

LFC Requester:	
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**AGENCY BILL ANALYSIS
2015 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply: Date 1-26-16
Original **Amendment** _____ **Bill No:** HB236
Correction _____ **Substitute** _____

Sponsor: Antonio "Moe" Maestas **Agency Code:** 264
Short Title: Penalty for Sexual Exploitation of Children **Person Writing:** Gail MacQuesten
Title: _____ **Phone:** 466-0532 **Emai:** gailmacquesten@q.com

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		
0	0	n/a	n/a

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18		
0	0	0	n/a	n/a

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	minimal	minimal	minimal	unknown	recurring	general

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: HB65
 Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

HB236 amends NMSA 1978, Section 30-6A-3, the statute setting out the crime of Sexual Exploitation of Children, to increase the penalty for possession of prohibited images depicting a child under eighteen from a fourth degree felony to a second degree felony.

FISCAL IMPLICATIONS

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

It is difficult to assess the fiscal impact the bill will have on the district attorneys. The higher penalty may encourage plea bargaining and reduce trials, or the higher stakes may cause defendants to go to trial more often.

SIGNIFICANT ISSUES

HB236 raises the penalty for possession crimes under the Sexual Exploitation of Children Act from a fourth degree felony to a second degree felony. Other crimes set out in the act are unchanged:

Distribution	3rd degree felony
Causing or permitting a child to engage in act	3rd degree felony (if child under 18) 2 nd degree felony (if child under 13)
Manufacturing	2 nd degree felony
Manufacturing (depiction)	4 th degree felony
Distribution (depiction)	3 rd degree felony

Under HB236, possession is as serious an offense as causing a child under 13 to engage in the prohibited act, or manufacturing the prohibited images. Possession will be a more serious offense than the remaining crimes set out in the act.

Increasing the penalty for possession is likely a response to *State v. Olsson*, 2014-NMSC-012, 324 P.3d 1230, in which the New Mexico Supreme Court interpreted the crime of possession.

Looking at the entire Sexual Exploitation of Children Act, Section 30-6A-1 *et seq.*, the court found that the legislature had not clearly defined the unit of prosecution for the offense of possession. Because the statutory language was ambiguous, and the history and purpose of the statute did not offer further clarity, the court looked at the defendants' conduct to see if the acts were separated by sufficient indicia of distinctness to justify multiple punishments. The court concluded that their acts were not sufficiently distinct. The defendants, who had multiple images of child pornography, were each punished for one count of possession.

By raising the degree of the felony, HB236 dramatically increases the punishment available for the crime. The basic sentence on a fourth degree felony is eighteen months; the basic sentence on a second degree felony is nine years. So, although *Olsson* may require the state to bring a single count in situations involving possession of a large number of prohibited images, HB236 will allow the punishment to better fit the crime, which typically involves the possession of a large number of images. At the same time, it limits the punishment and provides clarity: possession of child pornography is punishable as a single count second degree felony. In contrast, a change in the statute that would allow a separate count for each image could result in hundreds or even thousands of felony charges for possession of a single computer disc.

PERFORMANCE IMPLICATIONS

HB236 provides for increased sentences in possession cases, which rarely involves a single prohibited image.

ADMINISTRATIVE IMPLICATIONS

See Performance Implications, above.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB236 conflicts with HB65, which makes extensive amendments to the Sexual Exploitation of Children Act, including its sentencing provisions. HB65 takes a different approach to the addressing the issues raised in *Olsson*: HB65 makes the possession, distribution or manufacture of each depiction of a child under eighteen years engaged in a prohibited sexual act a separate crime. HB65 also adds penalty enhancements to the crimes set out in the Act. By allowing a separate charge for each depiction, HB65 leaves it to the prosecutor's discretion whether to charge one count or a thousand counts in a case involving a thousand images on a computer disk. Of course, the prosecutor will need to meet its burden of proof on each separate charge.

TECHNICAL ISSUES

None noted.

OTHER SUBSTANTIVE ISSUES

None noted.

ALTERNATIVES

None noted.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Possession of an obscene visual or print medium depicting any prohibited sexual act or simulation of such act where a participant in that act is a child under eighteen years will be a fourth degree felony.

AMENDMENTS

None suggested.