

Department of Legislative Services
Maryland General Assembly
2014 Session

FISCAL AND POLICY NOTE
Revised

House Bill 43
Judiciary

(Delegate Simmons, *et al.*)

Judicial Proceedings

Criminal Law - Harassment - Revenge Porn

This bill prohibits a person from intentionally causing serious emotional distress to another by intentionally placing on the Internet a photograph, film, videotape, recording, or any other reproduction of the image of the other person that reveals the identity of the other person with his or her intimate parts exposed or while engaged in an act of sexual contact, (1) knowing that the other person did not consent to the placement of the image on the Internet and (2) under circumstances in which the other person had a reasonable expectation that the image would be kept private. For purposes of the prohibition, the bill provides specific definitions for “intimate parts” and “sexual contact.”

Violators are guilty of a misdemeanor, punishable by imprisonment for up to two years and/or a \$5,000 maximum fine.

The prohibition does not apply to (1) lawful and common practices of law enforcement, the reporting of unlawful conduct, or legal proceedings or (2) situations involving voluntary exposure in public or commercial settings. An interactive computer service, as defined in 47 U.S.C. § 230(f)(2), is not liable under the bill for content provided by another person.

Fiscal Summary

State Effect: Minimal increase in general fund revenues and expenditures due to the bill’s penalty provisions.

Local Effect: Minimal increase in local revenues and expenditures due to the bill’s penalty provisions.

Small Business Effect: None.

Analysis

Current Law: Pursuant to Chapter 369 of 2013, which took effect on October 1, 2013, a person may not use an “interactive computer service” to maliciously engage in a course of conduct that inflicts serious emotional distress on a minor or places a minor in reasonable fear of death or serious bodily injury with the intent to (1) kill, injure, harass, or cause serious emotional distress to the minor or (2) place the minor in reasonable fear of death or serious bodily injury. Violators are guilty of a misdemeanor, punishable by imprisonment for up to one year and/or a \$500 maximum fine.

Under State law, an “interactive computer service” means an information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including a system that provides access to the Internet and cellular phones.

A person also may not maliciously engage in a course of conduct, through the use of electronic communication that alarms or seriously annoys another (1) with the intent to harass, alarm, or annoy the other; (2) after receiving a reasonable warning or request to stop by or on behalf of the other; and (3) without a legal purpose. “Electronic communication” means the transmission of information, data, or a communication by the use of a computer or other electronic means that is sent to a person and that is received by the person. The prohibition does not apply to a peaceable activity intended to express a political view or provide information to others, and there are additional exceptions related to court orders for electronic surveillance. Violators are guilty of a misdemeanor and subject to maximum penalties of one year imprisonment and/or a \$500 fine.

Under 47 U.S.C. § 230(f)(2), an “interactive computer service” is defined as any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

Background: “Revenge porn” is a relatively recently coined phrase used to describe the (usually malicious) posting of sexually explicit images or media of another person (typically a former intimate partner) without the subject’s consent. Oftentimes the images are taken by the subject and relayed to an intimate partner of the subject, only to be posted online by the recipient after the relationship ends. Victims have expressed frustration with being unable to pursue criminal charges because the images were self-portraits that were willingly given to another person. Many websites that publish these images assert that they are not legally responsible for third-party content under Section 230 of the federal Communications Decency Act of 1996 (47 U.S.C. § 230), so long as the content does not violate intellectual property or federal criminal laws.

According to news reports, anti-revenge pornography activists are in the process of drafting federal legislation to force revenge porn websites to remove images and content and criminalize the posting of such material without the subject's consent.

“Revenge porn” gained national media attention with the advent of websites specifically designed to facilitate the posting of these types of images. In December 2013, a California man was charged with 31 counts of extortion, identity theft, and conspiracy for operating a revenge porn website. According to the complaint, Kevin Bollaert allegedly posted 10,170 private photographs containing nude and explicit images of individuals without their consent. The website also published personal identifying information about the individuals depicted in the pictures, and some of the victims reported receiving harassing phone calls and messages as a result of the website. Mr. Bollaert also allegedly created a second website that charged a fee to individuals seeking to have their images removed from the first website.

California and New Jersey have both enacted laws to ban these postings. California expanded its misdemeanor disorderly conduct statute to prohibit a person from posting explicit images of another identifiable person that were intended to remain private “with the intent to cause serious emotional distress.” A first offense is punishable by imprisonment for up to six months and/or \$1,000 maximum fine. A penalty of imprisonment for up to one year and/or a \$2,000 maximum fine may be imposed for a second or subsequent offense or if the victim was a minor at the time of the offense. The law only applies if the individual who posted or recorded the image was also the photographer/recorder.

New Jersey's third-degree invasion of privacy statute prohibits a person from photographing, filming, videotaping, recording, or otherwise reproducing explicit images of another person without that person's consent and under circumstances in which a reasonable person would not expect to be observed if the person knew at the time of the offense that he or she did not have license or privilege to do so. The offense is punishable by imprisonment for three to five years and a \$30,000 maximum fine.

Similar legislation has been introduced in at least three other states.

State Revenues: General fund revenues increase minimally as a result of the bill's monetary penalty provision from cases heard in the District Court.

State Expenditures: General fund expenditures increase minimally as a result of the bill's incarceration penalty due to more people being committed to State correctional facilities and increased payments to counties for reimbursement of inmate costs. The number of people convicted of this proposed crime is expected to be minimal.

Persons serving a sentence longer than 18 months are incarcerated in State correctional facilities. Currently, the average total cost per inmate, including overhead, is estimated at \$3,100 per month. This bill alone, however, should not create the need for additional beds, personnel, or facilities. Excluding overhead, the average cost of housing a new State inmate (including variable health care costs) is about \$735 per month. Excluding all health care, the average variable costs total \$185 per month.

Persons serving a sentence of one year or less in a jurisdiction other than Baltimore City are sentenced to local detention facilities. For persons sentenced to a term of between 12 and 18 months, the sentencing judge has the discretion to order that the sentence be served at a local facility or a State correctional facility. Prior to fiscal 2010, the State reimbursed counties for part of their incarceration costs, on a per diem basis, after a person had served 90 days. Currently, the State provides assistance to the counties for locally sentenced inmates and for inmates who are sentenced to and awaiting transfer to the State correctional system. A \$45 per diem grant is provided to each county for each day between 12 and 18 months that a sentenced inmate is confined in a local detention center. Counties also receive an additional \$45 per day grant for inmates who have been sentenced to the custody of the State but are confined in a local facility. The State does not pay for pretrial detention time in a local correctional facility. Persons sentenced in Baltimore City are generally incarcerated in State correctional facilities. The Baltimore City Detention Center, a State-operated facility, is used primarily for pretrial detentions.

Local Revenues: Revenues increase minimally as a result of the bill's monetary penalty provision from cases heard in the circuit courts.

Local Expenditures: Expenditures increase minimally as a result of the bill's incarceration penalty. Counties pay the full cost of incarceration for people in their facilities for the first 12 months of the sentence. A \$45 per diem State grant is provided to each county for each day between 12 and 18 months that a sentenced inmate is confined in a local detention center. Counties also receive an additional \$45 per day grant for inmates who have been sentenced to the custody of the State but are confined in a local facility. Per diem operating costs of local detention facilities have ranged from approximately \$60 to \$160 per inmate in recent years.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Baltimore, Carroll, Harford, Montgomery, Queen Anne’s, and St. Mary’s counties; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Department of State Police; Department of Public Safety and Correctional Services; State’s Attorneys’ Association; *New York Times*; *Seattle Times*; National Conference of State Legislatures; CNN.com; State of California – Office of the Attorney General; State of California – Legislative Counsel; New Jersey Legislature; usnews.com (*U.S. News and World Report*); wsj.com (*Wall Street Journal*); WGAL.com; nbcwashington.com; forbes.com; nbcnews.com; WYPR.org; Department of Legislative Services

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