

**LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS**

Bill Number: SB 352

50th Legislature, 1st Session, 2011

Tracking Number: .183493.1SA

Short Title: No Notice Before Prosecution for Sex Offense

Sponsor(s): Senator Linda M. Lopez

Analyst: Kevin Force

Date: March 15, 2011

Bill Summary:

SB 352 amends the *Criminal Code*:

- to clarify that:
 - “child solicitation by electronic communication device” is a “sex offense” and that anyone convicted of that crime must register as a sex offender; but
 - the attempt to commit “child solicitation by electronic communication device” will no longer result in the offender having to register as a sex offender; and
- to exempt the crimes “child solicitation by electronic communication device” and “criminal sexual communication with a child” from the “notice” provisions of Section 30-37-4 of the *Sexually Oriented Materials Harmful to Minors Act*. (That section requires a district attorney to provide “actual or constructive notice” of a previous determination that the material in question is harmful to minors, and provides prospective defendants with a procedure for challenging that determination before a prosecution under the act can commence.)

Fiscal Impact:

The bill does not contain an appropriation.

Fiscal Issues:

According to the Administrative Office of the Courts (AOC):

- there will be a minimal administrative cost for statewide update, distribution, and documentation of statutory changes;
- new laws, amendments to existing laws, and new hearings may increase caseloads in the courts, thus requiring additional resources to handle the increase;
- additional fiscal impact on the judiciary would be proportional to any increased filing of actions pursuant to:

- the proposed amendment, relieving district attorneys of the duty of establishing that the defendant had received actual or constructive notice of a determination that certain electronic images are obscene or constitute improper solicitations; or
- the assertion of defenses based on constitutional challenges.

The Administrative Office of the District Attorney (AODA) states that eliminating the notice requirement for these two crimes may increase the number of cases that could be prosecuted and may therefore necessitate additional resources.

Substantive Issues:

According to the AOC analysis:

- The validity of state statutes and regulations that regulate internet communications are often challenged by defendants, or by internet service providers, as violations of the First, Fifth, and Fourteenth amendments to the United States Constitution.
- The prior determination that certain materials are harmful to children, and a proof of notice to a defendant of that determination, as required by Section 30-37-4, are aimed at defeating such constitutional challenges.
- The legislative findings and declaration of the purpose of the act relating to Sexually Oriented Material Harmful to Minors states that:
 - the Legislature “finds that children do not have the judgment necessary to protect themselves from harm;” and
 - the Legislature “has the inherent power to control commercial conduct within this state for the protection of minors in a manner that reaches beyond the scope of its authority to protect adults.”
- The AOC analysis further suggests that, by removing this requirement of notice for sexual offenses involving electronic devices, SB 352:
 - implies that such offenses are, by nature, different from offenses committed via print or other media and that obscenity is more self-evident and instant in an electronic format;
 - may open the door to constitutional challenges to such “inherent power”; and
 - the specific definition of “intimate parts” in Section 30-37-3.3 may supply the required specificity to avoid that constitutional challenge.

Background:

According to the Attorney General’s Office (AGO):

- in 2007, was enacted to add “child solicitation by electronic communication device,” to the definition of “sex offense” – the conviction of which would trigger the registration requirement under the *Sex Offender Registration and Notification Act*;
- during the same session, enacted legislation also amended the definition of “sex offense” and did *not* include “child solicitation by electronic communication device”;
- the current definition of “sex offense” is as amended by the latter version of the law;

- the Legislature intended the conviction of child solicitation to trigger the registration requirement, but due to the passing of the latter version that omitted it, it was not codified. SB 352 would correct that omission;
- the *Sexually Oriented Materials Harmful to Minors Act* largely deals with the retail display of sexually explicit materials that are deemed to be harmful to minors, and targets businesses providing minors access to these materials;
- the act also requires actual or constructive notice of a judicial finding that the material is harmful to minors before prosecution can commence. A person “adversely affected” by such a finding can seek a judicial determination of whether the finding was correct, or not;
- a situation may arise where child predators are given advance notice to cease their behavior before they could be prosecuted, and may appeal to the courts for a stay of that prosecution, thus ignoring the original intention of the act; and
- SB 352 would correct this potential problem.

Related Bills:

SB 184 *Sex Offender Residency Restrictions*

HB 83a *Sex Offender Management Board Changes*

CS/HB 298a *Sex Offender Registration Requirements*