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FISCAL IMPACT REPORT

ORIGINAL DATE 03/08/21

SPONSOR SJC LAST UPDATED _____ HB _____

SHORT TITLE Inspection of Private Prisons SB 291/SJCS

ANALYST Carswell/Rabin

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY22	FY23	FY24	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	Up to \$90.0	Up to \$90.0	Up to \$90.0	Up to \$270.0	Recurring	General Fund—NMAG
	\$164.0	NFI	\$164.0	\$328.0	Recurring	General Fund—NMCD

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB40, “Private Detention Facility Moratorium Act”

Relates to HB191, “Corrections Ombudsman Act”

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General’s Office (NMAG)

Corrections Department (NMCD)

SUMMARY

Synopsis of Bill

The Senate Judiciary Committee substitute for Senate Bill 291 changes the title of the “Privately Operated Correctional Facilities Oversight Act” (Chapter 33, Article 15 NMSA 1978) to the “Privately and Publicly Operated Correctional Facilities Oversight Act” and creates a new section that makes all prisons in the state subject to inspection without prior notice by an inspector designated by the Legislative Council at least once every two years. The bill specifies qualifications the inspector should possess and prohibits certain conflicts of interest, such as having been an employee or independent contractor of a correctional facility or the parent company of a facility within the past two years.

Under SB291/SJCS, the inspector would be entitled to review all reports, audits, records, and complaints and shall be given reasonable access to the facility itself, to staff and inmates for

private interviews, to all areas used by and accessible to inmates, and to programs for inmates. According to the language of the bill, such access is necessary to provide the inspector with information about the available services, respect for the rights and safety of inmates, and for inspecting, viewing, photographing, and video recording all areas accessible to inmates. Correctional facilities shall pay the cost of inspections, including reviews of reports, audits, records, or complaints, and on-site inspection. The inspector shall provide a report of each inspection to the appropriate interim legislative committee, the attorney general (NMAG), the secretary of the Corrections Department (NMCD), and the facility with 30 days, and the attorney general and facility must post the reports to their public websites. SB291/SJCS also specifies the topics reports should cover, including information from private interviews and evaluations of the availability and quality of medical and mental health services, the facility's compliance with contractual requirements, the systems of physical restraint, isolation, classification, retaliation, and management, and the adequacy of staff training.

Finally, SB291/SJCS directs the inspector to determine within 30 days of the report whether corrective action is necessary. If it is, the inspector shall issue a corrective action plan to the attorney general, the NMCD secretary, and the facility. After six months, if the inspector determines the facility has not taken sufficient corrective action, they shall refer the facility to the attorney general and the NMCD secretary for enforcement and fines.

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

SB291/SJCS would make NMCD and private prison operators responsible for paying the cost of inspections. NMCD estimates the impact to its operating budget at \$164 thousand per inspection year, based on the cost of American Correctional Association (ACA) audits that currently occur at its facilities (\$14,916 per facility). The department notes, "because ACA has published standards against which the department can measure itself prior to audits, costs related to findings are reasonably predictable; because this bill grants broad discretion to the inspector, inspection-related costs could be significantly higher." NMCD states it would need additional appropriations to cover the costs of SB291/SJCS.

NMAG notes it does not currently have a staff member that can be dedicated to the enforcement duties of SB291/SJCS. The estimated impact to its operating budget assumes the addition of an FTE dedicated to these new enforcement duties.

SIGNIFICANT ISSUES

NMCD currently contracts for the operation of four private detention facilities: The Guadalupe County Correctional Facility, Lea County Correctional Facility, Otero County Prison Facility, and Northwest New Mexico Correctional Center. The department operates another seven facilities. As of February 1, the private facilities housed about 46 percent of the state's inmate population, or roughly 2,700 inmates. NMCD also contracts with a private company and one prison operator to provide healthcare services to inmates.

NMCD employs contract monitors at each of the private prisons to oversee compliance with NMCD policies and contract terms. When the monitors find violations, they suggest corrective

actions and the facilities may be subject to fines. According to NMCD, “contract monitors are responsible for appraising the accuracy, reliability, and efficiency of contractor internal controls, processes, and records as they relate to the prison and to audit operations related to contractor scope of work.” Both public and private prisons in New Mexico are also subject to regular audits by the American Correctional Association (ACA), which accredits the facilities. The department notes, “ACA standards are the national benchmark for the effective operation of correctional systems throughout the United States and are utilized to ensure that correctional facilities are operated professionally.” Additionally, ACA audits “currently address all areas referenced in this bill.” However, the ACA is a private, trade organization for the corrections industry, not a public body, and nationwide, issues with safety and the conditions of confinement have been found at numerous ACA-accredited facilities. A 2016 report by the Inspector General of the U.S. Department of Justice found higher rates of safety and security incidents at private, contract prisons than federally-managed facilities, for instance. ACA accreditation is required to secure contracts with the federal Bureau of Prisons as it is required by NMCD for state contracts.

The duties of the inspector under SB291/SJCS may overlap with the duties of the contract monitors and ACA auditors while also adding a layer of independent oversight and transparency to the operations of state prisons. The work products of the private contract monitors currently employed by NMCD are subject to the Inspection of Public Records Act (IPRA), but the audits and corrective action plans monitors generate are not automatically made public, as would be required for inspections conducted under SB291/SJCS. Additionally, public access to the records of private corrections contractors, including the healthcare provider and prison operators, has been the subject of litigation in recent years. In 2019, the New Mexico Supreme Court affirmed that private contractors to the state corrections system were subject to public records laws after a former healthcare contractor refused to release settlement agreements requested under IPRA. However, a similar issue came before state courts again in 2020, when a nonprofit sued NMCD and private prison operators after two operators refused to release records related to claims and lawsuits brought against them in New Mexico, claiming they were not subject to IPRA.

Additionally, 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. Regular independent inspection of both public and private NMCD facilities, as mandated by SB291/SJCS, may contribute to identifying where such issues occur within the system and correcting them.

ADMINISTRATIVE IMPLICATIONS

NMAG notes that it does not currently have a staff member that can be dedicated to the enforcement duties of SB291/SJCS.

NMCD states administrative workloads at the department could be impacted, depending on the reach of requests for information and documents under SB291/SJCS. Additionally, NMCD notes

the bill’s requirements appear to overlap with the duties of its contract monitors.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Related to House Bill 40, “Private Detention Facility Moratorium Act.” HB40 would make it unlawful to operate a private detention facility in New Mexico and would effectively phase-out private prisons in the state when current contracts expire. LFC analysis indicates HB40 would not impact the prison system until 2024. If HB40 were enacted, there would eventually be no need for independent inspections of private prisons.

Related to House Bill 191, “Corrections Ombudsman Act,” which would provide independent and impartial assistance to strengthen procedures and practices that lessen the possibility of action occurring within NMCD that may adversely impact the health, safety, welfare, and rehabilitation of offenders and effectively reducing the exposure of NMCD to litigation.

TECHNICAL ISSUES

The office of Attorney General states that while SB291/SJCS allows for enforcement of the corrective action plan, including the assessment of fines, it does not state what action the attorney general may take to ensure compliance with the corrective action plan nor does it establish minimum or maximum fines.

Additionally, NMAG notes the following:

SB291/SJCS creates some confusion by adding “publicly” to the short title act. If the act is going to change the process for Corrections Department oversight of prisons, it is likely more statutory revisions will be required.

AMENDMENTS

Office of Attorney General suggests the following:

1. Consider stating the legislative purpose/intent of the proposed bill for greater clarity and understanding of the bill’s intent.
2. Consider clarifying what information is considered confidential for purposes of redaction when posting the inspection reports.
3. Consider clarifying what information should be gathered from private and confidential interviews as contemplated in Section (B)(1).
4. Consider providing specific and measurable inspection report data to be collected to avoid potential litigation.
5. Consider outlining what types of items may appear in a corrective action plan the same way items are considered for the original inspection report.
6. Consider adding what actions the Attorney General and/or the secretary may take to ensure compliance with a corrective action plan.