

Department of Legislative Services
Maryland General Assembly
2014 Session

FISCAL AND POLICY NOTE

House Bill 64
Judiciary

(Delegate Cardin)

Criminal Law - Intentional Disclosure of Sexually Explicit Image of Another Person Without Consent

This bill prohibits a person from intentionally disclosing a sexually explicit image of another person who is identifiable and whose intimate parts are exposed or who is engaged in a sexual act, sexual contact, or vaginal intercourse, knowing that the other person has not consented to the disclosure. For purposes of the prohibition, the bill (1) provides specific definitions for activities and content to which the prohibition applies and (2) specifies actions and media that constitute disclosure and images, respectively. Violators are guilty of a felony, punishable by imprisonment for up to five years and/or a \$25,000 maximum fine.

The prohibition does not apply to (1) a law enforcement official in connection with a criminal prosecution; (2) a person acting in compliance with a subpoena or court order for use in a legal proceeding; (3) a person acting with a bona fide and lawful scientific, educational, governmental, news, or other similar public purpose; or (4) a voluntary exposure in a public or commercial setting. The bill's provisions do not affect any legal or equitable right or remedy otherwise provided by law.

Fiscal Summary

State Effect: Potential minimal increase in general fund expenditures due to the bill's incarceration penalty. Revenues are not affected.

Local Effect: Potential minimal increase in local revenues from fines imposed in circuit court cases. Potential minimal increase in local expenditures due to the bill's incarceration penalty.

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.

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.

Among other prohibitions under the State’s creation or distribution of child pornography statute, a person may not (1) use a computer to depict or describe a minor engaging in an obscene act, sadomasochistic abuse, or sexual conduct or (2) knowingly promote, distribute, or possess with the intent to distribute any matter, visual representation, or performance that depicts a minor engaged as a subject in sadomasochistic abuse or sexual conduct or that reflects the belief, or that is intended to cause another to believe, that it depicts a minor engaged as a subject of such activities. A violator is guilty of felony and is subject to maximum penalties of 10-years imprisonment and/or a \$25,000 fine for a first violation, and 20-years imprisonment and/or a \$50,000 fine for each subsequent violation.

In addition, under the State’s prohibition against possession of child pornography, a person may not knowingly possess and intentionally retain a film, videotape, photograph, or other visual representation depicting an actual child younger than age 16 (1) engaged as a subject of sadomasochistic abuse; (2) engaged in sexual conduct; or (3) in a state of sexual excitement. A violator is guilty of a misdemeanor and subject to maximum

penalties of five-years imprisonment and/or a \$2,500 fine for a first violation. A subsequent offense is a felony, punishable by up to 10-years imprisonment and/or a \$10,000 fine. It is an affirmative defense that the person charged acted promptly and in good faith to destroy each visual representation or reported the matter to a law enforcement agency.

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, 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.

Local Fiscal Effect: Worcester County advises that it can handle any additional cases generated by the bill with existing resources. The Kent County Sheriff's Office, the Montgomery County Police Department, and Washington County advise that the bill does not have a fiscal impact.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Kent, Montgomery, Washington, and Worcester counties; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Department of Public Safety and Correctional Services; Department of State Police; *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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