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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/06/17  
 LAST UPDATED 03/02/17    HB 71

SPONSOR Fajardo

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

ANALYST Daly

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

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		Minimal, but likely NFI	Minimal	Minimal	Recurring	General Fund

(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)
- Law Offices of the Public Defender (LOPD)
- New Mexico Corrections Department (NMCD)
- New Mexico Sentencing Commission (NMSC)
- Department of Public Safety (DPS)

### SUMMARY

#### Synopsis of Bill

House Bill 71 amends the crime of criminal sexual communication with a child (Section 30-37-3.3 NMSA 1978) to include **providing** a child under 16 years of age with 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 (potentially an eighteen month prison sentence).

### FISCAL IMPLICATIONS

LOPD reports that there are likely very few prosecutions for these offenses, so little impact is envisioned. Although LOPD may be able to absorb some cases under HB 71, 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. Similarly, AODA reports that expansion of the definition of criminal activity such as occurs in this bill may result in more prosecutions which could increase expenses for the district attorneys.

Fiscal implications to AOC are commensurate with enforcement of this law; increased prosecutions 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.

According to NMSC, on June 30, 2016, 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. Because the bill could result in a minimal increase in the number of new convictions, NMCD estimates that this bill likely ultimately will result in a subsequent minimal increase in its prison population and probation/parole supervision caseloads. Sentencing judges have the discretion to order probation in lieu of incarceration. If incarceration in a NMCD prison is ordered, a parole term of one year (for a fourth degree felony) must by law attach. On average it costs \$44,755 to incarcerate a person in a state-run facility.

## **SIGNIFICANT ISSUES**

Both AGO and CYFD advise this bill attempts to strengthen the existing language of this statute and close potential loopholes. AGO points to a recent New Mexico Court of Appeals decision as illustrative of the problem:

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, accepting the defendant's argument that he never actually "sent" the harmful material to the child victim.

Subsequently in State v. Tufts, 2016-NMSC-020, the New Mexico Supreme Court reversed the Court of Appeals and remanded the case on other issues. In reversing the Supreme Court stated, "The communication could not have been more direct, and it was achieved through a telephone or a device capable of "produc[ing] an electronically generated image[.]" which was specifically defined by the Legislature as an " 'electronic communication device.' The Supreme Court found that the defendant's argument that he did not actually send the images of himself via a third-party carrier was without merit; for purposes of the statute the defendant did send the images by directly delivering them to the child.

AGO concludes that, since the New Mexico Supreme Court rejected the defendant’s argument, the substitution of “providing” in place of “sending” might be considered superfluous, although it might be seen as the Legislature strengthening or clarifying the language of the statute. CYFD notes that HB 71 brings existing law into conformity with the Tufts decision.

LOPD advises that there are First Amendment issues with the statute as currently enacted because it fails to define “obscene”. AODA raises this same issue. It also cites *State v. Garcia*, 2013-NMCA-005, 294 P.3d 1256, in expressing its concern that as the scope of the crime defined in this bill expands, the more likely the statute may face challenges. AODA explains the difficulty in drafting statutes of this nature is to make them broad enough to cover the conduct sought to be prohibited, but narrow enough to exclude other conduct, and clear enough that anyone reading the statute would know what conduct is criminal and what conduct is not criminal. Thus, issues concerning overbreadth and vagueness may be raised. Further, AODA discusses the rule of statutory construction: if one statute deals with a subject in general and comprehensive terms, and another addresses part of the same subject matter in a more specific manner, the latter controls. Other criminal laws, such as those dealing with harassment, contributing to the delinquency of a minor, and providing obscene images to a minor, may need to be examined when determining what charges to bring in certain cases.

Both AODA and NMSC discuss “sexting” in the context of HB 71. NMCA explains that 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> AODA points to the provision that requires the perpetrator be at least four years older than the child victim (under 16 years of age): thus a 15-year-old sending an obscene image to a 10 year old could be prosecuted, but two 15-year-olds exchanging images could not be prosecuted. Further, because HB 71 applies to all obscene images (and not just images of the sender) minors who are close in age could exchange obscene images of a third party (another minor, for example) without criminal consequences under this statute.

## OTHER SUBSTANTIVE ISSUES

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.<sup>2</sup>

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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, Jaelyn 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>.