and legislative committees with inspection responsibilities were significantly less common.

Previous legislation to strengthen oversight of NMCD and other cabinet level departments in the executive branch has been considered by the legislature. For example, 2015 Senate Bill 204 (Died) proposed the State Inspectors General Act, which would create independent and objective offices of inspectors general within eight cabinet-level departments (including NMCD) to perform internal and compliance audits and conduct investigations having unrestricted access to records, data, reports, contracts, memoranda, and any other information necessary to carry out the duties of the office. The inspectors general would be appointed by each cabinet secretary and report directly to the secretary, submitting work plans to the cabinet secretary, LFC, and a proposed Government Accountability Coordinating Council.

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