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FISCAL IMPACT REPORT

ORIGINAL DATE 02/15/21

SPONSOR Baca LAST UPDATED _____ HB _____

SHORT TITLE Create Crime of Looting SB 258/ec

ANALYST Tolman

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY21	FY22	FY23		
See Fiscal Implications			Recurring	Crime Victims Reparation Fund

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Likely Minimal; See Fiscal Implications				Recurring	Agency Operating Budgets

(Parenthesis () Indicate Expenditure Decreases)

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)
 Attorney General’s Office (AGO)
 New Mexico Sentencing Commission (NMSC)
 New Mexico Corrections Department (NMCD)
 Department of Public Safety (DPS)

SUMMARY

Synopsis of Bill

Senate Bill 258 would create the crime of looting within the Criminal Code, which is defined as, “knowingly and without authority of law or consent of the owner: 1) entering any home or dwelling or any commercial business or property in which normal security of property is unavailable

because of fire, natural disaster, riot, mob or other man-made disaster or emergency; and 2) obtaining or exerting control over or damaging or removing property of the owner.” The bill would make looting a fourth degree felony, which would be punishable by up to 18 months imprisonment and a fine of up to \$5,000 pursuant to Section 31-18-15 NMSA 1978. Regardless of whether a sentence of imprisonment is suspended or deferred, the bill requires a minimum sentence of at least 100 hours of community service, and requires the defendant to make restitution to the owner of the looted property.

This bill contains an emergency clause and would become effective immediately upon signature by the governor.

FISCAL IMPLICATIONS

The creation of any new crime, increase of felony degree, or increase of sentencing penalties will likely increase the population of New Mexico’s prisons and long-term costs to the general fund. In addition to the potential of new crimes to send more individuals to prison, increased sentence lengths decrease releases relative to the rate of admissions, pushing the overall prison population higher. The Corrections Department 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.

This bill may increase the number of individuals incarcerated and increase the time they spend incarcerated, but it is difficult to determine how many individuals would be charged or convicted of the new crime created by the bill. The Sentencing Commission reports the average length of stay for fourth-degree property crimes is almost 18 months. For each individual convicted under this bill, the state would likely face an additional cost of \$34.4 thousand.

Any increase in criminal offense or penalties has an impact on the workload of all elements of the criminal justice system, including law enforcement, courts, district attorneys, public defenders, jails, and prisons. However, because the elements of the crime of looting as defined in SB258 overlap with existing criminal offenses, the additional costs related to this bill will likely be low, as incidents likely to lead to looting charges under this bill are already addressed in current law.

As the Public Defender Department (PDD) noted, it is unclear whether this crime would be charged to the exclusion of other crimes under a general-specific analysis. If in addition to other crimes, its enactment could have the effect of increasing public defender workloads requiring a concomitant increase in resources. In general, the creation of any new crime increases the strain on public defenders since any defendant charged with a crime has a constitutional right to a defense.

Incidents that could only be charged as misdemeanor offenses under current law, such as criminal damage to property with damages under \$1,000, could be escalated to fourth degree felonies under the provisions of the bill, potentially making those offenses more likely to be pursued by law enforcement and go to trial, creating additional costs to the state and local entities. Additionally, if a charge of looting is added to a charge or charges of other offenses that exist under current law related to the same incident, this could result in a longer period of incarceration, at additional cost.

Additional felony sentences that could be imposed under this law would require additional payments of crime victims reparation fees, which are \$75 for a felony and provide revenue for the

crime victims reparation fund. This could result in some additional revenue to this fund.

Because it is unclear to what extent this law could or would be applied in place of or in addition to current offenses, it is impossible to accurately estimate the resulting costs.

PDD also indicated that the mandatory community service provision could create additional work for courts, prosecutors, and public defenders, noting that 100 hours is a very significant amount of community service. By comparison, a first-offense DWI carries a mandatory 24 hours of community service. They noted further that courts, prosecutors, and public defenders would have to manage the warrants and probation violation hearings that would come up when some defendants failed to complete their community service.

SIGNIFICANT ISSUES

The conduct described by the definition of “looting” within SB258 overlaps with several existing offenses outlined within the Criminal Code, including trespass (a misdemeanor), breaking and entering (a fourth degree felony), non-residential burglary (a fourth degree felony), larceny (a misdemeanor or felony depending on the value of property stolen), and criminal damage to property (a misdemeanor or felony depending on the value of property damage). The Administrative Office of the District Attorneys notes that the distinction between SB258 and what is breaking and entering (see Section 30-14-8 NMSA) is that the crime of looting does not require fraud, deception, breaking or dismantling of any part of a dwelling place or commercial business. The crime of looting merely requires entry, obtaining or exerting control over the home or business and damaging or removing property of the owner while normal security is unavailable due to fire, natural disaster, riot, mob or man-made disaster or emergency.

Both the Attorney General’s Office (NMAG) and PDD outlined several existing property crimes with which SB258 overlaps. A person who entered the property of another and took or damaged property, regardless of whether there was a natural or man-made disaster at the time, could face prosecution for one or more of the following crimes:

- It is already a crime to intentionally damage property of another without the owner’s consent. NMSA 1978, § 30-15-1 (1963). Causing damage of greater than \$1,000 is a fourth-degree felony (as “looting” would be); damage below that is a petty misdemeanor.
- A person who intentionally or negligently burned the property of another would be guilty of arson. NMSA 1978, § 30-17-5 (2006), § 30-17-6 (1963). Depending on the arsonist’s intent and the degree of damage, arson ranges from a petty misdemeanor (for less than \$250 of damage) to a second-degree felony (for more than \$20 thousand of damage, or willful or malicious arson causing great bodily harm).
- Theft (or larceny) is also illegal, with the penalty dependent on the value of the items stolen; it ranges from a petty misdemeanor (for property worth less than \$250) to a second-degree felony (for property worth more than \$20 thousand).
- Entering land owned by another person and causing any damage, or simply being there while knowing it is not allowed, is criminal trespass, a misdemeanor. NMSA 1978, § 30-14-1 (1995).
- Breaking into someone’s vehicle or building, or entering by “fraud or deception,” is breaking and entering, a fourth-degree felony. NMSA 1978, § 30-14-8 (1981).
- Entering someone else’s vehicle or building without authorization and “with the intent to commit any felony or theft” is burglary, a third- or fourth-degree felony. NMSA 1978, § 30-16-3 (1963). If the burglar was armed with a deadly weapon or committed a battery, the

penalties would increase to a second-degree felony. NMSA 1978, § 30-16-4 (1963).

It is not clear if the charge of looting may be charged and sentenced as a separate offense alongside one or more of these similar offenses related to a single incident and may vary among the different offenses. The Public Defender Department notes that the conduct within the ordinary or colloquial meaning of the word “looting” is already illegal and that the existing laws impose more serious penalties than SB258 would create. They add that the double jeopardy and general-specific doctrines might prohibit some combinations of convictions but not others and that these issues would need to be litigated in the district and appellate courts.

The Public Defender Department also points out that the mandatory restitution and community service imposed by SB258 could have a disparate impact on defendants who cannot afford restitution payments or for whom transportation and work schedules make compliance with the community service particularly difficult. Defendants struggle to comply with the significant mandatory term of 100 hours of community service could face additional sanctions for failing to comply with their sentencing obligations. Because restitution requires an assessment of a defendant’s ability to pay, this bill may overstep the procedures outlined in NMSA 1978, Section 31-17-1 regarding victim restitution. Therefore, it may be unnecessary to mandate restitution in SB258 as it is already part of a sentence that typically occurs by operation of law.

PERFORMANCE IMPLICATIONS

Administrative Office of the Courts indicate that they are participating in performance-based budgeting. They indicate that this bill may have an impact on the measures of the magistrate, metropolitan and district courts in the areas of cases disposed of as a percent of cases filed and percent change in case filings by case type.

ADMINISTRATIVE IMPLICATIONS

Administrative Office of the Courts states that there may be an administrative impact on the courts as the result of an increase in caseload and/or in the amount of time necessary to dispose of cases. 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 an increase in commenced prosecutions, as well as appeals from convictions. 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.

TECHNICAL ISSUES

The Administrative Office of the District Attorneys noted that the phrase “normal security of property” may need to be refined.

The Attorney General’s Office noted that the phrase “knowingly and without authority of law” has not been previously used in the Criminal Code. The similar crimes of burglary and criminal damage or property use the phrase “unauthorized” or “without consent of the owner”, respectively.

The Public Defender Department notes that the application of this law would apply only in specific circumstances, but these are not entirely clear. As an example, they note that during the coronavirus pandemic, many businesses do not have their normal security available and therefore this bill could

arguably apply to any property crime committed at those locations. Furthermore, SB258 also criminalizes “obtaining or exerting control over” the owner’s property, but “exerting control” is not defined. For example, if someone simply entered an abandoned location to rest, that might constitute “exerting control” over the property. Since the bill does not require the entry of a building, SB258 could make it a felony for a homeless person to sleep on a bench outside a restaurant, if the restaurant was closed due to the pandemic.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The Administrative Office of the Courts, Public Defender Department, and Attorney General’s Office commented that, if SB258 is not enacted, criminal acts that could be described as looting will continue to be charged and prosecuted under current criminal laws.

RT/sb/rl