

HOUSE BILL REPORT

HB 1999

As Reported by House Committee On:

Community Safety, Justice, & Reentry

Title: An act relating to fabricated intimate or sexually explicit images and depictions.

Brief Description: Concerning fabricated intimate or sexually explicit images and depictions.

Sponsors: Representatives Orwall, Leavitt, Ryu, Duerr, Ramos, Morgan, Taylor, Ormsby, Graham, Callan, Rule, Street, Lekanoff, Reeves, Shavers and Davis.

Brief History:

Committee Activity:

Community Safety, Justice, & Reentry: 1/16/24, 1/29/24 [DPS].

Brief Summary of Substitute Bill

- Expands certain criminal offenses prohibiting the dealing in, sending or bringing into the state of, possessing of, or viewing of depictions of a minor engaged in sexually explicit conduct to include circumstances involving fabricated depictions of an identifiable minor.
- Establishes the offense of Disclosing Fabricated Intimate Images, which a person commits if the person discloses a fabricated intimate image of another person and knows or should know that the depicted person has not consented to disclosure, and that disclosure would cause harm to the depicted person.
- Establishes a civil cause of action under the Uniform Civil Remedies for the Unauthorized Disclosure of Intimate Images Act for the nonconsensual, intentional disclosure or threatened disclosure of a fabricated intimate image.
- Specifies that consent to the disclosure of a fabricated intimate image in the context of a civil action is valid only if the consent is set forth in a written agreement.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

HOUSE COMMITTEE ON COMMUNITY SAFETY, JUSTICE, & REENTRY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Goodman, Chair; Simmons, Vice Chair; Mosbrucker, Ranking Minority Member; Griffey, Assistant Ranking Minority Member; Davis, Farivar, Fosse, Graham and Ramos.

Staff: Corey Patton (786-7388).

Background:

Depictions of a Minor Engaged in Sexually Explicit Conduct.

Under state law, a person may be charged with a range of criminal offenses if the person deals in, sends or brings into the state, possesses, or views a depiction of a minor engaged in sexually explicit conduct. These offenses generally regulate applicable visual or printed matter, and internet sessions where a user views such matter. Different offenses or penalties may apply depending on the ages of the perpetrator and the depicted minor.

Key Definitions.

"Visual or printed matter" means any photograph or other material that contains a reproduction of a photograph. To "photograph" means to make a print, negative, slide, digital image, motion picture, or videotape, and a "photograph" means anything tangible or intangible produced by photographing. An "internet session" means a period of time during which an internet user, using a specific internet protocol address, visits or is logged into an internet site for an uninterrupted period of time. "Sexually explicit conduct" means actual or simulated:

- sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;
- penetration of the vagina or rectum by any object;
- masturbation;
- sadomasochistic abuse;
- defecation or urination for the purpose of sexual stimulation of the viewer;
- depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer; and
- touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast for the purpose of sexual stimulation of the viewer.

Dealing.

A person age 18 or older commits the offense of Dealing in Depictions of a Minor Engaged in Sexually Explicit Conduct in the first or second degree if the person knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells such depictions, or if the person possesses such depictions with the intent to develop,

duplicate, publish, print, disseminate, exchange, or sell them. The offense is a class B felony, ranked at seriousness level VII if committed in the first degree, or a class C felony, ranked at seriousness level V if committed in the second degree.

A minor commits the offense of Minor Dealing in Depictions of Another Minor Age 13 or Older Engaged in Sexually Explicit Conduct in the first or second degree if the minor knowingly distributes, publishes, transfers, disseminates, or exchanges such depictions. The offense is a gross misdemeanor if committed in the first degree, or a misdemeanor if committed in the second degree.

A minor commits the offense of Minor Dealing in Depictions of Another Minor Age 12 or Younger Engaged in Sexually Explicit Conduct in the first or second degree if the minor knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells such depictions, or if the minor possesses such depictions with the intent to develop, publish, print, disseminate, exchange, or sell them. The offense is an unranked class B felony regardless of whether it is committed in the first or second degree.

A minor commits the offense of Minor Financing or Selling Depictions of Another Minor Engaged in Sexually Explicit Conduct if the minor finances, attempts to finance, or sells such depictions. The offense is an unranked class B felony.

A minor is not liable for financing, attempting to finance, developing, duplicating, publishing, printing, disseminating, exchanging, or possessing depictions of himself or herself. However, a minor commits the offense of Minor Selling Fabricated Depictions of Himself or Herself Engaged in Sexually Explicit Conduct if the minor sells such depictions. The offense is a misdemeanor.

Sending or Bringing into the State.

A person commits the offense of Sending or Bringing into the State Depictions of a Minor Engaged in Sexually Explicit Conduct in the first or second degree if the person knowingly sends or causes to be sent, or brings or causes to be brought, such depictions into the state for sale or distribution. The offense is a class B felony, ranked at seriousness level VII if committed in the first degree, or a class C felony, ranked at seriousness level V if committed in the second degree. A minor is not liable for knowingly sending or causing to be sent, or bringing or causing to be brought, depictions of any minor age 13 or older into the state for distribution. A minor age 12 or younger is not liable for knowingly sending or causing to be sent, or bringing or causing to be brought, depictions of himself or herself into the state for distribution.

Possessing.

A person commits the offense of Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct in the first or second degree if the person knowingly possesses such depictions. The offense is a class B felony, ranked at seriousness level VI if committed in the first degree, or a class C felony, ranked at seriousness level IV if committed in the

second degree. A person convicted of the offense must also be assessed a \$1,000 fee for each depiction or image that constitutes a separate conviction. A minor is not liable for possessing depictions of any minor age 13 or older. A minor age 12 or younger is not liable for possessing depictions of himself or herself.

Viewing over the Internet.

A person commits the offense of Viewing Depictions of a Minor Engaged in Sexually Explicit Conduct if the person intentionally views such depictions over the internet. The offense is a class B felony, ranked at seriousness level IV if committed in the first degree, or an unranked class C felony if committed in the second degree. A minor is not liable for intentionally viewing depictions of any minor age 13 or older over the internet. A minor age 12 or younger is not liable for viewing depictions of himself or herself over the internet.

Other Defenses and Immunities.

State law specifies particular circumstances that do not constitute a defense to certain prosecutions for offenses involving depictions of a minor engaged in sexually explicit conduct. For example, it generally is not a defense that the defendant did not know the age of the depicted minor. Conversely, state law also specifies particular circumstances that do constitute a defense to certain prosecutions. For example, it generally is a defense that the defendant was a law enforcement officer in the process of conducting an official investigation of a sex-related crime against a minor, or that the defendant was engaged in specified forms of lawful research.

Certain persons who report a depiction of a minor engaged in sexually explicit conduct to the proper law enforcement agency in good faith are immune from civil liability, if such depiction was discovered while repairing, modifying, or maintaining a computer, or in the course of processing or producing visual or printed matter, either privately or commercially. Failing to make a report constitutes a gross misdemeanor under specific circumstances.

Forfeitures and Seizures.

Certain property related to offenses involving depictions of a minor engaged in sexually explicit conduct is subject to seizure and forfeiture, including all visual or printed matter that depicts a minor engaged in sexually explicit conduct; all raw materials, equipment, and other tangible personal property of any kind used or intended to be used to manufacture or process such depictions; and all conveyances, including aircraft, vehicles, or vessels that are used or intended for use to transport, or in any manner to facilitate the transportation of such depictions in violation of state law. A minor who possesses any depiction of any other minor engaged in an act of sexually explicit conduct, or which constitutes an intimate image, forfeits any right to continued possession of such depiction or intimate image and the court must order forfeiture.

Disclosing Intimate Images.

Under state law, a person may be subject to criminal or civil liability for certain conduct

involving the nonconsensual disclosure of intimate images.

Key Definitions.

"Disclosure" means transferring, publishing, disseminating, or making a digital depiction available for distribution or downloading through the facilities of a telecommunications network, or through other means of transferring computer programs or data to a computer.

"Intimate image" means any photograph, film, videotape, digital image, or other record of another person who is identifiable from the image itself or from information displayed with or otherwise connected to the image, and that was taken in a private setting, is not a matter of public concern, and depicts:

- sexual activity, including sexual intercourse and masturbation; or
- a person's intimate body parts, whether nude or visible through less than opaque clothing, including the genitals, pubic area, anus, or postpubescent female nipple.

Criminal Penalties.

A person commits the offense of Disclosing Intimate Images if the person knowingly discloses an intimate image of another person and the person disclosing the image:

- obtained it under circumstances in which a reasonable person would know or understand that the image was to remain private;
- knows or should have known that the depicted person has not consented to the disclosure; and
- knows or reasonably should know that disclosure would cause harm to the depicted person.

A person age 17 or younger commits Disclosing Intimate Images only if the person:

- intentionally and maliciously disclosed an intimate image of another person;
- obtained the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and
- knows or should have known that the depicted person has not consented to the disclosure.

It is an affirmative defense to Disclosing Intimate Images that the defendant is a family member of a minor and did not intend harm or harassment in disclosing an image of the minor to the defendant's family or friends. Additionally, the prohibitions on disclosing an intimate image do not apply to:

- images involving voluntary exposure in public or commercial settings;
- disclosures made in the public interest including, but not limited to, reporting of unlawful conduct, or the lawful and common practices of law enforcement, criminal reporting, legal proceedings, or medical treatment; or
- an interactive computer service, mobile telecommunications service provider, or a telecommunications network or broadband provider, in regards to content provided by another person.

Disclosing Intimate Images is a gross misdemeanor for a defendant's first conviction, and an

unranked class C felony for a second or subsequent conviction.

Civil Cause of Action.

A depicted individual who is identifiable in a private intimate image, and who suffers harm from a person's intentional disclosure or threatened disclosure of the image without the depicted individual's consent, has a cause of action under the Uniform Civil Remedies for the Unauthorized Disclosure of Intimate Images Act (UCRUDIIA) against the person if the person knew or acted with reckless disregard for whether:

- the depicted individual did not consent to the disclosure;
- the intimate image was private; and
- the depicted individual was identifiable.

A person is not liable under the UCRUDIIA if the disclosure of an intimate image was:

- made in good faith in law enforcement activities, legal proceedings, or medical education or treatment;
- made in good faith in the reporting or investigation of unlawful conduct, or unsolicited and unwelcome conduct;
- related to a matter of public concern or public interest; or
- reasonably intended to assist the depicted individual.

Disclosure of an intimate image is not a matter of public concern or public interest solely because the depicted individual is a public figure. A defendant who is a parent, legal guardian, or individual with legal custody of a child is not liable for disclosure of an intimate image of the child, unless the disclosure was prohibited by law other than the UCRUDIIA or made for the purpose of sexual arousal, sexual gratification, humiliation, degradation, or monetary or commercial gain.

Classification of Crimes.

Crimes are classified as misdemeanors, gross misdemeanors, or class A, B, or C felonies. While there are exceptions, the classification of a crime generally determines the maximum term of confinement and fine for an offense. For each classification, the maximum terms of confinement and maximum fines are as follows:

Classification	Maximum Confinement	Maximum Fine
Misdemeanor	90 Days	\$1,000
Gross Misdemeanor	364 Days	\$5,000
Class C Felony	5 Years	\$10,000
Class B Felony	10 Years	\$20,000
Class A Felony	Life	\$50,000

For most felony offenses, the Sentencing Reform Act determines a specific sentence range within the statutory maximum according to a sentencing grid. The sentencing grid provides

a standard range of months for the sentence, based on both the severity, or "seriousness level," of the offense and the convicted person's "offender score," which is based on the person's criminal history.

Summary of Substitute Bill:

Fabricated Depictions of a Minor Engaged in Sexually Explicit Conduct.

The existing criminal offenses prohibiting the dealing in, sending or bringing into the state of, possessing of, or viewing of depictions of a minor engaged in sexually explicit conduct are expanded to include circumstances involving fabricated depictions of an identifiable minor. The corresponding criminal penalties for those offenses, the applicability of those offenses depending on the ages of the perpetrator and the depicted minor, the available defenses and immunities for those offenses, and the provisions governing forfeiture and seizure of certain property related to those offenses are the same regardless of whether a depiction is fabricated or real, except for the following:

- The prosecutor is required to establish the identity of the alleged victim in a prosecution for an offense involving a fabricated depiction of an identifiable minor.
- It is not a defense in a prosecution for an offense involving a fabricated depiction of an identifiable minor that the defendant lacked knowledge of whether the fabricated depiction had been created or altered by digitization.

"Fabricated depiction of an identifiable minor" and "fabricated depiction" mean any visual or printed matter that depicts a minor who is identifiable from the matter itself or from information displayed with or otherwise connected to the matter, and that was created or altered by digitization to depict the minor engaging in sexually explicit conduct in which the minor did not actually engage. "Digitization" means creating or altering any visual or printed matter depicting a minor in a realistic manner utilizing images of another person or computer generated images, regardless of whether such creation or alteration is accomplished manually or through an automated process, which includes, but is not limited to, creation or alteration of any visual or printed matter by using artificial intelligence.

Disclosing Intimate Images and Disclosing Fabricated Intimate Images.

Criminal Penalties.

The offense of Disclosing Fabricated Intimate Images is established. A person commits the offense if the person knowingly discloses a fabricated intimate image of another person and the person disclosing the image:

- knows or should have known that the depicted person has not consented to the disclosure; and
- knows or reasonably should know that disclosure would cause harm to the depicted person.

A person age 17 or younger commits Disclosing Fabricated Intimate Images only if the person:

- intentionally and maliciously disclosed a fabricated intimate image of another person; and
- knows or should have known that the depicted person has not consented to the disclosure.

It is not a defense that the perpetrator lacked knowledge of whether the disclosed image had been created or altered by digitization, or that the depicted person consented to the creation or alteration of the image. The prohibitions on disclosing a fabricated intimate image do not apply to:

- disclosures made in the public interest including, but not limited to, reporting of unlawful conduct, or the lawful and common practices of law enforcement, criminal reporting, legal proceedings, or medical treatment; or
- an interactive computer service, mobile telecommunications service provider, or a telecommunications network or broadband provider, in regards to content provided by another person.

The offenses of Disclosing Fabricated Intimate Images and Disclosing Intimate Images are both categorized as gross misdemeanors for a defendant's first conviction, and as unranked class C felonies if the defendant has one or more prior convictions for Disclosing Fabricated Intimate Images or Disclosing Intimate Images.

"Fabricated intimate image" means any photograph, motion picture film, videotape, digital image, or any other recording or transmission of another person who is identifiable from the image itself, or from information displayed with or otherwise connected to the image, and that was created or altered by digitization to depict:

- computer-generated intimate body parts or the intimate body parts of another person as the intimate body parts of the depicted person, whether nude or visible through less than opaque clothing and including the genitals, pubic area, anus, or postpubescent female nipple; or
- the depicted person engaging in sexual activity, including masturbation, sexual contact, or sexual intercourse, in which the depicted person did not actually engage.

Civil Cause of Action.

A civil cause of action is established under the Uniform Civil Remedies for the Unauthorized Disclosure of Intimate Images Act (UCRUDIIA) for the nonconsensual disclosure of fabricated intimate images. A depicted individual who is identifiable and who suffers harm from a person's intentional disclosure or threatened disclosure of a fabricated intimate image without the depicted individual's consent has a cause of action against the person if the person knew or acted with reckless disregard for whether:

- the depicted individual did not consent to the disclosure; and
- the depicted individual was identifiable.

A depicted individual's consent to the creation of the fabricated intimate image does not by itself establish consent to disclosure. Consent is deemed valid only if:

- it is set forth in an agreement written in plain language signed knowingly and voluntarily by the depicted individual; and
- it includes a general description of the fabricated intimate image and, if applicable, the audiovisual work into which it will be incorporated.

It is not a defense to an action for disclosure of a fabricated intimate image that there is a disclaimer stating that the image of the depicted individual was unauthorized or that the depicted individual did not participate in the creation or development of the image. Disclosure of a fabricated intimate image is not a matter of public concern or public interest solely because the depicted individual is a public figure. A person is not liable under the UCRUDIIA for disclosure of a fabricated intimate image if the image is commentary, criticism, or disclosure protected by the state or federal constitutions, or if disclosure of the image is:

- made in good faith in law enforcement activities, legal proceedings, or medical education or treatment;
- made in good faith in the reporting or investigation of unlawful conduct, or unsolicited and unwelcome conduct;
- related to a matter of public concern or public interest; or
- reasonably intended to assist the depicted individual.

Substitute Bill Compared to Original Bill:

The substitute bill: (1) eliminates the new criminal offenses prohibiting the dealing in, sending or bringing into the state, possessing, or viewing of fabricated depictions of a minor engaged in sexually explicit conduct, and instead expands the equivalent offenses involving nonfabricated depictions under current law to apply to situations involving fabricated depictions of an identifiable minor; and (2) modifies the definition of "digitization" to include the creation or alteration of visual or printed matter by using artificial intelligence, rather than by using artificial intelligence software.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on January 29, 2024.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) We should not be surprised when technology creates things that the government has not contemplated. Although artificial intelligence tools are new, their use is already prolific and only continues to grow. We live in a new world where a person's face can be transposed onto a fabricated image of another body doing things the person did

not do. These images cause serious long-term trauma and emotional and reputational harm to the depicted person regardless of whether the images are real or manufactured. We know that victims are stalked and harassed by people who see these images years later, that it is difficult to get platforms to remove these images, and that the circulation of these images can cause suicidal ideation, depression, and substance abuse. This bill provides an opportunity to give survivors a path to justice and makes a clear statement that these are harmful, damaging acts, especially to young survivors. The criminal justice system does not always make survivors whole, which is why adding a civil cause of action for the disclosure of fabricated intimate images under the Uniform Civil Remedies for the Unauthorized Disclosure of Intimate Images Act is an important component.

Some federal cases have distinguished between real and fake persons and recognized that there is also a category of modified persons that exists somewhere in the middle. The federal case law is generally supportive of prosecution in a dynamic that involves modified persons. This bill should be amended to expand the existing child sex crime statutes rather than create entirely new offenses. Prosecutors would otherwise have to overcharge by using both sets of statutes, and there would be procedural challenges in circumstances where law enforcement officers discover an image but do not know whether it is authentic or fabricated. These issues could lead to anti-police activists levying decertification complaints. The same public safety goals can be accomplished by combining the new offenses into the existing statutes.

(Opposed) None.

Persons Testifying: Representative Tina Orwall, prime sponsor; Barbara Mack; Caroline Mullet; James McMahan, Washington Association of Sheriffs and Police Chiefs; Russell Brown, Washington Association of Prosecuting Attorneys; and Leah Griffin, Washington State Association for Justice.

Persons Signed In To Testify But Not Testifying: None.