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FISCAL IMPACT REPORT

ORIGINAL DATE 2/5/15

SPONSOR Crowder LAST UPDATED _____ HB 251

SHORT TITLE Child Porn Images as Individual Offenses SB _____

ANALYST Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		NFI				

(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)
- Attorney General’s Office (AGO)
- New Mexico Sentencing Commission (NMSC)
- Children, Youth and Families Department (CYFD)
- New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of Bill

House Bill 251 proposes to amend Section 30-6A-3 (Sexual Exploitation of Children) to include each separate image recorded or prohibited sexual act performed be prosecuted as an individual criminal offense, as well as the possession, distribution or manufacture of those images into visual or print media.

FISCAL IMPLICATIONS

The AODA reports that HB 251 may reduce costs for the district attorneys because the bill clarifies the unit of prosecution for this crime. However, issues still may remain concerning what constitutes each “act” or each “separate image recorded,” and in some cases whether a person can be prosecuted both for the “act” and the recorded image of the “act.” So, whether HB 251 decreases costs or increases costs to the district attorneys is difficult to predict.

NMCD believes the bill is unlikely to impact the NMCD.

SIGNIFICANT ISSUES

The NMSC, AODA, and AGO report that In *State v. Olsson* (NM Supreme Court) (April 21, 2014), the court held that the legislature had not clearly defined the unit of prosecution for possession of child pornography, as the statutory language was ambiguous and the legislative history did not offer any further clarity. Consequently, the Court relied on the rule of lenity to hold that the defendants in that case could only be charged with one count of possession of child pornography, instead of multiple charges. (A copy of the *Olsson* is attached)

According to NMSC, as of June 30, 2014, 27 offenders committed to the custody of the NMCD had a conviction for sexual exploitation of children (30-6A-3) as their highest charge. That total includes new admissions and offenders returned to prison for revocations whose original conviction was for sexual exploitation of children.

AOC opines that HB 251 clarifies what the legislative intent is for each image and/or act that is possessed, distributed or manufactured by an individual should be a separate and distinct criminal charge. With greater access to the internet and computers, an individual can download large volumes of illegal materials at one time. This bill would expand the language in the criminal statutes to allow for multiple charges, rather than a single penalty, for volumes of illegal material that is obtain at one time, or through one source. Several states have case law or similar statutes that permit multiple charges based on each image of child pornography. Legally, these laws make clear the intent that punishment should accumulate for each image.

According to AODA, HB251 amends subsection C of the sexual exploitation of children statute to state the legislature's intent as to the correct unit of prosecution for the offense described in that subsection, allowing "each separate image recorded or each act performed publicly" to be prosecuted as an individual criminal offense. HB 251 does not apply to the subsection at issue in the Olsson case, or to any of the other subsections in the statute.

TECHNICAL ISSUES

CYFD points out that the language HB 251 is only in two of the eight sections. The other six sections will need this language, or it will only apply to the limited circumstances in section (C) – making illegal a person intentionally causing or permitting a child to engage in any sexual act or simulation of such an act if that person knows, has reason to know or intends that the act may be recorded. While (H) tries to be a catch-all, without the necessary language replicated in the remaining sections, it is unlikely to be successful.

The AGO suggests the definition of visual or print medium will need to be modified to fully address the ambiguities discussed in the Ballard/Olssen opinion.

Further, because the Supreme Court focused on the statutory ambiguity of the definition of visual or print medium and applied the rule of lenity in holding that the statute as constructed only allowed for an individual possession multiple images to be charged with one count of child exploitation by possession, the Supreme Court reached an altogether different holding than that of the opinion by the Court of Appeals which was not abrogated. The Court of Appeals held that an individual could be only be charged with multiple counts under the statute so long as the State could establish individualized intent to possess an image thus also ostensibly calling for a statutory clarification of the definition of visual or print medium.

Finally, the language “shall be prosecuted as an individual offense” seems to mandate that the prosecution charge and prosecute one count of child exploitation for every image possessed by an offender which could interfere with prosecutorial discretion or be overly cumbersome for investigators in cases where an individual possesses thousands of images and prosecutors prefer to charge only images they believe they could prove fit the statutory elements at trial or have been identified by the National Center for Missing and Exploited Children or would otherwise be in the interest of justice. A suggestion for re-write of this language would be “may be charged as an individual offense.”

ABS/je/bb