

LFC Requester: _____

**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

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:
Original **Amendment** _____
Correction _____ **Substitute** _____

Date 2/19/2025
Bill No: HB 451-280

Sponsor: Rep. Linda Serrato & John Block
Short Title: INDECENT EXPOSURE TO CHILD OUT OF VIEW

Agency Name and Code LOPD 280
Number: _____
Person Writing Mary Barket
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: None known
Duplicates/Relates to Appropriation in the General Appropriation Act: None known

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

Existing law criminalizes indecent exposure “in public view.” NMSA 1978, § 30-9-14.

HB 451 would create the misdemeanor offense of indecent exposure to a child out of public view. The crime would consist of a person 18 or older “knowingly and intentionally exposing the person’s primary genital area to a child in a lewd and lascivious manner” and would apply when the person and child are in a nonpublic place.

HB 451 would be retroactive and apply “to all actions not currently pending based on indecent exposure to a child out of public view, regardless of the date of exposure and regardless of whether any statute of limitations on such actions expired prior to the effective date of this 2025 act.”

FISCAL IMPLICATIONS

If HB 451 were enacted and applied to past conduct, it would be virtually certain to trigger constitutional challenges, which would require resources from LOPD, prosecutors, and the courts.

It is otherwise unclear how big of a financial impact HB 451 would have on the LOPD. If charged broadly, it could result in additional charges in virtually every case involving sex offenses or it could result in charges for potentially innocuous behavior. If infrequently charged, then its impact on department resources could be minimal. Regardless, any increase in crimes or charges would trigger a corresponding increase in LOPD resources.

The LOPD cost for experienced defense attorneys, including salary, benefits, operational costs, and support staff is \$291,144.66 annually in the Albuquerque/Santa Fe areas, and \$299,633.95 in outlying geographic areas. A recent workload study by an independent organization and the American Bar Association concluded that New Mexico faces a critical shortage of public defense attorneys. The study concluded, “A very conservative analysis shows that based on average annual caseload, the state needs an additional 602 full-time attorneys – more than twice its current level - to meet the standard of reasonably effective assistance of counsel guaranteed by the Sixth Amendment.”

https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-moss-adams-nm-proj.pdf.

Barring some other way to reduce indigent defense workload, any increase in the number of serious, complex felony prosecutions would bring a concomitant need for an increase in indigent defense funding in order to keep the LOPD's workload crisis from spreading.

In addition to the impact on LOPD, courts, DAs, AGs, and NMCD could anticipate increased costs.

SIGNIFICANT ISSUES

Although HB 451 is similar to language in NMSA 1978, Section 30-9-14 (indecent exposure) and NMSA 1978, Section 30-9-14.3 (aggravated indecent exposure)—which punish indecent exposure in public view—LOPD sees several issues with HB 451's effort to punish such conduct in private spaces.

First, the indecent exposure in HB 451 could potentially result in additional charges in cases involving sex offenses, which could create potential double jeopardy issues. For example, it is difficult to imagine a criminal sexual penetration offense that would not involve exposure of a person's privates.

In addition, because HB 451 would cover conduct which occurs in the privacy of the home, it could potentially result in punishment of people for lifestyle choices involving nudity in their own home. While the requirement that they act in a "lewd and lascivious manner" could be used as a defense for a person in a household with a higher threshold for nudity, "lewd and lascivious" is not defined in the statute, subjective, and open to interpretation. It therefore has the potential to result in disparate enforcement or to provide insufficient notice as to what conduct is covered.

Finally, because HB 451 proposes to apply retroactively it is likely to be found unconstitutional under the ex post facto clauses of the state and federal constitutions. The ex post facto clauses of the federal and state constitutions prohibit the retroactive application of penal legislation. See U.S. Const. Art. I, § 10, cl. 1 (No State shall ... pass any ... ex post facto Law"); N.M. Const. art. II, § 19 ("No ex post facto law ... shall be enacted by the legislature."); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) ("The Ex Post Facto Clause flatly prohibits retroactive application of penal legislation"). Whether a change in the law constitutes a violation of the ex post facto clause can depend on whether it makes "criminal a previously innocent act, increase[s] the punishment, or change[s] the proof necessary to convict the defendant." *State v. Romero*, 2011-NMSC-013, ¶ 10, 150 N.M. 80. Because HB 451 proposes to criminalize conduct that was not previously criminalized, its retroactive application would likely be found to violate the federal and state constitutions.

PERFORMANCE IMPLICATIONS

None known

ADMINISTRATIVE IMPLICATIONS

None known

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None known

TECHNICAL ISSUES

None known

OTHER SUBSTANTIVE ISSUES

None known

ALTERNATIVES Not having the law apply retroactively and imposing a more stringent culpability requirement than “lewd and lascivious.”

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status Quo

AMENDMENTS

None known