

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 151 Sexual Cyberharassment

SPONSOR(S): Criminal Justice Subcommittee

TIED BILLS: None **IDEN./SIM. BILLS:** SB 538

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Criminal Justice Subcommittee		Keegan	Cunningham

SUMMARY ANALYSIS

Internet security company McAfee recently published the results of a survey conducted in 2012, which explored the connection between romantic breakups and the loss of privacy online. Among other results, the survey found that one in ten ex-partners have threatened to expose risqué photos online, and that these threats were carried out nearly 60 percent of the time.

Florida law does not currently prohibit a person from posting on the Internet nude photos of adults that were taken consensually.

The bill creates s. 784.049, F.S., to prohibit a person from willfully and maliciously sexually cyberharassing another person. "Sexually cyberharass" is defined as publishing a sexually explicit image of a person that contains or conveys the personal identification information of the depicted person to an Internet website without such person's consent, for no legitimate purpose, and with the intent to cause substantial emotional distress to such person.

A person who commits sexual cyberharassment commits a first degree misdemeanor. However, a second or subsequent violation by a person with a prior conviction for sexual cyberharassment is a third degree felony.

The bill amends s. 901.15, F.S., to permit a law enforcement officer to arrest a person without a warrant when there is probable cause to believe that the person has committed sexual cyberharassment. Additionally, the bill permits a search warrant to be issued for a private dwelling if evidence relevant to proving sexual cyberharassment is contained therein.

The bill also authorizes an aggrieved person to initiate a civil action against a person who commits sexual cyberharassment to obtain all appropriate relief in order to prevent or remedy a violation. This relief includes:

- Injunctive relief; monetary damages to include five thousand dollars or actual damages incurred, whichever is greater; and reasonable attorney fees and costs.

The bill specifies that sexual cyberharassment is considered to be committed in Florida if any conduct that is an element of the offense, or any harm to the depicted person resulting from the offense, occurs within the state.

The Criminal Justice Impact Conference has not yet met to determine the prison bed impact of the bill. However, the bill may have a negative prison bed impact on the Department of Corrections and a negative jail bed impact on local governments because it creates a new third degree felony and first degree misdemeanor offense.

The bill is effective on October 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Internet security company McAfee recently published the results of a survey conducted in 2012, which explored the connection between romantic breakups and the loss of privacy online.¹ Among other results, the survey found that one in ten ex-partners have threatened to expose risqué photos online, and that these threats were carried out nearly 60 percent of the time.² Men reported being threatened with such exposure more often than women.³

In 2004, New Jersey⁴ passed a law prohibiting unlicensed distribution of sexually explicit photos online, and California followed suit in 2013.⁵ Since then, a number of other states have enacted similar legislation.⁶ However, because such statutes restrict speech, they raise constitutional concerns. In September, 2014, a lawsuit was filed challenging the constitutionality of one such law passed in Arizona, but no ruling has yet been issued.⁷

Florida law does not currently prohibit a person from posting on the Internet nude photos of adults that were taken consensually. However, in some circumstances, posting such pictures could be an element of stalking or cyberstalking (s. 784.048, F.S.), or extortion (s. 836.05, F.S.). Additionally, s. 817.568(4), F.S., makes the non-consensual use of a person's personal identification information a first degree misdemeanor⁸ if used to harass⁹ that person. "Personal identification information" is defined as any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any:

- Name, postal or electronic mail address, telephone number, social security number, date of birth, mother's maiden name, official state-issued or United States-issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number, Medicaid or food assistance account number, bank account number, credit or debit card number, or personal identification number or code assigned to the holder of a debit card by the issuer to permit authorized electronic use of such card;
- Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
- Unique electronic identification number, address, or routing code;
- Medical records;
- Telecommunication identifying information or access device; or
- Other number or information that can be used to access a person's financial resources.¹⁰

¹ McAfee, Inc., *Lovers Beware: Scorned Exes May Share Intimate Data and Images Online*, MCAFEE.COM (Feb. 4, 2013), <http://www.mcafee.com/us/about/news/2013/q1/20130204-01.aspx>. (last visited March 14, 2015).

² *Id.*

³ *Id.*

⁴ N.J. Stat. § 2C:14-9 (2004).

⁵ Cal. Penal Code § 647 (2013).

⁶ *See, e.g.*, Ariz. Rev. Stat. §13-1425 (Arizona); CRSA §18-7-107 (Colorado); Ga. Code Ann. §16-11-90 (Georgia); §711-1110.9 (Hawaii); §18-66009 (Idaho).

⁷ *Antigone Books, L.L.C. v. Horne*, 2014 WL 4784248 (D. Ariz. filed Sept. 23, 2014).

⁸ A first degree misdemeanor is punishable by up to one year in jail and a \$1,000 fine. ss. 775.082 and 775.083, F.S.

⁹ Section 817.568, F.S., defines "harass" as engaging in conduct directed at a specific person that is intended to cause substantial emotional distress to such person and serves no legitimate purpose.

¹⁰ s. 817.568(1)(f), F.S.

Effect of the Bill

The bill provides the following legislative findings:

- The Legislature finds that a person depicted in a sexually explicit image that was taken with such person's consent has a reasonable expectation that such image will remain private.
- The Legislature finds that it is becoming a common practice for persons to publish a sexually explicit image of another to Internet websites without the depicted person's consent, for no legitimate purpose, and with the intent to cause substantial emotional distress to the depicted person.
- The Legislature finds that when such images are published on Internet websites, they are able to be viewed indefinitely and by persons worldwide, and are able to be easily reproduced and shared.
- The Legislature finds that the publication of such images on Internet websites creates a permanent record of the depicted person's private nudity or private sexually explicit conduct.
- The Legislature finds that the existence of such images on Internet websites causes those depicted in such images significant psychological harm.
- The Legislature further finds that safeguarding the psychological well-being of persons depicted in such images is compelling.

The bill creates s. 784.049, F.S., to prohibit a person from willfully and maliciously sexually cyberharassing another person. "Sexually cyberharass" is defined as publishing a sexually explicit image¹¹ of a person that contains or conveys the personal identification information¹² of the depicted person to an Internet website without such person's consent, for no legitimate purpose, and with the intent to cause substantial emotional distress to such person.

A person who commits sexual cyberharassment commits a first degree misdemeanor. However, a second or subsequent violation by a person with a prior conviction for sexual cyberharassment is a third degree felony.¹³

The bill amends s. 901.15, F.S., to permit a law enforcement officer to arrest a person without a warrant when there is probable cause to believe that the person has committed sexual cyberharassment. Additionally, the bill permits a search warrant to be issued for a private dwelling if an instrumentality or means by which a violation of s. 784.049, F.S., has been committed, is contained therein, or if evidence relevant to proving sexual cyberharassment is contained therein.

The bill authorizes an aggrieved person to initiate a civil action against a person who commits sexual cyberharassment to obtain all appropriate relief in order to prevent or remedy a violation. This relief includes:

- Injunctive relief;
- Monetary damages to include five thousand dollars or actual damages incurred, whichever is greater; and
- Reasonable attorney fees and costs.

The bill exempts the following from the above-described criminal penalties and civil remedies:

- A provider of an interactive computer service as defined in 47 U.S.C. § 230(f), information service as defined in 47 U.S.C. § 153, or communications service as defined in s. 202.11, F.S., that provides the transmission, storage, or caching of electronic communications or messages of others; other related telecommunications or commercial mobile radio service; or content provided by another person; or
- A law enforcement officer as defined in s. 943.10, F.S., or any local, state, federal, or military law enforcement agency, that publishes a sexually explicit image in connection with the performance of his or her duties as a law enforcement officer, or law enforcement agency.

¹¹ The bill defines "sexually explicit image" to mean any image depicting nudity, as defined in s. 847.001, F.S., or depicting a person engaging in sexual conduct, as defined in s. 847.001, F.S. "Image" includes but is not limited to, any photograph, picture, motion picture, film, video, or representation.

¹² The bill defines "personal identifying information" in accordance with s. 817.568, F.S.

¹³ A third degree felony is punishable by up to five years in prison and a \$5,000 fine. ss. 775.082, 775.083, and 775.084, F.S.

The bill specifies that sexual cyberharassment is considered to be committed in Florida if any conduct that is an element of the offense, or any harm to the depicted person resulting from the offense, occurs within the state.

B. SECTION DIRECTORY:

Section 1. Creates s. 784.049, F.S., relating to sexual cyberharassment.

Section 2. Amends s. 901.15, F.S., relating to when arrest by officer without warrant is lawful.

Section 3. Amends s. 933.18, F.S., relating to when warrant may be issued for search of private dwelling.

Section 4. Provides an effective date of October 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The Criminal Justice Impact Conference has not yet met to determine the prison bed impact of the bill. However, the bill may have a negative prison bed impact on the Department of Corrections because it creates a new third degree felony offense.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill may have a negative jail bed impact on local governments because it creates a new first degree misdemeanor offense.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Private individuals or companies who engage in the behavior prohibited by the bill may be subject to civil action for doing so.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law..

2. Other:

Overbreadth

The First Amendment to the United States Constitution and article I, section 4, of the Florida Constitution protect the rights of individuals to express themselves in a variety of ways. These protections safeguard speech, the written word, and any conduct intended to communicate. When lawmakers attempt to restrict or burden First Amendment rights such as these, the laws must not only be directed toward a legitimate state interest,¹⁴ but they must be drawn as narrowly as possible.¹⁵ As the United States Supreme Court has noted, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."¹⁶ Put another way, statutes cannot be so broad that they prohibit constitutionally protected conduct as well as unprotected conduct.¹⁷

When legislation is drafted to apply to conduct that is protected by the First Amendment, it is said to be unconstitutionally overbroad.¹⁸ The overbreadth doctrine permits an individual whose own speech or conduct may be prohibited to challenge an enactment facially "because it also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid."¹⁹ The doctrine contemplates the pragmatic judicial assumption that an overbroad statute will have a chilling effect on protected speech.²⁰ If statutes are not narrowly constructed they may be challenged as being overbroad.

In *Reno v. American Civil Liberties Union*, the United States Supreme Court stated:

[T]he growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.²¹

The bill makes it a crime to publish a sexually explicit image of a person in specified circumstances. To the extent that the bill regulates speech protected by the First Amendment, it could be challenged as being unconstitutionally overbroad.

Content Based Regulation

A regulation that abridges speech because of the content of the speech is subject to the strict scrutiny standard of judicial review.²² In order for a statute to meet the strict scrutiny test, it must be narrowly tailored to promote a compelling state interest, where there is no other less-restrictive option available to accomplish the state interest.²³ The strict scrutiny test applies to content-based

¹⁴ *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *Bates v. City of Little Rock*, 361 U.S. 516, 523-24 (1960).

¹⁵ *NAACP v. Button*, 371 U.S. 415 (1963).

¹⁶ *Id.* at 433.

¹⁷ *Sult v. Florida*, 906 So. 2d 1013 (Fla. 1963).

¹⁸ *Id.*

¹⁹ *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985).

²⁰ *Sult*, 906 So. 2d at 1018.

²¹ 521 U.S. 844, 885 (1997).

²² *United States v. Playboy Ent'mt Grp., Inc.*, 529 U.S. 803, 812 (2000).

²³ *Id.* at 813.

regulation of Internet speech,²⁴ including speech that involves or communicates sexual content.²⁵ It is very uncommon for the courts to uphold regulations that forbid or limit the communication of specific ideas or viewpoints.

The bill makes it a crime to publish certain images partially because of the content of the images. To the extent that the bill regulates speech protected by the First Amendment based on its content, it could be challenged as being unconstitutional.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

²⁴ *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (stating that “our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”)

²⁵ *Sable Commc'ns of Cal., Inc., v. F.C.C.*, 492 U.S. 115, 126 (1989).