

LFC Requester:	Aurora Sanchez
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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:
Original **Amendment**
Correction **Substitute**

Date 1/20/2015
Bill No: HB 101

Sponsor: Rep. David M. Gallegos
Short Title: Sexual Exploitation of Children, Penalties

Agency Code: Attorney General's Office
Person Writing: Clara M. Moran, AAG
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	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:

HB 101 amends and modifies the age qualification within 30-6A-4 and adds a new penalty of a first degree felony for anyone hiring or offering to hire a child who is thirteen years of age or younger to engage in a prohibited sex act. Where the statute currently only criminalizes the act of a person knowingly receiving a pecuniary profit as a result of a child “under sixteen” engaging in a prohibited sexual act with another, meaning a child aged 15 years who had not reached the age of 16, the proposed legislation expands 30-6A4(A) to apply to children who are 16 years of age or under.

Further, the proposed legislation amends and modifies the age qualification under that same section to punish as a first degree felony anyone knowingly receiving a pecuniary profit as a result of a child thirteen years of age or younger engaging in a sex act, where the statute currently only contemplates a first degree felony for anyone receiving a profit as a result of a child aged 12 or younger because it contains the language “under 13.”

The proposed legislation creates a new statutory subsection criminalizing the act of hiring or offering to hire a child who is thirteen years of age or younger to engage in a prohibited sex act under 30-6A-4(B), moving and modifying the existing language to subsection (C) to punish as a second degree felony any person hiring or offering to hire a child fourteen years of age to sixteen years of age from the previous language of “over the age of thirteen and under the age of sixteen” meaning a child 14 or 15 years of age.

FISCAL IMPLICATIONS

N/A

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.

SIGNIFICANT ISSUES

Proposed subsection (A) clarifies the current statutory language to protect minors 16 years or younger from being the victims of the participation of a prohibited sex act. This subsection punishes persons who profit from such victimization, making such criminal conduct a 2nd degree felony—unless the minor is 13 years or younger in which the basic sentence would be

a 1st degree felony.

Proposed subsection (B) makes the act of hiring or attempting to hire a minor 13 years or younger to perform a prohibited sex act a 1st degree felony. The current statute criminalizes the hiring or attempt to hire a minor over 13 years of age but under 16 years of age to perform a prohibited sex act a 2nd degree felony. The proposed amendment seeks to distinguish the penalties associated with the criminal conduct of hiring or attempting to hire a minor to perform a prohibited sex act based on the age of the minor.

The sentencing structure proposed by this legislation should reference or contemplate NMSA 31-18-15 to make it a Sex Offense Against a Child (SOAC), such that the penalty would be included under NMSA 31-18-15(4) (“2nd degree felony for sex offense against a child, 15 years imprisonment”).

Another matter to consider in evaluating this proposed legislation is that this act, and its amendments in subsection (B), do not criminalize the act of performing a sex act on a minor. The proposed legislation makes it a crime to hire or offer to hire a minor to engage in a prohibited sex act. The crime is complete once a minor victim has been hired or offered to be hired. The severity of the crime is dictated by the age of the victim. In this regard, a person who hires a minor to perform a prohibited sex act, and then completes the prohibited sex act would be subject to the provisions of NMSA 30-9-11. For a child under 13 years of age, NMSA 30-9-11(D) would apply (Criminal sexual penetration in the first degree consists of all sexual penetration perpetrated on a child under thirteen years of age). For a child 13 years to 18 years old, NMSA 30-9-11(E)(1) would apply (Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated by the use of force or coercion on a child thirteen to eighteen years of age). In the latter instance, the basic sentence is 3-15 years.

Consideration should be given to harmonizing both the proposed legislation and NMSA 30-9-11. For instance, a situation could arise where a person hires or offers to hire a 13 year old, and subsequently completes a prohibited sex act on that 13 year old. Under the proposed legislation, that person would be exposed to a 1st degree felony for the hiring or offering to hire, but be exposed to a 2nd degree felony for engaging in the sex act. Because there is significant interplay between these two statutes, consideration should be given to having the age element track that of the current law in NMSA 30-9-11.

Additional consideration should be given to including language associated with those circumstances where a person hires or attempts to hire a minor, who in turn is law enforcement posing as a child. Many cases involving a person who hires or attempts to hire come out of those instances where local law enforcement are involved, such that they pose as a child, engage in conversation, and meet up with the person (who perceives they are meeting with a child). If the Legislature’s intent is to punish those persons who believe they are hiring or offering to hire a child, irrespective if they are in fact negotiating with a child, then the legislation should include the language “or a child perceived to be [age element]”.

One element that is lacking from the current statute, and the proposed legislation, is the mental state a person must possess to complete the crime. The current legislation does not emphasize this essential element, such that as it is drafted a person could violate the law by offering to hire a minor who they believe to be 17, but turns out to be 13. If the intent is to require evidence that a person knew they were hiring or attempting to hire a 13 year at the time of the criminal act, then including the intent element “knowingly” should be added. If the intent, however, is to create a strict liability crime, where one’s mental intent is immaterial, then the current draft of the legislation comports with such intent.

PERFORMANCE IMPLICATIONS

N/A

ADMINISTRATIVE IMPLICATIONS

N/A

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

N/A

TECHNICAL ISSUES

Addressed above

OTHER SUBSTANTIVE ISSUES

N/A

ALTERNATIVES

N/A

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status Quo

AMENDMENTS

The House Judiciary Committee adds the element that a person must commit the crimes enumerated “knowingly.” Thus, the State must prove that the person committing the crimes knew by direct or circumstantial evidence the age of the child as part of its burden of proof.

The House Judiciary Amendments add the element of mens rea previously lacking in the proposed legislation making crimes within the statute specific intent crimes rather than a strict liability crimes.