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FISCAL IMPACT REPORT

SPONSOR SJCS **ORIGINAL DATE** 02/16/16 **HB** CS/CS/65/SPACS/SJCS/a
LAST UPDATED 02/17/16 **SFC** SFC

SHORT TITLE Child Porn Images as Individual Offenses **SB**

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	FY 19	4 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total				See Fiscal Implications	See Fiscal Implications	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with CS/320/SJCS
 Relates to HB 30

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the District Attorneys (AODA)
 Attorney General’s Office (AGO)
 Children, Youth and Families Department (CYFD)
 Public Defender Department (PDD)
 New Mexico Sentencing Commission (NMSC)

SUMMARY

Synopsis of SFC Amendment

The Senate Finance Committee amendment to the Senate Judiciary Committee Substitute for the Senate Public Affairs Committee Substitute for HB 65 exempts certain behavior from the child exploitation offense of intentional possession of any obscene visual or print media depicting any prohibited sex act of simulation of such act when a participant is under 18 years old. Specifically, possession by a child under eighteen of a depiction of a child between the ages of 14 and 18 is not a crime when the depicted child 1) knowingly and voluntarily consented to that possession; and 2) knowingly and voluntarily: a) consented to the creation of the depiction or b) produced the depiction without coercion. The amendment expressly states that this exemption does not prohibit nor grant immunity from prosecution for possession of images that are the result of coercion.

This amendment exempts certain uncoerced “sexting” (teenagers sending nude or sexually suggestive images of themselves to each other). It does not exempt, however, the depicted child who sent the image from the possibility of prosecution for the child exploitation offenses of distribution or manufacture. NMSC provides survey results that reported 65.5 percent of teens between the ages of 13-19 have sexted and when considering only young adults, 20-26 year olds, 73.5 percent have sexted.¹

Synopsis of Original Bill

The Senate Judiciary Committee Substitute for the Senate Public Affairs Committee Substitute for HB 65 increases the penalties for child exploitation offenses (intentionally possessing, distributing, producing or manufacturing any obscene visual or print media depicting any prohibited sex act or simulation of such an act when at least one participant is under 18 years of age). It creates a new basic sentencing structure in Section 31-18-15 in the Criminal Sentencing Act, with these penalties:

- For intentional possession, a fourth degree felony for sexual exploitation of children with a basic sentence of imprisonment of ten years (18 months under existing law). In addition, a one year sentencing enhancement shall be imposed if the court or jury finds beyond a reasonable doubt that the child depicted is under 13 years of age. That enhancement must be the first year served and cannot be suspended or deferred. If the offender is a youthful offender, this sentencing enhancement is discretionary;
- For intentional distribution, a third degree felony for sexual exploitation of children with a basic sentence of imprisonment of 11 years (three years under existing law);
- For intentional production (causing or permitting a child to engage or stimulate any prohibited sexual act), a third degree felony for sexual exploitation of children with a basic sentence of 11 years (three years under existing law), unless the child is under the age of thirteen, in which case it is a second degree felony for sexual exploitation of children with a basic sentence of 12 years (nine years under existing law); and
- For intentional manufacture, a second degree felony for sexual exploitation of children with a basic sentence of imprisonment of 12 years (nine years under existing law).

The substitute also authorizes the imposition of a \$5 thousand fine for second, third and fourth degree felonies for sexual exploitation of children.

This substitute has an emergency clause.

FISCAL IMPLICATIONS

There is no appropriation included in this substitute; no additional impact on the CYFD operating budget was reported. However, PDD reported in its analysis of an earlier version of this bill that the exposure to lengthier prison sentences will create more impetus to go to trial and would likely lead to more appeals. While PDD reported it is likely that it would be able to absorb some increase in litigation, it cautioned that any increase in its expenditures would bring a concomitant need for increase in indigent defense funding to maintain compliance with constitutional mandates. In addition, more litigation would increase costs for the judiciary.

The estimated cost increase for Corrections Department is represented in this table prepared by NMSC, which shows the increased costs to the state for the additional length of sentences

provided for in this substitute. LFC staff estimates cost increases will begin in FY 19, although the over \$1.6 million total reflected in the table is the full cost over time, not just that one FY. NMSC advises its analysis uses the average, annual cost (\$29,781) of incarcerating an offender in a privately-operated prison facility, as sex offenders within five years of their discharge date are housed at the privately-run facility in Chaparral, NM.

Most Serious Charge Admission Charge	Estimated Annual Admissions (average of last 4 years)	Average number of days from intake to Release	Increased Sentence length in days	Estimated Increased Cost Per Offender	Estimated Increased Cost for all Offenders
SEXUAL EXPLOITATION OF CHILDREN - DISTRIBUTION	2	830	815	\$66,497	\$132,995
SEXUAL EXPLOITATION OF CHILDREN - POSSESSION	15	858	970	\$79,103	\$1,186,548
SEXUAL EXPLOITATION OF CHILDREN - MANUFACTURE	4	1102	908	\$74,085	\$296,341

Increased sentence length assumes inmates will receive earned meritorious deductions while in prison that will reduce their sentence by 50 percent.

SIGNIFICANT ISSUES

CYFD reported in its analysis of an earlier version of this bill that the United States Supreme Court has found the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance because of the psychological and physical effects those activities have on children and families, especially when the abuse is permanently memorialized through pictures and videos. *See New York v. Ferber*, 458 U.S. 747, 757 (1982). Viewing and collecting images of children being sexually exploited contributes to the cycle of abuse. As the Court stated in *Ferber* “the most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise **promoting** this product.” *Ferber, Id.* at 760 (emphasis added).

This substitute increases the basic sentences for possession, distribution, production and manufacture of these kinds of images, and also adds a one-year mandatory sentencing enhancement to the crime of intentional possession. The table below summarizes the basic sentence under existing law and under this substitute, as well as the new mandatory enhancement for the crime to which it applies. If the perpetrator is a youthful offender under the Children’s Code, that enhancement is not mandatory, but discretionary.

Statute	Short Title	Basic Sentence (Existing)	Basic Sentence (HB 65)	Child Victim Under 13 Enhancement (HB 65)	Youthful Offender – Mandatory or Discretionary
30-6A-3(A)	Possession	18 months	10 years	Mandatory	Discretionary
30-6A-3(B)	Distribution	36 months	11 years	None	None
30-6A-3(C)	Production	36 months	11 years	None	None

30-6A-3(C)	Production (under 13)	9 years	12 years	Inapplicable	Not applicable
30-6A-3(D)	Manufacture	9 years	12 years	None	None
30-6A-3(E)	Manufacture (Simulated)	18 months	No change	None	None
30-6A-3(F)	Distribution (Simulated)	36 months	No change	None	None

Source: AGO, as revised by LFC staff

PDD commented that the earlier substitute, similar in this regard to this substitute, failed to provide for multiple counts (units of prosecution) or additional enhancements based on the number of depictions and/or victims involved which was the loophole in the law that the original bill meant to correct. The effect of this is that a person who possesses a single obscene image faces the same penalty as a person in possession of thousands of images.

On the other hand, AODA believed an earlier version of this bill that was similar to this substitute offered a solution to this “unit of prosecution” problem that was identified by the New Mexico Supreme Court in State v. Olsson, 2014-NMSC-012, 324 P.3d 1230. It explains:

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, or the nature of the acts depicted? Instead of trying to redefine the “unit of prosecution” under these statutes, this substitute increases 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 this bill, the defendant can still only be charged with one fourth degree felony count, but the basic sentence is nine years.

Similarly, PDD in its earlier analysis agreed that this substitute greatly reduces the potential exposure for possession by the absence of any language indicating that the possession of each depiction is a stand-alone felony. However, because the Olsson court found the unit of prosecution for possession ambiguous, PDD suggested that including language that only a single count may be charged, regardless of the quantity of depictions possessed, may help clarify legislative intent.

Additionally, AGO in its earlier analysis raised a number of concerns as to the language used in this bill. As to the sentencing enhancement's applicability to a youthful offender, AGO pointed out:

The substitute bill provides that “when the offender is a youthful offender, the sentence imposed by this subsection may be increased by one year.” The substitute bill's reference to “youthful offender” conflicts with the Children's Code and may present a constitutional notice issue.

“Youthful offender” is an explicitly defined statutory term in the Children's Code. Section 32A-2-3(J)(1),(3), NMSA 1978. 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.

AGO also expressed concern over the language used to describe the finding necessary to impose a sentence enhancement:

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.

Lastly, PDD noted that neither the existing statute nor the earlier bill similar to this substitute provided any guidance as to its applicability to consensual image exchanges among minors:

Considering the prevalence of “sexting” behavior among teenagers (sending nude or sexually suggestive images *of themselves, to each other*), the bill does not address the propriety of prosecuting cases charging child pornography possession against teenagers who have not actually “sexually exploited” a child in a way the statute was intended to address. Simple possession of an image *voluntarily provided by the depicted minor* should not be the focus of the statutory scheme.

TECHNICAL ISSUES

AGO believed the final section of the proposed language regarding when the sentencing enhancement must be served is unclear (“...the sentence imposed by this subsection”, when the subsection imposes both the basic sentence and any enhancement). It recommends breaking the clauses into independent sentences to clarify the legislative intent.

MD/jle/jo

¹ Susan Lipkins, Jaclyn Levy & Barbara Jerabkova, Sex Offender Statistics by A Voice of Reason, Sexting Part II: Results and Recommendations of Sexting Study (Jul. 2, 2009), <http://sexoffender-statistics.blogspot.com/2009/07/sexting-part-ii-results-and.html>.