

LFC Requester:	Eric Cheiner
-----------------------	---------------------

**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 1/30/2015
Original **Amendment** **Bill No:** HB 251
Correction **Substitute**

Sponsor: Rep. Randal Crowder **Agency Code:** Attorney General's Office
Short Title: Child Porn Images as Individual Offenses **Person Writing:** Clara M. Moran, AAG
Title: Offenses **Phone:** 222-9027 **Email:** cmoran@nmag.gov

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

House Bill 251 amends 30-6A-3 by adding language to subsection C of the existing statute (which criminalizes any person intentionally causing or permitting a child under the age of eighteen to engage in any prohibited sexual act or simulation of such an act if the person knows that it will be recorded or performed publically), adding the sentence at the end of the subsection “For the purposes of this subsection, each separate image recorded or each act performed publicly shall be prosecuted as an individual criminal offense.

House Bill 251 also adds a new subsection to 30-6A-3, subsection H which states, “[f]or the purposes of this section, the possession, distribution or manufacture of each separate image of a child under eighteen years of age engaged in any prohibited sexual act or simulation of such act contained on or depicted on any item of visual or print medium shall be prosecuted as an individual criminal offense under the relevant subsection of this section.

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

HB 251 seeks to amend 30-6A-3, to make the act of possession of separate images separate offenses of possession pursuant to the Supreme Court holding in State v. Olssen and State v. Ballard, which held that the statutory language of section 30-6(A)-3(A) is ambiguous. HB 251 changes subsection (C) to broaden the unit of prosecution to focus on the number of items possessed. The bill also tries to include a sweeping unit of prosecution definition in subsection (H) that makes the crime hinge on the number of images possessed, but leaves intact the definition of what the statute criminalizes. Placing the sweeping language under subsection (C) creates further ambiguity and could create a construction argument that the proposed language

applies to only to subsection (C) rather than subsections (A), (B), and (C). The Supreme Court holding in Ballard only dealt with the language pertaining to possession – thus, the placement of the new language under subsection (C) rather than firmly within Subsection (A) creates ambiguity and is unnecessary under the Ballard opinion which is isolated to sexual exploitation of children by possession (subsection A).

The root problem with statute according to the holding of Ballard/Olssen is the definition of "visual or print medium". The current definition of the term visual or print medium is (1) any film, photograph, negative, slide, computer diskette, videotape, videodisc or any computer or electronically generated imagery; or (2) any book, magazine or other form of publication or photographic reproduction containing or incorporating any film, photograph, negative, slide, computer diskette, videotape, videodisc or any computer generated or electronically generated imagery. The current statutory definition is problematic because, as in those cases, a person possessing 1000 images on a computer diskette has committed the same crime as a person possessing one photo image according to the analysis of the Court in Ballard. Certainly the Legislature did not create law that would incentivize the collection of multiple images of child sexual abuse, so long as such collection was relegated to one source. The bill modifies 30-6A-3(C) by narrowing the unit of prosecution for that given charge, yet does not relate such to 30-6A-3(B) and 30-6A-3(A) (Ballard/Olssen). Proposed subsection (H) attempts to broaden the unit of prosecution to allow for prosecution based on the number of images, yet the source of the problem in Ballard remains the definition.

Anecdotally, defendants who collect images of child sexual abuse seldom use anything but their computer to store the images. Long gone are the days when these offenders physically traded images and stored them in a shoe box or other tangible container. As such, 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.”

PERFORMANCE IMPLICATIONS

N/A

ADMINISTRATIVE IMPLICATIONS

N/A

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

Addressed above

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

N/A

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status Quo

AMENDMENTS