

HOUSE SUBSTITUTE FOR
SENATE BILL NO. 773

A bill to amend 1931 PA 328, entitled
"The Michigan penal code,"
by amending section 145c (MCL 750.145c), as amended by 2002 PA
629.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

- 1 Sec. 145c. (1) As used in this section:
- 2 (a) "Appears to include a child" means that the depiction
- 3 appears to include, or conveys the impression that it includes, a
- 4 person who is less than 18 years of age, and the depiction meets
- 5 either of the following conditions:
- 6 (i) It was created using a depiction of any part of an actual
- 7 person under the age of 18.
- 8 (ii) It was not created using a depiction of any part of an
- 9 actual person under the age of 18, but all of the following apply
- 10 to that depiction:

1 (A) The average individual, applying contemporary community
2 standards, would find the depiction, taken as a whole, appeals to
3 the prurient interest.

4 (B) The reasonable person would find the depiction, taken as
5 a whole, lacks serious literary, artistic, political, or
6 scientific value.

7 (C) The depiction depicts or describes a listed sexual act in
8 a patently offensive way.

9 (b) "Child" means a person who is less than 18 years of age,
10 subject to the affirmative defense created in subsection (6)
11 regarding persons emancipated by operation of law.

12 (c) "Commercial film or photographic print processor" means a
13 person or his or her employee who, for compensation, develops
14 exposed photographic film into movie films, negatives, slides, or
15 prints; makes prints from negatives or slides; or duplicates
16 movie films or videotapes.

17 **(d) "Computer technician" means a person who installs,**
18 **maintains, troubleshoots, upgrades, or repairs computer hardware,**
19 **software, personal computer networks, or peripheral equipment.**

20 **(e) —(d)—** "Contemporary community standards" means the
21 customary limits of candor and decency in this state at or near
22 the time of the alleged violation of this section.

23 **(f) —(e)—** "Erotic fondling" means touching a person's clothed
24 or unclothed genitals, pubic area, buttocks, or, if the person is
25 female, breasts, or if the person is a child, the developing or
26 undeveloped breast area, for the purpose of real or simulated
27 overt sexual gratification or stimulation of 1 or more of the

1 persons involved. Erotic fondling does not include physical
2 contact, even if affectionate, that is not for the purpose of
3 real or simulated overt sexual gratification or stimulation of 1
4 or more of the persons involved.

5 (g) ~~—(f)—~~ "Erotic nudity" means the lascivious exhibition of
6 the genital, pubic, or rectal area of any person. As used in
7 this subdivision, "lascivious" means wanton, lewd, and lustful
8 and tending to produce voluptuous or lewd emotions.

9 (h) ~~—(g)—~~ "Listed sexual act" means sexual intercourse,
10 erotic fondling, sadomasochistic abuse, masturbation, passive
11 sexual involvement, sexual excitement, or erotic nudity.

12 (i) ~~—(h)—~~ "Masturbation" means the real or simulated
13 touching, rubbing, or otherwise stimulating of a person's own
14 clothed or unclothed genitals, pubic area, buttocks, or, if the
15 person is female, breasts, or if the person is a child, the
16 developing or undeveloped breast area, either by manual
17 manipulation or self-induced or with an artificial instrument,
18 for the purpose of real or simulated overt sexual gratification
19 or arousal of the person.

20 (j) ~~—(i)—~~ "Passive sexual involvement" means an act, real or
21 simulated, that exposes another person to or draws another
22 person's attention to an act of sexual intercourse, erotic
23 fondling, sadomasochistic abuse, masturbation, sexual excitement,
24 or erotic nudity because of viewing any of these acts or because
25 of the proximity of the act to that person, for the purpose of
26 real or simulated overt sexual gratification or stimulation of 1
27 or more of the persons involved.

1 **(k)** ~~—(j)—~~ "Prurient interest" means a shameful or morbid
2 interest in nudity, sex, or excretion.

3 **(l)** ~~—(k)—~~ "Child sexually abusive activity" means a child
4 engaging in a listed sexual act.

5 **(m)** ~~—(l)—~~ "Child sexually abusive material" means any
6 depiction, whether made or produced by electronic, mechanical, or
7 other means, including a developed or undeveloped photograph,
8 picture, film, slide, video, electronic visual image, computer
9 diskette, computer or computer-generated image, or picture, or
10 sound recording which is of a child or appears to include a child
11 engaging in a listed sexual act; a book, magazine, computer,
12 computer storage device, or other visual or print or printable
13 medium containing such a photograph, picture, film, slide, video,
14 electronic visual image, computer, or computer-generated image,
15 or picture, or sound recording; or any reproduction, copy, or
16 print of such a photograph, picture, film, slide, video,
17 electronic visual image, book, magazine, computer, or
18 computer-generated image, or picture, other visual or print or
19 printable medium, or sound recording.

20 **(n)** ~~—(m)—~~ "Sadomasochistic abuse" means either of the
21 following:

22 (i) Flagellation or torture, real or simulated, for the
23 purpose of real or simulated sexual stimulation or gratification,
24 by or upon a person.

25 (ii) The condition, real or simulated, of being fettered,
26 bound, or otherwise physically restrained for sexual stimulation
27 or gratification of a person.

1 (o) ~~—(n)—~~ "Sexual excitement" means the condition, real or
2 simulated, of human male or female genitals in a state of real or
3 simulated overt sexual stimulation or arousal.

4 (p) ~~—(e)—~~ "Sexual intercourse" means intercourse, real or
5 simulated, whether genital-genital, oral-genital, anal-genital,
6 or oral-anal, whether between persons of the same or opposite sex
7 or between a human and an animal, or with an artificial genital.

8 (2) A person who persuades, induces, entices, coerces,
9 causes, or knowingly allows a child to engage in a child sexually
10 abusive activity for the purpose of producing any child sexually
11 abusive material, or a person who arranges for, produces, makes,
12 or finances, or a person who attempts or prepares or conspires to
13 arrange for, produce, make, or finance any child sexually abusive
14 activity or child sexually abusive material is guilty of a
15 felony, punishable by imprisonment for not more than 20 years, or
16 a fine of not more than \$100,000.00, or both, if that person
17 knows, has reason to know, or should reasonably be expected to
18 know that the child is a child or that the child sexually abusive
19 material includes a child or that the depiction constituting the
20 child sexually abusive material appears to include a child, or
21 that person has not taken reasonable precautions to determine the
22 age of the child.

23 (3) A person who distributes or promotes, or finances the
24 distribution or promotion of, or receives for the purpose of
25 distributing or promoting, or conspires, attempts, or prepares to
26 distribute, receive, finance, or promote any child sexually
27 abusive material or child sexually abusive activity is guilty of

1 a felony, punishable by imprisonment for not more than 7 years,
2 or a fine of not more than \$50,000.00, or both, if that person
3 knows, has reason to know, or should reasonably be expected to
4 know that the child is a child or that the child sexually abusive
5 material includes a child or that the depiction constituting the
6 child sexually abusive material appears to include a child, or
7 that person has not taken reasonable precautions to determine the
8 age of the child. This subsection does not apply to the persons
9 described in section 7 of 1984 PA 343, MCL 752.367.

10 (4) A person who knowingly possesses any child sexually
11 abusive material is guilty of a felony punishable by imprisonment
12 for not more than 4 years or a fine of not more than \$10,000.00,
13 or both, if that person knows, has reason to know, or should
14 reasonably be expected to know the child is a child or that the
15 child sexually abusive material includes a child or that the
16 depiction constituting the child sexually abusive material
17 appears to include a child, or that person has not taken
18 reasonable precautions to determine the age of the child. This
19 subsection does not apply to any of the following:

20 (a) A person described in section 7 of 1984 PA 343,
21 MCL 752.367, ~~or to~~ a commercial film or photographic print
22 processor acting pursuant to subsection (8), **or a computer**
23 **technician acting pursuant to subsection (9).**

24 (b) A police officer acting within the scope of his or her
25 duties as a police officer.

26 (c) An employee or contract agent of the department of social
27 services acting within the scope of his or her duties as an

1 employee or contract agent.

2 (d) A judicial officer or judicial employee acting within the
3 scope of his or her duties as a judicial officer or judicial
4 employee.

5 (e) A party or witness in a criminal or civil proceeding
6 acting within the scope of that criminal or civil proceeding.

7 (f) A physician, psychologist, limited license psychologist,
8 professional counselor, or registered nurse licensed under the
9 public health code, 1978 PA 368, MCL 333.1101 to 333.25211,
10 acting within the scope of practice for which he or she is
11 licensed.

12 (g) A social worker registered in this state under article 15
13 of the public health code, 1978 PA 368, MCL 333.16101 to
14 333.18838, acting within the scope of practice for which he or
15 she is registered.

16 (5) Expert testimony as to the age of the child used in a
17 child sexually abusive material or a child sexually abusive
18 activity is admissible as evidence in court and may be a
19 legitimate basis for determining age, if age is not otherwise
20 proven.

21 (6) It is an affirmative defense to a prosecution under this
22 section that the alleged child is a person who is emancipated by
23 operation of law under section 4(2) of 1968 PA 293, MCL 722.4, as
24 proven by a preponderance of the evidence.

25 (7) If a defendant in a prosecution under this section
26 proposes to offer in his or her defense evidence to establish
27 that a depiction that appears to include a child was not, in

1 fact, created using a depiction of any part of an actual person
2 under the age of 18, the defendant shall at the time of the
3 arraignment on the information or within 15 days after
4 arraignment but not less than 10 days before the trial of the
5 case, or at such other time as the court directs, file and serve
6 upon the prosecuting attorney of record a notice in writing of
7 his or her intention to offer that defense. The notice shall
8 contain, as particularly as is known to the defendant or the
9 defendant's attorney, the names of witnesses to be called in
10 behalf of the defendant to establish that defense. The
11 defendant's notice shall include specific information as to the
12 facts that establish that the depiction was not, in fact, created
13 using a depiction of any part of an actual person under the age
14 of 18. Failure to file a timely notice in conformance with this
15 subsection precludes a defendant from offering this defense.

16 (8) If a commercial film or photographic print processor
17 reports to ~~the local prosecuting attorney~~ **a law enforcement**
18 **agency having jurisdiction** his or her knowledge or observation,
19 within the scope of his or her professional capacity or
20 employment, of a film, photograph, movie film, videotape,
21 negative, or slide depicting a person that the processor has
22 reason to know or reason to believe is a child engaged in a
23 listed sexual act; furnishes a copy of the film, photograph,
24 movie film, videotape, negative, or slide to ~~the prosecuting~~
25 ~~attorney~~ **a law enforcement agency having jurisdiction**; or keeps
26 the film, photograph, movie film, videotape, negative, or slide
27 according to the ~~prosecuting attorney's~~ **law enforcement**

1 agency's instructions, both of the following shall apply:

2 (a) The identity of the processor shall be confidential,
3 subject to disclosure only with his or her consent or by judicial
4 process.

5 (b) If the processor acted in good faith, he or she shall be
6 immune from civil liability that might otherwise be incurred by
7 his or her actions. This immunity extends only to acts described
8 in this subsection.

9 (9) If a computer technician reports to a law enforcement
10 agency having jurisdiction his or her knowledge or observation,
11 within the scope of his or her professional capacity or
12 employment, of an electronic visual image, computer-generated
13 image or picture or sound recording depicting a person that the
14 computer technician has reason to know or reason to believe is a
15 child engaged in a listed sexual act; furnishes a copy of that
16 image, picture, or sound recording to the law enforcement agency;
17 or keeps the image, picture, or sound recording according to the
18 law enforcement agency's instructions, both of the following
19 shall apply:

20 (a) The identity of the computer technician shall be
21 confidential, subject to disclosure only with his or her consent
22 or by judicial process.

23 (b) If the computer technician acted in good faith, he or she
24 shall be immune from civil liability that might otherwise be
25 incurred by his or her actions. This immunity extends only to
26 acts described in this subsection.

27 (10) ~~—(9)—~~ This section applies uniformly throughout the

1 state and all political subdivisions and municipalities in the
2 state.

3 (11) ~~—(10)—~~ A local municipality or political subdivision
4 shall not enact ordinances, nor enforce existing ordinances,
5 rules, or regulations governing child sexually abusive activity
6 or child sexually abusive material as defined by this section.