



MEMORANDUM

TO: The Pennsylvania House Judiciary Committee

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: January 22, 2021

RE: OPPOSITION TO HB 163 P.N. 131 (STAATS)

Bill summary: [HB 163](#) (PN 131) would enhance invasion of privacy from a misdemeanor of the third degree to a felony of the third degree for adults or teachers convicted of this offense where minors or students are the victims. A second or subsequent offense would be graded as a second-degree felony.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose House Bill 163.

HB 163 broadly expands the penalties for this offense, further bloating Pennsylvania's crimes code.

"Upskirting" — or any invasion of privacy — is already punishable under [Pa.C.S. § 7507.1](#). But HB 163 expands the scope of the crime by adding enhancements for adults or teachers convicted of this offense, increasing the penalty from a third-degree misdemeanor to a third- (or second-) degree felony:

- **M3** (6 months–1 year incarcerated; \$2,500 in fines) → **F3** (3.5–7 years in prison; \$15,000 in fines)
- Second, subsequent offense: **F2** (5–10 years in prison; \$25,000 in fines)

This kind of enhancement is, unfortunately, standard fare in the Pennsylvania legislature. HB 163 contributes to a broader trend of legislation that expands and enhances the crimes code, a trend we specifically addressed in our report, [More Law, Less Justice](#).¹ This report traces how, over the past four decades, the Pennsylvania legislature has become a bipartisan offense factory, as members of both political parties draft hundreds of redundant crime bills that duplicate existing law or add unnecessarily punitive new penalties. This unrelenting expansion effectively diverts power away from judges into the hands of prosecutors and police — police are given more potential offenses to investigate and prosecutors are armed with duplicative offenses used to overcharge defendants as leverage to force them to accept plea bargains to circumvent jury trials.

According to the National Inventory of Collateral Consequences of Conviction, there are [879](#) collateral consequences for criminal convictions in Pennsylvania.² Felony convictions restrict or limit rights and benefits including those that relate to employment, education, housing, occupational licensing, firearms, and even jury service. Every time the legislature creates a new offense or enhances offense grading from a misdemeanor to a felony, it triggers these costly collateral consequences.

¹ ACLU of Pennsylvania, *More Law, Less Justice*, October 2019, at <https://www.aclupa.org/en/publications/more-law-less-justice>

² Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, *National Inventory of Collateral Consequences of Conviction*, <https://niccc.nationalreentryresourcecenter.org/consequences>.

HB 163 broadly expands the scope and elements of this offense.

HB 163 not only expands the scope of this offense by through penalty enhancements for adults and teachers as mentioned above, but it also adds the **receipt of images or videos** as an element of the crime:

(a) Offense defined.--Except as set forth in subsection (d), a person commits the offense of invasion of privacy if he, for the purpose of arousing or gratifying the sexual desire of any person, knowingly does any of the following:

* * *

(3) [~~Transfers or transmits~~] ~~Transfers, transmits or~~ **receives** an image ~~or video~~ obtained in violation of paragraph (1) or (2) by live or recorded telephone message, electronic mail or the Internet or by any other transfer of the medium on which the image is stored.

Unlike the active process of transferring or transmitting an image or video, adding the passive act of “receiving” an image or video as an element of this crime raises extremely problematic questions. There are few people these days who have not received spam or even unwelcome, unsolicited images or videos. Are those in receipt of those files now implicated in this crime along with those who “transmit” or “transfer” those files? What is the standard for “knowingly receives”? Does it require that the defendant also knowingly opened or viewed the files?

HB 163 adds a problematic and unclear defense provision to the statute.

(b.1) Defense.--In any prosecution under this section, it shall be a defense that the person viewed an image or video under subsection (a) unintentionally and with no purpose of arousing or gratifying the sexual desire of the person.

This provision raises three serious concerns in particular:

1. **Unnecessary:** Unless this bill is attempting to attach strict liability to this offense (which it does not), this provision is unnecessary. It is already an obviously permissible defense to argue intent in cases where “mens rea” is at issue — whether someone inadvertently, unintentionally, and with no recklessness did something that causes harm.
2. **Changes the element of the crime:** If the offense includes “receives” as an element of the crime, why does this provision narrow the permissible defense against the crime to “viewing” an image or video?
3. **Shifts the burden of proof:** This provision requires that the defense disproves an element of the crime. In other words, the defense must prove a negative. How does one prove, if in receipt of an image or video, that the defendant received it unintentionally and with no purpose of sexual arousal or gratification? Leaving aside the question of whether receipt of such files is a justifiable element of this offense, the **burden is on the state** to prove that the defendant **intentionally** received the image or video for the purpose of sexual arousal or gratification, not the other way around.

HB 163 not only expands the scope and penalties for this offense, it adds an alarming new element of the crime — one that may invite unintended consequences for those in receipt of questionable images or videos. Furthermore, the problematic defense provision in HB 163 raises far more questions than it clarifies.

For these reasons, we urge you to oppose House Bill 163.