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FISCAL IMPACT REPORT

SPONSOR: Vaughn DATE TYPED: 03/15/01 HB 788

SHORT TITLE: Unlawful Filming or Photographing of a Person SB _____

ANALYST: Gonzales

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY01	FY02	FY01	FY02		
			See Narrative		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

Administrative Office of the Courts (AOC)
 Bernalillo County Metropolitan Court
 Office of the Attorney General (AG)
 Corrections Department
 Department of Public Safety (DPS)

SUMMARY

Synopsis of Bill

House Bill 788 proposes to enact a new section of the Criminal Code making it a misdemeanor to unlawfully observe, film, videotape or photograph a person. It becomes a crime when a person, with the intent to invade a person's privacy, observes, films, videotapes or photographs another without the other person's consent, when the other person is: (1) naked or in the state of undress that exposes the person's genitals, pubic area, buttocks or female breasts; and (2) in a restroom, dressing room, locker room, hotel room, motel room, tanning booth, tanning bed, bedroom or any other location not open to public view and where the other person has a reasonable expectation of privacy. There are exceptions to the provisions of this bill when committed by law enforcement officers who are conducting an inmate cell extraction, or employees and independent contractors of the new media engaged in the gathering of information expected to produce news for broadcast or publication. The effective date of the provisions of this bill become effective July 1, 2001.

PERFORMANCE IMPLICATIONS

Impact on various judicial agencies will be dependent upon the number of prosecutions of violations of this Act which could eventually lead to a correspondingly increase in operating budgets to cope with the increased workload.

FISCAL IMPLICATIONS

The Administrative Office of the Courts report the following impact:

It will cost the judicial system \$400 for statewide update, distribution, and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws, and new hearings have the potential to increase case-loads in the courts, thus requiring additional resources to handle the increase.

The impact to other judicial entities depends upon the extent of impact to caseloads and judge's dockets in enactment of this legislation leads to numerous prosecutions for alleged violations of this act.

According to the Corrections Department:

The bill does not contain an appropriation to cover the increase in costs to the Corrections Department that will result from the new misdemeanor offense. The Department estimates that a small to moderate number of offenders will be convicted of the new misdemeanor each year. Most of the offenders convicted of the new misdemeanor will probably be sentenced to probation under the Department's supervision.

The cost per client in Probation and Parole for a standard supervision program is \$1,536 per year. The cost per client in Intensive Supervision programs is \$3,922 per year. The cost per client in Department-Operated Community Corrections programs is \$5,519 per year. The cost per client in Privately-Operated Community Corrections programs is \$10,724 per year.

The Department estimates that only a few persons convicted of the new misdemeanor offense will be required to serve a prison term.

The private prison annual cost of incarcerating an inmate based upon Fiscal Year 00 actual expenditures is \$21,670 per year for males. The cost per client to house a female inmate at the privately operated facility in Grants is \$24,348 per year. Any net increase in inmate population will be housed at a private facility.

The bill will result in a minimal increase in revenue from the probation supervision fees and fines collected from those convicted of the new misdemeanor offense.

ADMINISTRATIVE IMPLICATIONS

The administrative impact to the judicial system may increase if caseloads increase and/or the time necessary to dispose cases increase. Additionally, the Corrections Department states the provisions of

this bill “will result in an increase in the number of offenders sentenced to probationary supervision by the (Corrections) Department. Therefore, there will be an increase in the caseload of the department’s probation and parole officers” which the department will not be able to absorb.

CONFLICT/DUPLICATION/COMPANIONSHIP/RELATIONSHIP

According to the Office of the Attorney General, “no similar crime exists under present law except that stalking laws might overlap as to ‘observing’ nude persons in private places without consent. Due to the other requirements for stalking, no significant confusion between the two laws is anticipated.”

OTHER SUBSTANTIVE ISSUES

The Administrative Office of the Courts states that as the bill is written appears to be a strict liability crime because it does not seem to contain an element of criminal intent. If it is not intended to be a strict liability crime, should it contain an element of criminal intent?

Similar laws have been adopted in other states, including Missouri, Oregon and North Dakota but not court cases have yet resulted in these states. Wisconsin is the only state with a published case.

The Office of the Attorney General reports the following in its analysis:

On June 28, 2000, in State v. Stevenson, 613 N.W.2d 90 (Wis. 2000), the state Supreme Court found that a law making it a felony to photograph, videotape or film “nudity without the knowledge or consent of the person who is depicted nude” was unconstitutional. Although the First Amendment provided no protection for the defendant’s conduct in surreptitiously photographing a former girlfriend in the nude, his conviction was overturned because the statute was too broad because it would reach activity protected under the First Amendment such as reproducing photographs of Michaelangelo’s statue “David” or a Pulitzer Prize winning photograph of a Vietnamese girl running nude following a napalm attack.

The Court in Stevenson noted that the law might be constitutional if it required the victim to have a reasonable expectation of privacy and if it applied to photographs and videotapes but not reproductions (such as of art works). The proposed New Mexico statute meets these requirements and so might have survived constitutional scrutiny by the Wisconsin Court. How it would fare in New Mexico’s courts is a difficult question. A best guess would be that the law as proposed would survive a constitutional challenge.

One concern might be the phrase “any other location not open to public view” which seems to challenge the would-be photographer to exploit the limits of technology to capture images of persons in private outdoor hot tubs or an accident victim who must be partially disrobed for medical attention prior to transport to the hospital. This phrase might restrict application of the law in circumstances in which it is intended to apply. The phrase invites a contest over images of a person with a reasonable expectation of privacy but who may or may not have been in “public view.”

In addition, the exception in B (3) for employees or “independent contractors” of news media threatens to swallow the law. It appears that any person could take photographs or make a videotape of a person who was in a non-public place and who had a

reasonable expectation of privacy, and as long as the photographer sold the picture for publication there would be no crime. Thus the law would in essence criminalize only the taking of photographs or videos for private viewing but not those sold for publication. Lastly, although the law includes an exception for police investigations, it ignores private investigators that might photograph unclothed or partially clothed persons in the course of their employment, making such conduct a crime. It is unclear whether this impact is intentional.

According to the Public Defender: “There are several potential problems with this statute: 1) it may cast a net that catches private investigators investigating matrimonial infidelities, or private security doing theft surveillance; 2) the statute appears to be strict liability. Both of these potential problems, and perhaps others unseen, would be eased by adding language requiring that the film-maker have criminal intent.”

The Corrections Department suggests “the bill should more clearly exempt law enforcement and corrections employees who are required to observe offenders when collecting urine samples.”

POSSIBLE QUESTIONS

1. Is reference to “without consent” sufficient to make filming “lawful” or should there be language requiring some mens rea of criminality?
2. Would filming for security purposes by non-law enforcement personnel, i.e. private security, be criminalized under this Act?

JMG/ar