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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/25/19

SPONSOR Bash/Garratt/Akhil LAST UPDATED \_\_\_\_\_ HB 597

SHORT TITLE Crime of Stealing Regulated Material SB \_\_\_\_\_

ANALYST Edwards

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

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	\$0.0	Minimal	Minimal	Minimal	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Law Office of the Public Defender (LOPD)

Administrative Office of the District Attorney (AODA)

New Mexico Corrections Department (NMCD)

### SUMMARY

#### Synopsis of Bill

House Bill 597 seeks to create a new section of the criminal code to penalize criminal damage to property by stealing regulated material. House Bill 597 would criminalize, as a third degree felony, criminal damage to property by stealing regulated material. The violation consists of damaging the real or personal property of another in the commission of stealing regulated material when the cost of repair to the real or personal property is more than three thousand dollars (\$3,000).

### FISCAL IMPLICATIONS

House Bill 597 is likely to have a minimal fiscal impact to the criminal justice system.

AODA explains “House Bill 597 creates a new crime. To the extent this results in additional prosecutions, costs to the district attorneys will increase.”

LOPD states that the addition of any new crimes under the criminal code is likely to have a negative fiscal impact on the law offices of the public defender. While LOPD would likely be able to absorb some cases under the proposed law, any increase in the number of trials brought

about by the cumulative effect of this and all other proposed criminal legislation would bring a concomitant need for an increase in indigent defense funding to maintain compliance with constitutional mandates.

LOPD attorneys might also need experts to challenge any dubious testing repair valuations resulting in a belief and precipitating charge that the repair would be in excess of \$3 thousand, and, pursuant to *State v. Schoonmaker*, 2008-NMSC-010, and *State v. Brown*, 2006-NMSC-023, LOPD is required to pay for expert services of even indigent individuals who are privately represented, upon receipt of a court order. Any increases in expert witness contracts brought about by the proposed legislation together with the cumulative effect of all other proposed criminal legislation would bring a concomitant need for an increase in indigent defense funding to maintain compliance with constitutional mandates.

An LOPD Assistant Trial Attorney's mid-point salary including benefits is \$102.2 thousand in Albuquerque/Santa Fe and \$109.4 thousand in the outlying areas (due to salary differential required to maintain qualified employees). Recurring statewide operational costs per attorney would be \$2.3 thousand with start-up costs of \$3.2 thousand; additionally, average support staff (secretarial, investigator and social worker) costs per attorney would total \$77.1 thousand.

NMCD states:

It is difficult to estimate the fiscal impact of this or any new crime bill. However, the bill creates a new third degree felony, which carries a basic incarceration term of three years or a probation term in district court of up to five years. The Department therefore reasonably estimates that the bill is likely to result in a minimal increase in the number of offenders sentenced to NMCD custody or placed on probation, and thus a minimal increase to its prison population and/or probation/parole caseloads during the relevant three year fiscal period. Individuals sentenced to incarceration for a third degree felony also have a two year parole term upon release from incarceration.

The classification of an inmate determines his or her custody level, and the incarceration cost varies based on the custody level and particular facility. The average cost to incarcerate a male inmate is \$43.4 thousand per year in a state-owned and operated prison, and the average annual cost in a privately operated prison is \$32.1 thousand (where primarily only level III or medium custody inmates are housed). The cost per client in Probation and Parole for a standard supervision program is \$2.9 thousand per year. The cost per client in Intensive Supervision programs is \$1.3 thousand per year. The cost per client in Community Corrections is \$10.1 thousand per year. The cost per client per year for female residential Community Corrections programs is \$24 thousand and for males is \$23.5 thousand. Offenders placed on probation for the crimes covered by this bill seem likely to be immediately or eventually placed on standard supervision.

## **SIGNIFICANT ISSUES**

Regulated materials, as defined in 57-30-2 NMSA 1978 are aluminum materials, bronze materials, copper or brass materials, steel materials, lead materials, utility access covers, water meter covers, road or bridge guard rails, highway or street signs, traffic directional or control signs or signals, and catalytic converters that are not part of an entire motor vehicle.

AODA explains:

House Bill 597 adds a new, specific type of criminal damage to property crime. The general criminal damage to property statute, Section 30-15-1 NMSA 1978, makes damaging the real or personal property of another a petty misdemeanor or a fourth degree felony if the damage amounts to more than \$1 thousand. New Mexico also has several specific criminal damage to property statutes: damage to caverns, desecration of roadside memorials, desecration of a church, unauthorized graffiti. These specific criminal damage to property statutes range from petty misdemeanors to fourth degree felonies.

House Bill 597 makes it a third degree felony to damage real or personal property in the commission of stealing regulated material when the cost of repair is more than \$3 thousand.

If a defendant is charged and prosecuted for both the theft of the regulated material and the criminal damage to property resulting from the theft, there may be double jeopardy concerns: two convictions for a single course of conduct.

[C]rime consists of causing damage (in the course of stealing regulated material), and the basis for the crime is the cost of repair, not the value of the materials stolen. The theft of a small amount of regulated material may result in an expensive repair bill and give rise to a third degree felony charge. The state will need to prove the cost of repair.

LOPD analysis states:

Ordinarily, criminal penalties for financial crimes vary according to the value of damages done. Peculiarly, House Bill 597 would tie the amount of damage to the cost of repair, not the value of the actual damage. And, House Bill 597 does not graduate “degrees” of crimes so that up to \$3 thousand might constitute a lesser crime. Consequently, since the only crime created is a third degree felony tied to the repair value of \$3 thousand, alleged victims would be naturally incentivized to cause the repair to cost in excess of \$3 thousand. The value of damages here is left to the alleged victim as opposed to an objectively determined damages value, and that could result in the law being unjustly applied.

Moreover, this conduct is already covered by the residential and commercial burglary statutes, which already penalize unauthorized entry of a home or commercial building as a felony. If the damages done to a building were shown to be in excess of \$3 thousand, the perpetrator would ordinarily be responsible for them already, under the laws as they presently exist. Therefore, this legislation appears unnecessary.

As an alternative, LOPD suggests the bill adjust the value of damages so that it is not wholly reliant on the cost of repair.

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