

SENATE BILL No. 1328

May 20, 2008, Introduced by Senators KUIPERS and GLEASON and referred to the Committee on Judiciary.

A bill to amend 1931 PA 328, entitled
"The Michigan penal code,"
by amending section 145c (MCL 750.145c), as amended by 2004 PA 478.

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

1 actual person under the age of 18, but all of the following apply
2 to that depiction:

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

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

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

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

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

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

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

25 (f) "Erotic fondling" means touching a person's clothed or
26 unclothed genitals, pubic area, buttocks, or, if the person is
27 female, breasts, or if the person is a child, the developing or

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

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

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

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

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

1 the persons involved.

2 (k) "Prurient interest" means a shameful or morbid interest in
3 nudity, sex, or excretion.

4 (l) "Child sexually abusive activity" means a child engaging in
5 a listed sexual act.

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

20 (n) "Sadomasochistic abuse" means either of the following:

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

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

27 (o) "Sexual excitement" means the condition, real or

1 simulated, of human male or female genitals in a state of real or
2 simulated overt sexual stimulation or arousal.

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

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

22 (3) A person who distributes or promotes, or finances the
23 distribution or promotion of, or receives for the purpose of
24 distributing or promoting, or conspires, attempts, or prepares to
25 distribute, receive, finance, or promote any child sexually abusive
26 material or child sexually abusive activity is guilty of a felony,
27 punishable by imprisonment for not more than 7 years, or a fine of

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

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

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

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

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

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

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

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

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

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

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

22 (7) If a defendant in a prosecution under this section
23 proposes to offer in his or her defense evidence to establish that
24 a depiction that appears to include a child was not, in fact,
25 created using a depiction of any part of an actual person under the
26 age of 18, the defendant shall at the time of the arraignment on
27 the information or within 15 days after arraignment but not less

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

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

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

27 (b) If the processor acted in good faith, he or she shall be

1 immune from civil liability that might otherwise be incurred by his
2 or her actions. This immunity extends only to acts described in
3 this subsection.

4 (9) A COMPUTER TECHNICIAN WHO HAS KNOWLEDGE OF OR OBSERVES
5 CHILD SEXUALLY ABUSIVE MATERIAL WITHIN THE SCOPE OF HIS OR HER
6 PROFESSIONAL CAPACITY OR EMPLOYMENT SHALL REPORT THAT KNOWLEDGE OR
7 OBSERVATION TO THE LOCAL LAW ENFORCEMENT AGENCY. A COMPUTER
8 TECHNICIAN WHO FAILS TO REPORT KNOWLEDGE OR OBSERVATION OF CHILD
9 SEXUALLY ABUSIVE MATERIAL AS REQUIRED IN THIS SUBSECTION IS GUILTY
10 OF A MISDEMEANOR PUNISHABLE BY IMPRISONMENT FOR 93 DAYS OR A FINE
11 OF \$500.00, OR BOTH. If a computer technician reports to a law
12 enforcement agency having jurisdiction his or her knowledge or
13 observation, within the scope of his or her professional capacity
14 or employment, of an electronic visual image, computer-generated
15 image or picture or sound recording depicting a person that the
16 computer technician has reason to know or reason to believe is a
17 child engaged in a listed sexual act; furnishes a copy of that
18 image, picture, or sound recording to the law enforcement agency;
19 or keeps the image, picture, or sound recording according to the
20 law enforcement agency's instructions, both of the following shall
21 apply:

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

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

1 described in this subsection.

2 (10) This section applies uniformly throughout the state and
3 all political subdivisions and municipalities in the state.

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