

<b>LFC Requester:</b>	
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**AGENCY BILL ANALYSIS  
2017 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:**

**[LFC@NMLEGIS.GOV](mailto:LFC@NMLEGIS.GOV)**

*and*

**[DFA@STATE.NM.US](mailto: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:*

<b>Original</b>	<input checked="" type="checkbox"/>	<b>Amendment</b>	<input type="checkbox"/>	<b>Date</b>	<u>1-12-17</u>
<b>Correction</b>	<input type="checkbox"/>	<b>Substitute</b>	<input type="checkbox"/>	<b>Bill No:</b>	<u>HB71</u>

<b>Sponsor:</b>	<u>Kelly K. Fajardo</u>	<b>Agency Code:</b>	<u>264</u>
<b>Short Title:</b>	<u>Communication of Certain Images to Children</u>	<b>Person Writing</b>	<u>Gail MacQuesten</u>
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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY17	FY18		
0	0	n/a	n/a

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY17	FY18	FY19		
0	0	0	n/a	n/a

(Parenthesis ( ) Indicate Expenditure Decreases)

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

	<b>FY17</b>	<b>FY18</b>	<b>FY19</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>	minimal	minimal	minimal	unknown	recurring	general

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:  
Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis:

HB71 amends NMSA 1978, Section 30-37-3.3, which sets out the crime of criminal sexual communication with a child.

A currently written, the crime consists of a person knowingly and intentionally communicating directly with a specific child under sixteen years of age by sending the child obscene images of the person's intimate parts by means of an electronic communication device when the perpetrator is at least four years older than the child. (Emphasis added.) HB71 amends Section 30-37-3.3(A) to change “sending” to “providing,” and “the person's intimate parts” to “any person's intimate parts.”

**FISCAL IMPLICATIONS**

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.

HB71 expands the definition of criminal activity in Section 30-37-3.3, which may result in more prosecutions. That may increase expenses for the district attorneys.

**SIGNIFICANT ISSUES**

HB71 expands the reach of Section 30-37-3.3 in two ways.

First, the existing statute only criminalizes the sending of obscene images of the defendant's intimate parts to a child by means of an electronic communication device. Communication of obscene images of other people's intimate parts was not criminal under the statute. HB71 criminalizes the communication of any person's intimate parts.

Second, HB71 applies to “providing” such images, instead of “sending” the images. In State v. Tufts, 2016-NMSC-020, the defendant argued that he did not “send” obscene images when he removed the SD card from the child victim's cell phone, recorded himself nude and masturbating, and then placed the SD card back into the child victim's cell phone. The Court of

Appeals agreed with the defendant, interpreting “send” to require an electronic transmission of the image. The Supreme Court did not adopt such a strict interpretation of “send,” finding that to do so would frustrate the purpose of the legislation. Instead, the Supreme Court held that the defendant “sent” the image to the child, in violation of the statute. Although the Supreme Court has addressed this issue, changing the language in the statute from “sending” to “providing” would make the statute clearer, and eliminate the need to look to legislative intent to interpret “sending.”

There will be issues regarding when Section 30-37-3.3 applies to “sexting” between minors. The statute provides that the perpetrator must be at least four years older than the child victim, which “child” defined as being under sixteen years of age. A fifteen-year-old sending an obscene image to a 10 year old could be prosecuted. Two 15-year-olds exchanging images could not be prosecuted. Note that because HB71 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.

As the scope of the prohibition expands, the more likely the statute is to face challenges. 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. See, for example, the discussion in *State v. Garcia*, 2013-NMCA-005, 294 P.3d 1256. Legal challenges may take the following forms:

1. Freedom of Expression. HB71 may be challenged as violating freedom of speech under the federal and state constitutions. However, HB71 is restricted in its scope. The communication must be knowing and intentional, and must be with a specific child under sixteen. The image must be “obscene” (although that term is not defined in Article 37), must depict a person’s intimate parts, must be transmitted by an electronic communication device, and the perpetrator must be at least four years older than the victim. Article 37 excludes from prosecution employees of a school, museum or public library. NMSA 1978, Section 30-37-5.
2. Overbreadth. A statute may not prohibit a substantial amount of protected speech beyond that needed to achieve its proper purpose. The limitations described above help address the overbreadth issue.
3. Vagueness. Due process prohibits terms so unclear that a person of common intelligence must necessarily guess at their meaning. The limitations described above also help with the vagueness issue. The issue of whether an image is “obscene” can be difficult. However, New Mexico courts have upheld other statutes with terms that call for judgment calls, reasoning that “[t]he common sense of the community, as well as the sense of decency, the propriety, and morality which most people entertain, is sufficient to apply the statute to each particular case, and point out what particular conduct is rendered criminal by it.” *State v. McKinley*, 53 N.M. 106, 111 (1949), *quoted in Garcia*, 2013 NMCA-005, ¶26.
4. General/Specific. If one statute deals with a subject in general and comprehensive terms, and another statute 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.

## PERFORMANCE IMPLICATIONS

As discussed above, the district attorney will need to apply the general/specific rule to determine whether charges should be brought under this statute or other possibly applicable statutes.

#### **ADMINISTRATIVE IMPLICATIONS**

See Performance Implications, above.

#### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

None found.

#### **TECHNICAL ISSUES**

None noted.

#### **OTHER SUBSTANTIVE ISSUES**

None noted.

#### **ALTERNATIVES**

None noted.

#### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

The prohibition in Section 30-37-3.3 will apply only to obscene images of the defendant, and will not apply to obscene images of other people.

#### **AMENDMENTS**

None proposed.