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## FISCAL IMPACT REPORT

**SPONSOR** Fajardo **ORIGINAL DATE** 1/20/16  
**LAST UPDATED** 2/5/16 **HB** 30/aHSCAC

**SHORT TITLE** Communication of Certain Images to Children **SB** \_\_\_\_\_

**ANALYST** Sánchez

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	<b>FY16</b>	<b>FY17</b>	<b>FY18</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>	Minimal	Minimal	Minimal	Minimal	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB 65

### **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)  
Public Defender Department (PDD)  
New Mexico Sentencing Commission (NMSC)  
Department of Public Safety (DPS)

### **SUMMARY**

#### Synopsis of HSCAC Amendment

House Safety and Civil Affairs Committee amendment to House Bill 30 proposes to amend 30-37-3.3(A) to include sending or **providing** the child obscene images...

#### Synopsis of Bill

House Bill 30 proposes to amend the criminal statute dealing with criminal sexual communication with a child (Section 30-37-3.3 NMSA 1978) to include sending a child obscene images of **any** person's intimate parts by means of an electronic communication device when the perpetrator is at least four years older than the child. Under the current law, such actions only constitute a crime when the perpetrator sends the child images of the perpetrator's own intimate parts. The criminal penalty remains a fourth degree felony.

### **FISCAL IMPLICATIONS**

PDD reports that there are likely very few prosecutions for these offenses, so little impact is envisioned. Although, PDD may be able to absorb some cases under the proposed law, any increase in the number of prosecutions because of the enactment of proposed criminal legislation could result increased need for indigent defense funding to maintain compliance with constitutional mandates.

Fiscal implications to AOC are commensurate with enforcement should this bill become law; however, increased enforcement may require additional resources to address increased workload. Because this legislation would expand the types of cases that could be charged with criminal sexual communication with a child, it is likely that more cases can be charged under this amended statute. If that is the case, more defendants may invoke their right to trial or their right to trial by jury. More trials and more jury trials will require additional judge time, courtroom staff time, and courtroom availability and will increase jury fees. These additional costs are not capable of quantification.

The AODA reports that expansion of the definition of criminal activity may result in more prosecutions which could increase expenses for the district attorneys.

According to NMSC, on June 30, 2015, there were no offenders committed to the custody of the New Mexico Corrections Department (NMCD) who had a conviction for criminal sexual communication with a child as their highest charge. However, the cost per day of a person committed to the custody of NMCD, based on FY14 data, ranges from \$68 per day at a low level state-operated facility to \$138 at a higher custody state-operated facility and about \$80 per day at a private prison.

### **SIGNIFICANT ISSUES**

The AGO opines as follows:

HB 30 addresses a much needed clarification of legislative intent within the plain text of the statute. Under current language of the statute, the State may be required to prove beyond a reasonable doubt that the obscene image of intimate parts sent to a child was in fact an image of the sender's intimate parts -- which may be an impossibility in some cases as a matter of proof. By changing the language to "any" in lieu of "the," the bill criminalizes sending obscene images of intimate parts to a child via an electronic communication device.

A very recent New Mexico Court of Appeals decision in *State v. Tufts*, 2015-NMCA-075, 355 P.3d 32, 36, cert. granted (June 19, 2015) illustrates a potential loophole in the statute. In *Tufts*, the defendant removed the SD card from the child victim's cell phone. The defendant then recorded himself nude and masturbating onto the SD card. He then placed the SD card back into the child victim's cell phone. He was charged for violating NMSA § 30-37-3.3. The Court of Appeals overturned the defendant's conviction based on the statutory language. The Court of Appeals accepted the defendant's argument that he never actually "sent" the harmful material to the child victim.

The PDD reports that it is possible that youth might face an increase in prosecutions of this charge where they may be exchanging qualifying pictures. This could result in an increase in juvenile delinquency prosecutions and when New Mexico becomes compliant with the Adam Walsh Act, federally mandated sex offender registration for acts undertaken as a juvenile.

The AODA cites examples of constitutional challenges in *State v. Garcia*, 2013-NMCA-005, 294 P.3d 1256 that may be applicable to this bill.

NMSC reports that the bill deals with the issue commonly known as "sexting." Sexting is the practice of a person taking nude or partially nude digital images of themselves or others and texting them to others, or posting them online. The majority of reported sexting incidents involve the self-creation or consensual creation of sexual photos by teenage women and the further dissemination of them.<sup>1</sup>

## **PERFORMANCE IMPLICATIONS**

The changes to the law may have an impact to the following performance measures

- District Courts: Cases disposed as a percent of cases filed;
- District Attorneys: Average attorney caseload, Number of cases prosecuted, Number of cases prosecuted per attorney;
- Public Defenders: Percent of cases that go to trial with clients defended by contract attorneys.

## **RELATIONSHIP**

Relates to HB 65 - Porn Images as Individual Offenses.

## **OTHER SUBSTANTIVE ISSUES**

NMSC provides survey results that reported 65.5% of teens between the ages of 13-19 have sexted and when considering only young adults, 20-26 year olds, 73.5% have sexted.<sup>2</sup>

## **ALTERNATIVES**

PDD suggests adding the "harmful to minors" after images may cure First Amendment issues since the Act includes a definition for "harmful to minors".

**TECHNICAL ISSUE**

The AGO suggests a possible amendment to the bill to address the factual scenario of *State v. Tufts* to change the language from “sending” to “sending or providing the child with obscene images of any person’s intimate parts.”

ABS/sec/jo

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<sup>1</sup> McLaughlin, J. (2010) Crime and Punishment: Teen Sexting in Context. Penn State Law Review. Vol 115:1 p. 136, 142, 181.

<sup>2</sup> 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>.