

SENATE BILL REPORT

ESSB 5105

As Passed Senate, February 5, 2025

Title: An act relating to sexually explicit depictions of minors.

Brief Description: Concerning sexually explicit depictions of minors.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Orwall, Christian, Dhingra, Nobles, Salomon, Wellman and Wilson, C.).

Brief History:

Committee Activity: Law & Justice: 1/16/25, 1/23/25 [DPS].

Floor Activity: Passed Senate: 2/5/25, 49-0.

Brief Summary of Engrossed First Substitute Bill

- Expands the definition of fabricated depictions to include obscene visual or printed matter.
- Clarifies certain defenses to prosecutions for offenses involving depictions of a minor engaged in sexually explicit conduct.
- Expands the crime of sexual exploitation of a minor.
- Increases the statute of limitations for certain offenses involving depictions of a minor engaged in sexually explicit conduct.
- Establishes immunity from criminal liability for certain persons who process or produce visual or printed matter as part of an action to prevent fabricated depictions if such persons make a timely, good faith report to proper law enforcement agencies.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5105 be substituted therefor, and the substitute bill do pass.

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.

Signed by Senators Dhingra, Chair; Trudeau, Vice Chair; Holy, Ranking Member; Fortunato, Lovick, Salomon, Torres, Valdez and Wagoner.

Staff: Ryan Giannini (786-7285)

Background: Depictions of 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. Visual or printed matter includes fabricated depictions of an identifiable minor.

Different offenses or penalties may apply depending on the ages of the perpetrator and the depicted minor.

Obscenity. The First Amendment of the U.S. Constitution and Article 1, Section 5 of the Washington State Constitution protect freedom of speech. Neither the federal nor state constitutions consider obscenity to be a protected form of speech. Both allow obscenity to be regulated or completely prohibited.

Defenses and Immunities Regarding Depictions of Minor Engaged in Sexually Explicit Conduct. *Defenses.* State law specifies 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 is not a defense in a prosecution for an offense involving a fabricated depiction of a minor engaged in sexually explicit conduct that the defendant lacked knowledge of whether the fabricated depiction had been created or altered by digitization.

State law also specifies circumstances that do constitute a defense to certain prosecutions. For example, the prosecutor is required to establish the identity of the alleged victim in a prosecution for an offense involving a fabricated depiction of a minor engaged in sexually explicit conduct.

Civil Immunity. A person who, in the course of processing or producing visual or printed matter either privately or commercially, has reasonable cause to believe that the visual or printed matter submitted for processing or producing depicts a minor engaged in sexually explicit conduct, and who reports such incident in good faith to the proper law enforcement agency, is immune from civil liability resulting from the report. Persons failing to do so are guilty of a gross misdemeanor.

Statute of Limitations for Offenses Involving Depictions of a Minor Engaged in Sexually Explicit Conduct. A statute of limitations provides an authorized period of time for initiating a prosecution after a crime is committed. Once the applicable statute of limitations has expired, a prosecutor is barred from bringing charges against the alleged

perpetrator. Statutes of limitation vary according to the crime.

Felony offenses related to dealing in, sending or bringing into the state, possessing, and viewing depictions or fabricated depictions of a minor engaged in sexually explicit conduct are considered sex offenses and must be prosecuted within three years of the commission of the crime.

In a prosecution for a sex offense, the applicable statute of limitations begins to run from whichever of the following dates is later:

- the date the crime was committed; or
- four years from the date the identity of the suspect is conclusively established by DNA testing or by photograph.

Sexual Exploitation of a Minor. A person commits the offense of sexual exploitation of a minor if the person:

- compels a minor by threat or force to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance;
- aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance; or
- permits a minor to engage in sexually explicit conduct, knowing that the conduct will be photographed or part of a live performance, when the person is a parent, legal guardian, or person with custody or control of the minor.

Sexual exploitation of a minor is a class B felony.

Summary of Engrossed First Substitute Bill: Depictions of Minors Engaged in Sexually Explicit Conduct. The definition of "fabricated depiction" is expanded to mean any visual or printed matter that is created or altered by digitization to depict a minor engaging in sexually explicit conduct and: (1) the minor is identifiable, or (2) is obscene.

Obscenity. Obscenity is defined as any matter:

- which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest;
- which the average person, applying contemporary community standards, would find explicitly depicts or describes patently offensive representations or descriptions of sexually explicit conduct; and
- which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

Defenses and Immunities Regarding Depictions of Minors Engaged in Sexually Explicit Conduct. *Defenses.* The requirement for the state to establish the identity of the alleged victim for prosecutions related to obscene fabricated depictions of minors engaged in sexually explicit conduct is eliminated. Additionally, it is not a defense that the defendant

lacked knowledge of whether the depicted minor in such prosecutions actually exists.

Criminal Immunity. Immunity from criminal liability is provided for persons who, in the course of processing or producing visual or printed matter as part of an action to prevent, detect, protect against, report, or respond to the production, generation, incorporation, or synthesization through artificial intelligence of fabricated depictions, has reasonable cause to believe the visual or printed matter depicts a minor engaged in sexually explicit conduct and who immediately make a good faith report, or cause a report to be made, to the proper law enforcement agency. Persons who fail to report are guilty of a gross misdemeanor.

Statute of Limitations for Offenses Involving Depictions of a Minor Engaged in Sexually Explicit Conduct. The statute of limitations is increased from three years to ten years for offenses related to dealing in, sending or bringing into the state, possessing, and viewing depictions of a minor engaged in sexually explicit conduct.

Sexual Exploitation of a Minor. The crime of sexual exploitation of a minor is expanded to include instances where a person knowingly causes an unconscious or unaware minor to be photographed or part of a live performance which depicts the minor engaged in sexually explicit conduct.

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 on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: There has been a huge volume increase on the Internet of child sexual abuse material (CSAM) due to the exponential growth in capabilities of AI. These images may result in increased sexual interest in children and may lower the boundaries for offenders to commit other child offenses. CSAM images can be filtered or distorted to avoid detection by law enforcement. Current law requires the state to prove that the child is real, which is becoming impossible. Defendants can claim that the child is not real or that the defendant did not know the child was real. This bill ensure that no predator can hide behind technicalities. Fabricated depictions of minors engaged in sexual exploitation is not a victimless crime. The harm of portraying children in sexual images is done whether or not the images are actual children. There is no reason to make a policy distinction between identifiable or nonidentifiable minors engaged in sex acts. Funds, education, and preventative programs should also be considered to complement enforcement. Tying the definition of fabricated depictions to obscenity would make it lawful under the First Amendment.

CON: Removing the requirement that a minor be identifiable may conflict with the First Amendment per the U.S. Supreme Court's ruling in *Ashcroft v. Free Speech Coalition*. It moves a clear standard to one that does not give notice of the prohibited conduct, since there is no legal or standard definition of obscenity. The government cannot prohibit legal speech merely because it has a tendency to persuade viewers to engage in illegal activity. Shifting focus and priority away from supporting specific identified victims of abuse and the legal complications undermine what HB 1999 was meant to do. This bill also ends up legalizing fabricated sexual images of specific identified minors that do not meet the legal definition of obscenity.

OTHER: Most companies have dedicated teams that monitor websites to identify potential CSAM. Federal law requires such companies that identify potential CSAM to provide that information to the National Center for Missing and Exploited Children. When development teams create new AI software programs, they pressure test the program and must also report any creation of CSAM per federal requirements. Amendments are requested to ensure that companies would not be found liable for continuing their efforts to scour their websites for CSAM and to hold harmless development teams from doing pressure tests on new AI software programs.

Persons Testifying: PRO: Senator Tina Orwall, Prime Sponsor; Laura Harmon; Noel Gomez, Washington against sexual exploitation (WASE Forward); Salim Nice, City Mercer Island; Morgan Irwin, Association of Washington Business; James McMahan, WA Assoc Sheriffs & Police Chiefs; Paula Sardinias, WBBA (WA Build Black Alliance).

CON: Ramona Brandes, Washington Defender Association/Washington Association of Criminal Defense Lawyers; Keri-Anne Jetzer, WA State Sentencing Guidelines Commission; emi koyama, Coalition for Rights & Safety.

OTHER: Rose Feliciano, TechNet.

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