

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 2-9-16
Original **Amendment** **Bill No:** HB65S
Correction **Substitute**

Sponsor: S.M. Barnes and R.S. Crowder **Agency Code:** 264
Short Title: Child Porn Images as Individual Offenses **Person Writing:** Gail MacQuesten
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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:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

The Senate Public Affairs Committee Substitute for HB65 amends NMSA 1978, Section 30-6A-3 of the Sexual Exploitation of Children Act.

HB65S amends the provisions related to possession and distribution of prohibited images to impose a basic sentence of nine years. When a separate finding of fact made by a court or jury shows beyond a reasonable doubt that a child depicted in the medium is a child under thirteen, the basic sentence shall be increased by one year, and the sentence imposed shall be the first year served and shall not be suspended or deferred. For youthful offenders, the sentence may be increased by one year.

HB65S does not change the basic sentence for manufacturing prohibited images, but adds the language enhancing the sentence when the depicted child is under thirteen: when a separate finding of fact made by a court or jury shows beyond a reasonable doubt that a child depicted in the medium is a child under thirteen, the basic sentence shall be increased by one year, and the sentence imposed shall be the first year served and shall not be suspended or deferred. For youthful offenders, the sentence may be increased by one year.

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.

The increased sentences for possession and distribution may lead to more pleas, which may reduce trial costs for the courts, district attorneys and public defenders. If HB65S leads to increased incarceration, that will increase costs for the department of corrections.

SIGNIFICANT ISSUES

HB65S offers a solution to the “unit of prosecution” problem identified by the New Mexico Supreme Court in State v. Olsson, 2014-NMSC-012, 324 P.3d 1230.

In that case, the court found Subsection A of Section 30-6A-3, which addresses possession of

child pornography, did not clearly define the unit of prosecution. 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.

Redefining the "unit of prosecution" in child pornography cases in a rational way that will pass constitutional challenges is a notoriously difficult task. Should the number of counts be based on the number of images (which could be in the thousands), how the images are stored (one count for each magazine, thumb drive or hard drive, without regard to how many images appear there), how many different children are depicted, how many different acts are depicted, the nature of the acts depicted? Instead of trying to redefine the "unit of prosecution" under the Sexual Exploitation of Children Act, HB65S raises the possible sentences for possession and distribution offenses, so that sentences can be fashioned to match the seriousness of the offense, which often involves large numbers of prohibited images. As currently written, and as interpreted by the court in Olsson, a defendant with a computer hard drive containing thousands of prohibited images could be charged with only one count of possession, a fourth degree felony punishable by eighteen months. Under HB65S, the defendant can still only be charged with one fourth degree felony count, but the basic sentence is nine years. HB65S makes the same change for distribution cases, keeping that offense a third degree felony, but raising the basic sentence to nine years.

For possession, distribution and manufacturing, HB65S adds language enhancing the sentence when the child depicted is under thirteen. In such cases the basic sentence is enhanced by one year, and the first year cannot be suspended or deferred. If the defendant is a youthful offender, the sentence may be increased by one year.

PERFORMANCE IMPLICATIONS

For possession, distribution and manufacturing cases in which the child is under thirteen, a separate finding of fact will need to be made by the court or the jury. Courts may need to develop additional jury instructions.

ADMINISTRATIVE IMPLICATIONS

See Performance Implications, above.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None noted.

TECHNICAL ISSUES

None noted.

OTHER SUBSTANTIVE ISSUES

None noted.

ALTERNATIVES

None noted.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Without this bill, prosecutors will continue to charge crimes under the Sexual Exploitation of Children Act using the analysis in the Olsson case.

AMENDMENTS

None suggested.