LFC Requester:	Theresa Rogers

AGENCY BILL ANALYSIS
2016 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

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{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:

Original ___ **Amendment** ___
Correction ___ **Substitute** x

Date February 5, 2016
Bill No: HB 65

Sponsor: Barnes & Crowder
Short Title: Child Porn Images as Individual Offenses

Agency Code: 305
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		

(Parenthesis ( ) Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18		

(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						

(Parenthesis ( ) Indicate Expenditure Decreases)

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

SECTION III: NARRATIVE

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Letter. This is a staff analysis in response to an agency's, committee's, or legislator's request.

BILL SUMMARY

Synopsis:

This substitute bill seeks to increase the basic penalties for possession, distribution, and manufacture of media that constitutes sexual exploitation of children under Section 30-6A-3. The only changes to the statute relate to the applicable penalties – the substance as to what constitutes the prohibited acts is unchanged. The act does not change the degree of felony and only seeks to increase the basic sentences.

Subsection A of Section 30-6A-3 prohibits the possession of material constituting sexual exploitation of children. The crime is currently a fourth degree felony which carries a basic sentence of 18 months. *See* § 31-18-15(A)(10). The substitute bill does not change this degree of felony but changes the basic sentence to nine years. The substitute bill also provides that this basic sentence "shall be increased by one year" if "a separate finding of fact" is made by "a court or jury . . . beyond a reasonable doubt" that the child depicted is under the age of 13.

Second, the bill provides that "and the sentence imposed by this subsection shall be the first year served and shall not be suspended or deferred; provided that when the offender is a youthful offender, the sentence imposed by this subsection may be increased by one year." As currently written, the purpose of this last provision is not entirely clear. It appears to mandate that adult offenders must serve the one year enhancement, if the child depicted is under 13, and that that year must be served first. However, for a youthful offender, it appears that the one year may be added to the basic nine year sentence, but can be suspended or deferred.

Subsection B of Section 30-6A-3 prohibits the distribution of material constituting sexual exploitation of children. This crime is currently a third degree felony which carries a basic sentence of three years. *See* § 31-18-15(A)(9) (penalty for third degree felony). Again, the bill seeks to increase the basic sentence for the crime to nine years with the identical language summarized above.

Subsection D of Section 30-6A-3 prohibits the manufacture of material constituting sexual exploitation of children. This crime is currently a second degree felony which already carries a basic sentence of nine years. *See* § 31-18-15(A)(6) (penalty for second degree felony). The bill thus includes only the language allowing for the one year enhancement if the finding is

made that the depicted child is under 13.

FISCAL IMPLICATIONS

SIGNIFICANT ISSUES

First, the substitute bill's reference to "youthful offender" conflicts with the Children's Code and may present a constitutional notice issue.

The substitute bill provides that "when the offender is a youthful offender, the sentence imposed by this subsection may be increased by one year."

"Youthful offender," however, is an explicitly defined statutory term in the Children's Code. NMSA 1978, § 32A-2-3(J)(1), (3). A child can qualify as a youthful offender if the child is charged with certain specified crimes—but sexual exploitation under Section 30-6A-3 is not one of the specified crimes. A child may also be a youthful offender if the child has three prior felony adjudications. The substitute bill's language would therefore only apply if the child was "youthful offender" with three prior felony adjudications. It is unclear whether this reflects the bill's intent or if the bill simply seeks to treat youthful offenders differently. If the bill is not incorporating the statutory definition of youthful offender from the Children's Code, that should be made explicit.

There is also a lack of clarity surrounding a child charged with multiple offenses, including both counts of sexual exploitation and other crimes that would render the child a youthful offender. In this circumstance, would the enhancement apply? If so, it may present a constitutional notice issue because the conduct being enhanced is not the conduct that made the child a youthful offender.

Second, the substitute bill's sentencing enhancements may be unconstitutional. Sentencing enhancements that depend on additional facts are only constitutional if the factfinder finds those facts beyond a reasonable doubt. *Apprendi v. New Jersey* mandates that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). The language in the substitute bill—"a separate finding by a court *or* jury. . ."—does not clearly follow this standard. Instead, it suggests that a court that was not the factfinder could find the necessary element.

Third, the substitute bill may violate the state constitutional prohibition on amendments by reference. The New Mexico Constitution prohibits blind legislation—any legislation that amends a substantive statutory section by reference only. N.M. Const. art. IV, § 18. Under the substitute bill, possession remains a fourth degree felony, which would otherwise by be punished with an 18-month basic sentence under the explicit terms of Section 31-18-15. The substitute bill, however, declares possession to be a fourth degree felony and "notwithstanding the provisions of Section 31-18-15 NMSA 1978," subject to a nine-year basic sentence. Section 31-18-15, however, only authorizes a nine-year sentence for second-degree felonies. The substitute bill therefore appears to alter the sentencing structure of Section 31-18-15 without explicitly amending that section.

The substitute bill is different than other examples, such as DWI sentencing, where a penalty is imposed "notwithstanding" Section 31-18-15. The difference here is that the substitute

bill declares crimes to be fourth-degree or third-degree felonies while imposing the exact sentence of a basic second-degree felony.

Fourth, as noted above, the final section of the proposed language, regarding when the one year enhancement must be served, is not clear. Breaking these clauses into independent sentences would clarify the legislative intent.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Section 30-6A-3 would remain as written and an offender could be sentenced to only one fourth degree felony count under Subsection A (possession) regardless of the actual number of images possessed. *State v. Olsson*, 2014-NMSC-012, 324 P.3d 1230.

AMENDMENTS