

SENATE BILL REPORT

SHB 1999

As Reported by Senate Committee On:
Law & Justice, February 20, 2024

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: House Committee on Community Safety, Justice, & Reentry (originally sponsored by Representatives Orwall, Leavitt, Ryu, Duerr, Ramos, Morgan, Taylor, Ormsby, Graham, Callan, Rule, Street, Lekanoff, Reeves, Shavers and Davis).

Brief History: Passed House: 2/8/24, 95-0.

Committee Activity: Law & Justice: 2/16/24, 2/20/24 [DP, w/oRec].

Brief Summary of Bill

- Expands certain criminal offenses related to depictions of a minor engaged in sexually explicit conduct to include fabricated depictions of an identifiable minor.
- Establishes the offense of disclosing fabricated intimate images.
- Establishes a civil cause of action 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.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass.

Signed by Senators Dhingra, Chair; Trudeau, Vice Chair; Padden, Ranking Member; Kuderer, McCune, Pedersen, Salomon, Torres, Valdez and Wilson, L..

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.

Minority Report: That it be referred without recommendation.

Signed by Senator Wagoner.

Staff: Ryan Giannini (786-7285)

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.

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.

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. 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 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 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.

A court imposing a sentence for an unranked felony must impose a determinate sentence which may include up to one year of confinement.

Summary of 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 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 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 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.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: We are seeing that with new technologies, indistinguishable fabricated images and explicit content can easily be created with artificial intelligence. This includes AI-generated child porn, revenge porn, and deepfakes. In most cases, people do not know that such fabricated images or explicit content have been created. Nonconsensual fabricated images can cause significant emotional and reputational harm, such as being used to embarrass or coerce. Victims of fabricated images have limited recourse. This legislation takes existing statutes and modifies them slightly to provide recourse to victims.

CON: There is concern about the constitutionality of expanding the current depiction offenses to include fabricated depictions, and regarding the assigned seriousness level and felony classes. Convictions of individuals in possession of a fabricated depiction where no child was harmed during the creation of the depiction and convictions of individuals in possession of a depiction where a child was sexually abused during the creation of the depiction have the same punishment. The Legislature is expected to create criminal laws that are constitutional and proportional to the harms inflicted. This bill does not meet that criteria.

Persons Testifying: PRO: Representative Tina Orwall, Prime Sponsor; Lily Jensen; James

McMahan, WA Assoc Sheriffs & Police Chiefs; Leah Griffin, Washington State Association for Justice; Russell Brown, WA Association of Prosecuting Attorneys.

CON: Joanne Smieja.

Persons Signed In To Testify But Not Testifying: No one.