

# HOUSE BILL No. 5954

October 19, 2016, Introduced by Rep. Canfield and referred to the Committee on Criminal Justice.

A bill to amend 1931 PA 328, entitled "The Michigan penal code," by amending section 145c (MCL 750.145c), as amended by 2012 PA 583.

## **THE PEOPLE OF THE STATE OF MICHIGAN ENACT:**

1       Sec. 145c. (1) As used in this section:

2       (a) "Access" means to intentionally cause to be viewed by or  
3 transmitted to a person.

4       (b) "Appears to include a child" means that the depiction  
5 appears to include, or conveys the impression that it includes, a  
6 person who is less than 18 years of age, and the depiction meets  
7 either of the following conditions:

8       (i) It was created using a depiction of any part of an actual  
9 person under the age of 18.

10       (ii) It was not created using a depiction of any part of an  
11 actual person under the age of 18, but all of the following apply

1 to that depiction:

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

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

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

10 (c) "Child" means a person who is less than 18 years of age,  
11 subject to the affirmative defense created in subsection ~~(6)~~-(7)  
12 regarding persons emancipated by operation of law.

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

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

21 (f) "Contemporary community standards" means the customary  
22 limits of candor and decency in this state at or near the time of  
23 the alleged violation of this section.

24 (g) "Erotic fondling" means touching a person's clothed or  
25 unclothed genitals, pubic area, buttocks, or, if the person is  
26 female, breasts, or if the person is a child, the developing or  
27 undeveloped breast area, for the purpose of real or simulated overt

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

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

10 (i) "Listed sexual act" means sexual intercourse, erotic  
11 fondling, sadomasochistic abuse, masturbation, passive sexual  
12 involvement, sexual excitement, or erotic nudity.

13 (j) "Make" means to bring into existence by copying, shaping,  
14 changing, or combining material, and specifically includes, but is  
15 not limited to, intentionally creating a reproduction, copy, or  
16 print of child sexually abusive material, in whole or part. Make  
17 does not include the creation of an identical reproduction or copy  
18 of child sexually abusive material within the same digital storage  
19 device or the same piece of digital storage media.

20 (k) "Masturbation" means the real or simulated touching,  
21 rubbing, or otherwise stimulating of a person's own clothed or  
22 unclothed genitals, pubic area, buttocks, or, if the person is  
23 female, breasts, or if the person is a child, the developing or  
24 undeveloped breast area, either by manual manipulation or self-  
25 induced or with an artificial instrument, for the purpose of real  
26 or simulated overt sexual gratification or arousal of the person.

27 (l) "Passive sexual involvement" means an act, real or

1 simulated, that exposes another person to or draws another person's  
2 attention to an act of sexual intercourse, erotic fondling,  
3 sadomasochistic abuse, masturbation, sexual excitement, or erotic  
4 nudity because of viewing any of these acts or because of the  
5 proximity of the act to that person, for the purpose of real or  
6 simulated overt sexual gratification or stimulation of 1 or more of  
7 the persons involved.

8 (m) "Prurient interest" means a shameful or morbid interest in  
9 nudity, sex, or excretion.

10 (n) "Child sexually abusive activity" means a child engaging  
11 in a listed sexual act.

12 (o) "Child sexually abusive material" means any depiction,  
13 whether made or produced by electronic, mechanical, or other means,  
14 including a developed or undeveloped photograph, picture, film,  
15 slide, video, electronic visual image, computer diskette, computer  
16 or computer-generated image, or picture, or sound recording which  
17 is of a child or appears to include a child engaging in a listed  
18 sexual act; a book, magazine, computer, computer storage device, or  
19 other visual or print or printable medium containing such a  
20 photograph, picture, film, slide, video, electronic visual image,  
21 computer, or computer-generated image, or picture, or sound  
22 recording; or any reproduction, copy, or print of such a  
23 photograph, picture, film, slide, video, electronic visual image,  
24 book, magazine, computer, or computer-generated image, or picture,  
25 other visual or print or printable medium, or sound recording.

26 (p) "Sadomasochistic abuse" means either of the following:

27 (i) Flagellation or torture, real or simulated, for the

1 purpose of real or simulated sexual stimulation or gratification,  
2 by or upon a person.

3 (ii) The condition, real or simulated, of being fettered,  
4 bound, or otherwise physically restrained for sexual stimulation or  
5 gratification of a person.

6 (q) "Sexual excitement" means the condition, real or  
7 simulated, of human male or female genitals in a state of real or  
8 simulated overt sexual stimulation or arousal.

9 (r) "Sexual intercourse" means intercourse, real or simulated,  
10 whether genital-genital, oral-genital, anal-genital, or oral-anal,  
11 whether between persons of the same or opposite sex or between a  
12 human and an animal, or with an artificial genital.

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

1 determine the age of the child.

2 (3) A person who distributes or promotes, or finances the  
3 distribution or promotion of, or receives for the purpose of  
4 distributing or promoting, or conspires, attempts, or prepares to  
5 distribute, receive, finance, or promote any child sexually abusive  
6 material or child sexually abusive activity is guilty of a felony,  
7 punishable by imprisonment for not more than 7 years, or a fine of  
8 not more than \$50,000.00, or both, if that person knows, has reason  
9 to know, or should reasonably be expected to know that the child is  
10 a child or that the child sexually abusive material includes a  
11 child or that the depiction constituting the child sexually abusive  
12 material appears to include a child, or that person has not taken  
13 reasonable precautions to determine the age of the child. This  
14 subsection does not apply to the persons described in section 7 of  
15 1984 PA 343, MCL 752.367.

16 (4) ~~A~~**EXCEPT AS PROVIDED IN SUBSECTION (5),** A person who  
17 knowingly possesses or knowingly seeks and accesses any child  
18 sexually abusive material is guilty of a felony punishable **AS**  
19 **FOLLOWS:**

20 **(A) EXCEPT AS PROVIDED IN SUBDIVISION (B),** by imprisonment for  
21 not more than 4 years or a fine of not more than \$10,000.00, or  
22 both, if that person knows, has reason to know, or should  
23 reasonably be expected to know the child is a child or that the  
24 child sexually abusive material includes a child or that the  
25 depiction constituting the child sexually abusive material appears  
26 to include a child, or that person has not taken reasonable  
27 precautions to determine the age of the child. ~~This subsection~~

1           (B) IF BOTH OF THE FOLLOWING APPLY, BY IMPRISONMENT FOR NOT  
2 MORE THAN 7 YEARS OR A FINE OF NOT MORE THAN \$50,000.00, OR BOTH:

3           (i) THE CHILD SEXUALLY ABUSIVE MATERIAL DEPICTS A PREPUBESCENT  
4 CHILD OR A CHILD LESS THAN 12 YEARS OF AGE, DEPICTS SADOMASOCHISTIC  
5 ABUSE OR BESTIALITY, OR INCLUDES MORE THAN 100 IMAGES OF CHILD  
6 SEXUALLY ABUSIVE MATERIAL.

7           (ii) THE PERSON KNOWS, HAS REASON TO KNOW, OR SHOULD  
8 REASONABLY BE EXPECTED TO KNOW THAT THE DEPICTED CHILD IS A CHILD  
9 OR THAT THE SEXUALLY ABUSIVE MATERIAL INCLUDES A CHILD OR THAT THE  
10 DEPICTION CONSTITUTING THE CHILD SEXUALLY ABUSIVE MATERIAL APPEARS  
11 TO INCLUDE A CHILD, OR THE PERSON HAS NOT TAKEN REASONABLE  
12 PRECAUTIONS TO DETERMINE THE AGE OF THE DEPICTED CHILD.

13           (5) SUBSECTION (4) does not apply to any of the following:

14           (a) A person described in section 7 of 1984 PA 343, MCL  
15 752.367, a commercial film or photographic print processor acting  
16 under subsection ~~(8)~~, ~~(9)~~, or a computer technician acting under  
17 subsection ~~(9)~~. ~~(10)~~.

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

20           (c) An employee or contract agent of the department of social  
21 services acting within the scope of his or her duties as an  
22 employee or contract agent.

23           (d) A judicial officer or judicial employee acting within the  
24 scope of his or her duties as a judicial officer or judicial  
25 employee.

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

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

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

9 **(6)** ~~(5)~~—Expert testimony as to the age of the child used in a  
10 child sexually abusive material or a child sexually abusive  
11 activity is admissible as evidence in court and may be a legitimate  
12 basis for determining age, if age is not otherwise proven.

13 **(7)** ~~(6)~~—It is an affirmative defense to a prosecution under  
14 this section that the alleged child is a person who is emancipated  
15 by operation of law under section 4(2) of 1968 PA 293, MCL 722.4,  
16 as proven by a preponderance of the evidence.

17 **(8)** ~~(7)~~—If a defendant in a prosecution under this section  
18 proposes to offer in his or her defense evidence to establish that  
19 a depiction that appears to include a child was not, in fact,  
20 created using a depiction of any part of an actual person under the  
21 age of 18, the defendant shall at the time of the arraignment on  
22 the information or within 15 days after arraignment but not less  
23 than 10 days before the trial of the case, or at such other time as  
24 the court directs, file and serve upon the prosecuting attorney of  
25 record a notice in writing of his or her intention to offer that  
26 defense. The notice shall contain, as particularly as is known to  
27 the defendant or the defendant's attorney, the names of witnesses



1 to be called in behalf of the defendant to establish that defense.  
2 The defendant's notice shall include specific information as to the  
3 facts that establish that the depiction was not, in fact, created  
4 using a depiction of any part of an actual person under the age of  
5 18. Failure to file a timely notice in conformance with this  
6 subsection precludes a defendant from offering this defense.

7       **(9)** ~~(8)~~—If a commercial film or photographic print processor  
8 reports to a law enforcement agency having jurisdiction his or her  
9 knowledge or observation, within the scope of his or her  
10 professional capacity or employment, of a film, photograph, movie  
11 film, videotape, negative, or slide depicting a person that the  
12 processor has reason to know or reason to believe is a child  
13 engaged in a listed sexual act; furnishes a copy of the film,  
14 photograph, movie film, videotape, negative, or slide to a law  
15 enforcement agency having jurisdiction; or keeps the film,  
16 photograph, movie film, videotape, negative, or slide according to  
17 the law enforcement agency's instructions, both of the following  
18 shall apply:

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

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

26       **(10)** ~~(9)~~—If a computer technician reports to a law enforcement  
27 agency having jurisdiction his or her knowledge or observation,

1 within the scope of his or her professional capacity or employment,  
2 of an electronic visual image, computer-generated image or picture  
3 or sound recording depicting a person that the computer technician  
4 has reason to know or reason to believe is a child engaged in a  
5 listed sexual act; furnishes a copy of that image, picture, or  
6 sound recording to the law enforcement agency; or keeps the image,  
7 picture, or sound recording according to the law enforcement  
8 agency's instructions, both of the following apply:

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

12 (b) If the computer technician acted in good faith, he or she  
13 is immune from civil liability that might otherwise be incurred by  
14 his or her actions. This immunity extends only to acts described in  
15 this subsection.

16 **(11)** ~~(10)~~—In any criminal proceeding regarding an alleged  
17 violation or attempted violation of this section, the court shall  
18 deny any request by the defendant to copy, photograph, duplicate,  
19 or otherwise reproduce any photographic or other pictorial evidence  
20 of a child engaging in a listed sexual act if the prosecuting  
21 attorney makes that evidence reasonably available to the defendant.  
22 Evidence is considered to be reasonably available to the defendant  
23 under this subsection if the prosecuting attorney provides an  
24 opportunity to the defendant and his or her attorney, and any  
25 person the defendant may seek to qualify as an expert witness at  
26 trial, to inspect, view, and examine that evidence at a facility  
27 approved by the prosecuting attorney.

1           **(12)** ~~(11)~~ This section applies uniformly throughout the state  
2 and all political subdivisions and municipalities in the state.

3           **(13)** ~~(12)~~ A local municipality or political subdivision shall  
4 not enact any ordinance or enforce any existing ordinance, rule, or  
5 regulation governing child sexually abusive activity or child  
6 sexually abusive material. ~~as defined by this section.~~

7           **(14) IF A PERSON IS CONVICTED OF A SECOND OR SUBSEQUENT**  
8 **OFFENSE UNDER THIS SECTION, THE SENTENCE IMPOSED FOR A SECOND OR**  
9 **SUBSEQUENT OFFENSE IS A MANDATORY MINIMUM SENTENCE OF NOT LESS THAN**  
10 **5 YEARS. FOR THE PURPOSES OF THIS SECTION, AN OFFENSE IS CONSIDERED**  
11 **A SECOND OR SUBSEQUENT OFFENSE IF, PRIOR TO CONVICTION OF THE**  
12 **SECOND OR SUBSEQUENT OFFENSE, THE PERSON HAS BEEN CONVICTED UNDER**  
13 **THIS SECTION OR OF ANOTHER CRIME INVOLVING A SEXUAL OFFENSE AGAINST**  
14 **A MINOR, OR UNDER A SUBSTANTIALLY SIMILAR STATUTE OF ANOTHER STATE**  
15 **OR OF THE UNITED STATES.**

16           Enacting section 1. This amendatory act takes effect 90 days  
17 after the date it is enacted into law.