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## FISCAL IMPACT REPORT

ORIGINAL DATE 03/11/21

SPONSOR HCPAC LAST UPDATED \_\_\_\_\_ HB 254/HCPACS

SHORT TITLE Law Enforcement Use of Deadly 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	\$780.3 to \$3,009.8	\$780.3 to \$3,009.8	\$1,560.5 to \$6,019.6	Recurring	General Fund
District Attorneys and Other State Agencies	See Fiscal Implications				Recurring	General Fund
Local Law Enforcement Agencies	NFI	up to \$2,229.6	up to \$2,229.6	up to \$4,459.1	Recurring	County Operating Funds

(Parenthesis ( ) Indicate Expenditure Decreases)

Almost Duplicates Senate Bill 274/SHPACS  
 Relates to House Bill 263, Senate Bill 220, Senate Bill 227/SHPACS  
 Relates to Appropriation in the General Appropriations Act

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

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

#### Responses to Introduced Bill Received From

Energy, Minerals and Natural Resources Department (EMNRD)  
 Corrections Department (NMCD)  
 New Mexico Counties

## SUMMARY

### Synopsis of Bill

The House Consumer and Public Affairs Committee substitute for House Bill 254 (HB254/HCPACS) 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 or in the event of any other in-custody death. For purposes of this bill, "deadly force" is defined as 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 not merely a contributing factor in the death of a person with a preexisting condition. "Great bodily harm" is defined as an injury to the person that creates a high probability of death, causes serious disfigurement, or results in permanent or protracted loss or impairment of the function of any member or organ of the body. "In-custody death" is defined as a death that occurs while an individual is being detained under color of law 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.

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 it 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 provides that these investigations must be conducted as soon as practicable.

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. If a district attorney declines to prosecute, the bill specifies that the attorney general has jurisdiction 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.

The bill proposes that any costs unexpended by a county or municipal LEA as a result of DPS conducting the investigation shall be reimbursed to DPS, and any costs unexpended by the jurisdictional district attorney's office as a result of the office of Attorney General (NMAG) conducting the prosecution shall be reimbursed to the attorney general's office.

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

**Cost Distribution.** The primary fiscal implications of this bill for the state relate to the costs of investigating and prosecuting alleged law enforcement uses of force resulting in great bodily harm or death. The bill specifies that these costs shall be paid as follows:

Any costs unexpended by a county or municipal law enforcement agency as a result of the department of public safety's conducting of the investigation shall be reimbursed to the department, and any costs unexpended by the district attorney's office in the judicial district where the conduct is alleged to have occurred as a result of the attorney general's office conducting the prosecution shall be reimbursed to the attorney general's office.

Rather than reimbursing the total cost of investigations or prosecutions, this bill only requires DPS and NMAG be reimbursed for “costs unexpended” (saved) by a local law enforcement agency (LEA) or jurisdictional district attorney's office as a result of those entities not conducting the investigation or prosecution, respectively. This creates significant ambiguity regarding how costs are to be distributed. Costs to NMAG and district attorneys' officers are both paid by the state, so the precise distribution of funds does not alter the overall impact of these costs to the state, but may lead to disagreements between the agencies. However, the distribution of costs between DPS and local LEAs does have a direct fiscal impact and hinges on the question of what costs were saved by the LEAs, which is very open to interpretation.

It is very difficult to define what costs are saved due to an event (in this case, an investigation by a local LEA) that did not occur. As a result, there are many instances in which it is conceivable that a local LEA would not fully reimburse DPS's costs to investigate a use of force incident, including

- The LEA would not have conducted an investigation into the incident.
- The LEA would have relied on DPS to conduct an investigation into the incident (as is often the case under current law).
- The LEA would have conducted a less costly investigation as a result of expending fewer resources on the investigation or its resources (such as officer pay) being less expensive than DPS's.
- The LEA conducts a separate investigation into the incident (either at its discretion or due to external requirements, such as the Albuquerque Police Department's consent decree), resulting in no costs being saved.

Such ambiguity makes it difficult to determine what, if any, of DPS's investigative costs will be

reimbursed, and differing interpretations may lead to disagreements between DPS and LEAs. Further, while the bill provides that county or municipal LEAs will provide reimbursement, no reimbursement is provided from any of the other agencies that employ law enforcement officers. The following analysis therefore considers a scenario under which costs are distributed based on DPS’s actual investigatory costs as well as a scenario under which none of their costs are reimbursed, resulting in a range of potential fiscal impacts.

**Investigation Costs.** 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.

DPS’s estimates below are based on the total cost the agency expects will be incurred. These totals represent the maximum cost to DPS if none of its investigation costs are 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
<b>Total</b>	<b>\$780.6</b>	<b>\$3,009.8</b>

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.

The entirety of this \$3 million estimated cost increase could be incurred by DPS in FY22 and future fiscal years in the event the agency is not reimbursed for any of its costs related to investigations. However, assuming some cost sharing, the additional operating budget impact to DPS could be significantly lower, but would likely not be reduced to zero. These cost estimates rely on the following assumptions:

- LEAs reimburse DPS for all investigation costs and additional hours for great-bodily-harm investigations;
- The remaining staffing costs (supervisors and crime scene technicians) would be split, with LEAs covering 75 percent of costs and DPS paying 25 percent for times when those personnel were not directly working on a reimbursable investigation; and,
- DPS is responsible for all training costs.

This would result in an average annual cost increase to LEAs of \$2.2 million and to DPS of \$780.3 thousand. As a result, this analysis estimates an increase in costs to DPS between \$780.3 thousand and \$3 million and an increase in costs to LEAs of up to \$2.2 million.

***Prosecution Costs.*** 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.

***Other Cost Impacts.*** There may be some additional costs related to staff time (from police departments, sheriffs' offices, district attorneys' offices, NMAG, 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 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. Notably, the House Appropriations and Finance Committee substitute for House Bill 2 includes \$1 million for a special appropriation to NMAG for extraordinary litigation, including officer misconduct cases.

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

HB254/HCPACS contains numerous technical issues that make its effect unclear and may prevent it from having the intended impact. Those issues are outlined in detail under Technical Issues, below. Most crucially, the definitions of “deadly force” 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.”

Currently, the bill requires DPS and NMAG to be reimbursed based on the costs other agencies have saved by DPS and NMAG undertaking investigatory and prosecutorial duties, respectively. The ambiguity of how costs saved will be determined will likely be a matter of debate between the relevant agencies, and could result in a much higher cost to the state if DPS is not reimbursed for its expenses. It may be desirable to instead simply require the totality of investigation costs be paid by the LEA that employs (or employed) the peace officer involved in the incident or, in the event of an in-custody death, the LEA in whose custody that death occurred, and to require that the totality prosecutorial costs be paid by the jurisdictional district attorney.

***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).<sup>1</sup>

Very few incidents of police killings in New Mexico have resulted in the prosecution of 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](https://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.

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 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 LEAs. For over a decade, state statute has required LEAs 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 LEAs 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 LEAs to fully cooperate with and promptly respond to requests for information from the relevant prosecuting authority and the LEA 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 HB254 also applies to correctional officers, those officers are similarly not considered law enforcement officers for purposes of the body-worn camera requirement.

## **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**

LEAs, district attorneys' offices, 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.

In its analysis of the introduced bill, NMCD noted that it will need to make arrangements with local sheriff's offices and/or municipal police departments 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**

HB254/HCPACS almost duplicates the Senate Health and Public Affairs Committee substitute for Senate Bill 274, with the exception that on line 14 of page 5, HB254/HCPACS refers to "this subsection," while SB274/SHPACS refers to "the subsection." SB274/SHPACS's use of "the" leaves significant ambiguity as to which subsection it refers to, making this a potentially substantive difference.

HB254/HCPACS relates to House Bill 263, which duplicates the introduced version of the bill.

HB254/HCPACS relates to Senate Bill 227, which also provides for reporting law enforcement officer uses of force. While the provisions of SB227 do not appear to directly conflict with those of HB254/HCPACS, 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 HB254/HCPACS.

HB254/HCPACS 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 LEA. Because body camera recordings may be used as evidence in an investigation pursuant to HB254/HCPACS, any exceptions to the requirement that law enforcement officers record their activities may impact available evidence for these investigations.

The House Appropriations and Finance Committee substitute for House Bill 2 includes \$1 million for a special appropriation to NMAG for extraordinary litigation, including officer misconduct cases.

## **TECHNICAL ISSUES**

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 an in-custody death. 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, a

crucial component of determining whether it meets the definition of an in-custody death) 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, which states that the “procedures in this section shall apply when a peace officer uses deadly force against a person in the course of the peace officer’s duties that results in great bodily harm or death *or any other in-custody death*” (emphasis added).

Subsection D establishes that the “relevant prosecuting authority shall represent the state at a probable cause hearing at which it 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. 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 “[a]ny costs unexpended by a county or municipal law enforcement agency as a result of the department of public safety’s conducting of the investigation shall be reimbursed to the department”. In addition to “costs unexpended” being difficult to define and open to differing interpretations, the bill also does not specify which county or municipal law enforcement agency is responsible for reimbursement. The bill may intend for costs to be reimbursed by the agency employing the officer whose use-of-force is in question or the agency in whose custody an in-custody death occurred, but this is not clear in the bill, as there may be instances in which an agency other than the employing agency might be expected to conduct an investigation absent the provisions of this bill, such as if the incident took place within one agency’s jurisdiction but the officer was employed by another agency. Finally, in the event that a law enforcement officer employed by a state agency other than DPS (such as EMNRD) were the subject of such investigation, the costs of that investigation would fall to DPS.

Subsection H specifies that, when a district attorney declines to exercise original prosecutorial

jurisdiction, the attorney general has jurisdiction “to prosecute unlawful uses of deadly force resulting in great bodily harm or death and in-custody deaths and 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.” 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 LEAs and has no statutory basis to do so.

In Subsection I, “deadly force” is defined as “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 *not merely a contributing factor in the death of a person with a preexisting condition*” (emphasis added). 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 Subsection I, “in-custody death” is defined as “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”. Many of the provisions of the bill (including those in Subsections E, F, and H, which establish procedures for investigations and prosecutions) apply 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 also notes:

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 LEAs, such as Border Patrol agents. At the time of this writing, it was not known if all LEAs 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 LEAs 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.

***Great Bodily Harm.*** This bill defines great bodily harm as "an injury to the person that creates a high probability of death; causes serious disfigurement; or results in permanent or protracted 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.

## AMENDMENTS

Issues related to cost distribution among agencies raised under "Fiscal Implications" and "Significant Issues," above, may be resolved by simply requiring the LEA that employs or employed the officer whose actions are under investigation or in whose custody an in-custody death occurred reimburse DPS for investigation costs and that the jurisdictional district attorney reimburse NMAG for prosecution costs. If such a change is desired, the following amendment is recommended:

On page 4, strike lines 18 through 24 and line 25 up to the period and insert in lieu thereof "incurred by the department of public safety to conduct the investigation shall be reimbursed to the department by the public entity that employed the officer whose actions were the subject of the investigation at the time the conduct was alleged to have occurred or the public entity in whose custody the in-custody death occurred, and any costs incurred by the attorney

general’s office to conduct the prosecution shall be reimbursed to the attorney general’s office by the district attorney’s office in the judicial district where the conduct was alleged to have occurred.”

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/rl/al