

BILL ANALYSIS

Senate Research Center

S.B. 1621
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Criminal Justice
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Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

With the advancement of technology comes new crimes that state law may not be able to address within the current construction of a given statute. Specifically, in the case of deepfake technology and artificial intelligence (AI), which allow individuals to create sexually explicit visual material of another person, the state must now take action in order to combat predators who create explicit visual material involving minors.

S.B. 1621 is a delete-and-re-write of our current child pornography statute to better take into account the advances in A.I.-generated content. The bill creates two new distinct definitions of "depiction of a child" and "depiction of a computer-generated child," along with updating the prosecutorial standards and penalty ranges for various amounts and types of those materials.

S.B. 1621 amends current law relating to prosecution and punishment of certain criminal offenses prohibiting sexually explicit visual material involving depictions of children, computer-generated children, or other persons; creates criminal offenses; and increases criminal penalties.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 43.26, Penal Code, by amending Subsections (a), (e), (g), and (h) and adding Subsections (a-1), (a-2), (c-1), (c-2), (c-3), (c-4), (e-1), (f), (g-1), (h-1), and (h-2), as follows:

(a) Defines "depiction of a child," "depiction of a computer-generated child," "promote," "sexual conduct," "school library," and "visual material."

(a-1) Creates this subsection from existing text. Provides that a person commits an offense if:

(1) the person intentionally or knowingly possesses, or intentionally or knowingly accesses with intent to view, visual material that contains a visual depiction of, rather than that visually depicts, a child, rather than a child younger than 18 years of age at the time the image of the child was made who is, engaging in sexual conduct, including a depiction of a child engaging in sexual conduct as a victim of an offense under certain provisions of Section 20A.02 (Trafficking of Persons); and

(2) the person knows or should have known that the depiction described by Subdivision (1) is of a child younger than 18 years of age at the time the image of the child was made, rather than that the person knows that the material depicts the child as described by Subdivision (1).

Makes nonsubstantive changes to this subsection.

(a-2) Provides that a person commits an offense if the person:

- (1) intentionally or knowingly possesses, or intentionally or knowingly accesses with intent to view, visual material that contains a visual depiction of a computer-generated child engaging in sexual conduct; and
- (2) either knows or should have known that the depiction described by Subdivision (1) appears to be of a child younger than 18 years of age or believes that the depiction is of an actual child younger than 18 years of age at the time the image of the child was made.

(c-1) Provides that an offense under Subsection (a-1) is a felony of the third degree, except that the offense is:

- (1) a felony of the second degree if it is shown on the trial of the offense that the actor has been previously convicted one time of an offense under Chapter 43 (Public Indecency) or described by Article 62.001(5) (relating to defining "reportable conviction or adjudication"), Code of Criminal Procedure, or possesses visual material that contains 10 or more visual depictions of a child engaging in sexual conduct as described by Subsection (a-1)(1) but fewer than 50 such depictions;
- (2) a felony of the first degree if it is shown on the trial of the offense that the actor has been previously convicted two or more times of certain offenses or possesses certain visual material; or
- (3) a felony of the first degree punishable by imprisonment in the Texas Department of Criminal Justice (TDCJ) for life or for any term of not more than 99 years or less than 25 years if it is shown on the trial of the offense that:

(A) at the time of the offense, the actor was:

- (i) an employee at a child-care facility or a residential child-care facility, as those terms are defined by Section 42.002 (Definitions), Human Resources Code;
- (ii) an employee at a residential treatment facility established under Section 221.056 (Residential Treatment Facility), Human Resources Code;
- (iii) an employee at a shelter or facility that serves youth and that receives state funds; or
- (iv) receiving state funds for the care of a child depicted by the visual material; or

(B) the actor displayed the visual material or caused the visual material to be displayed in a school library.

(c-2) Provides that, if it is shown on the trial of an offense under Subsection (a-1) that the visual material contained a depiction of a child younger than 10 years of age at the time the image of the child was made engaging in sexual conduct as described by Section (a-1)(1):

- (1) an offense punishable under Subsection (c-1) as a felony of the second or third degree is increased to the next higher category of offense; or
- (2) the minimum term of imprisonment for an offense described for purposes of punishment by Subsection (c-1)(2) is increased to 15 years.

(c-3) Provides that an offense under Subsection (a-2) is a state jail felony, except that the offense is:

(1) a felony of the third degree if it is shown on the trial of the offense that the actor has been previously convicted one time of an offense under this chapter or described by Article 62.001(5), Code of Criminal Procedure, or possesses visual material that contains 10 or more visual depictions of a computer-generated child engaging in sexual conduct as described by Subsection (a-2)(1) but fewer than 50 such depictions;

(2) a felony of the second degree if it is shown on the trial of the offense that the actor has been previously convicted two or more times of an offense, or any combination of offenses under this chapter or described by Article 62.001(5), Code of Criminal Procedure, or possesses visual material that contains 50 or more visual depictions of a computer-generated child engaging in sexual conduct as described by Subsection (a-2)(1); or

(3) a felony of the second degree with a minimum term of imprisonment of 10 years if it is shown on the trial of the offense that at the time of the offense, the actor was an employee described by Subsection (c-1)(3)(A)(i), (ii), or (iii) or the actor displayed the visual material or caused the visual material to be displayed in a school library.

(c-4) Provides that, if it is shown on the trial of an offense under Subsection (a-2) that the visual material contained a depiction of a computer-generated child who appears to be younger than 10 years of age and is engaging in sexual conduct as described by Subsection (a-2)(1), the punishment for the offense is increased to the punishment for the next higher category of offense, provided that the minimum term of imprisonment for an offense described for purposes of punishment by Subsection (c-3)(3) is 10 years.

(e) Provides that a person commits an offense if the person intentionally or knowingly promotes or possesses with intent to promote visual material described by Subsection (a-1)(1), rather than (a)(1), and the person knows or should have known that the depiction described by Subsection (a-1)(1), rather than (a)(1), is of a child younger than 18 years of age at the time the image of the child was made. Makes nonsubstantive changes.

(e-1) Provides that a person commits an offense if the person intentionally or knowingly promotes or possesses with intent to promote visual material described by Subsection (a-2)(1), and either knows or should have known that the depiction described by Subsection (a-2)(1) appears to be of a child younger than 18 years of age or believes that the depiction is of an actual child younger than 18 years of age at the time the image of the child was made.

(f) Provides that, in the prosecution of an offense under Subsection (a-1) or (e), the state is not required to prove the identity of the child in the depiction described by Subsection (a-1)(1) and there is a rebuttable presumption that the depiction is of an actual child, as described by Subsection (a)(1)(A) (relating to including a depiction of a child who was younger than 18 years of age at the time the image of the child was made in the definition of "depiction of a child") or (B) (relating to including depictions of a child with certain circumstances in the definition of "depiction of a child"), and not of a computer-generated child, as described by Subsection (a)(2) (relating to "defining depiction of a computer-generated child").

(g) Provides that an offense under Subsection (e) is a felony of the second degree, except that the offense is:

(1) a felony of the first degree if it is shown on the trial of the offense that the actor, rather than person, has been previously convicted one or more times of an offense under this chapter or described by Article 62.001(5), Code of Criminal Procedure, promotes or possesses with intent to promote visual material that

contains 10 or more visual depictions of a child engaging in sexual conduct as described by Subsection (a-1)(1) but fewer than 50 such depictions, or promotes or possesses with intent to promote visual material that contains one or more visual depictions of a child who appears to be younger than 10 years of age and is engaging in sexual conduct as described by Subsection (a-1)(1); or

(2) a felony of the first degree with a minimum term of imprisonment of 15 years if it is shown on the trial of the offense that the actor promotes or possesses with intent to promote visual material that contains certain amounts and forms of visual depictions of a computer-generated child engaging in sexual conduct.

Makes nonsubstantive changes to this subsection.

(g-1) Provides that an offense under Subsection (e-1) is a felony of the third degree, except that the offense is a felony of the second degree if it is shown on the trial of the offense that the person:

(1) has been previously convicted one or more times of an offense under this chapter or described by Article 62.001(5), Code of Criminal Procedure, promotes or possesses with intent to promote visual material that contains 10 or more visual depictions of a computer-generated child engaging in sexual conduct as described by Subsection (a-2)(1), or promotes or possesses with intent to promote visual material that contains one or more visual depictions of a computer-generated child who appears to be younger than 10 years of age and is engaging in sexual conduct as described by Subsection (a-2)(1); or

(2) a felony of the second degree with a minimum term of imprisonment of 10 years if it is shown on the trial of the offense that the person promotes or possesses with intent to promote visual material that contains 50 or more visual depictions of a computer-generated child engaging in sexual conduct as described by Subsection (a-2)(1).

(h) Provides that it is a defense to prosecution under Section 43.26 (Possession or Promotion of Child Pornography), rather than under Subsection (a) or (c) (relating to providing that affirmative defenses under certain provisions also apply to a prosecution under Section 43.26), that the actor is a law enforcement officer or a school administrator under certain circumstances.

(h-1) Provides that it is an affirmative defense to prosecution under this section that at the time of the offense the actor was a judicial or law enforcement officer discharging the officer's official duties.

(h-2) Provides that it is an affirmative defense to prosecution under Subsection (a-2) or (e-1) that the actor is not more than two years older than the depicted child.

SECTION 2. Amends Article 38.45(a), Code of Criminal Procedure, to prohibit the court, during the course of a criminal hearing or proceeding, from making available or allowing to be made available for copying or dissemination to the public certain property or material, including material that constitutes child pornography, as described by Section 43.26(a-1)(1) or (a-2)(2), rather than 43.26(a)(1), Penal Code.

SECTION 3. Amends Article 39.15(a), Code of Criminal Procedure, to require a court to allow discovery under Article 39.14 (Discovery) of certain property or material, including property or material that constitutes child pornography, as described by Section 43.26(a-1)(1) or (a-2)(2), rather than 43.26(a)(1), Penal Code.

SECTION 4. Amends Section 21.16(a)(5), Penal Code, to redefine "visual material."

SECTION 5. Amends Section 43.261(b-1), Penal Code, as follows:

(b-1) Provides that, for purposes of conduct prohibited under Subsection (b) (relating to providing that a person who is a minor commits an offense if the person performs certain actions), visual material to which that conduct applies includes:

(1) creates this subdivision from existing text and makes nonsubstantive changes;
or

(2) a depiction of a minor, created using an artificial intelligence application or other computer software, that to a reasonable person is virtually indistinguishable from an actual minor.

SECTION 6. Amends Section 43.262(b-1), Penal Code, as follows:

(b-1) Provides that, for purposes of conduct prohibited under Subsection (b) (relating to providing that a person commits an offense if the person possesses, accesses with intent to view, or promotes visual material that meets certain criteria), visual material to which that conduct applies includes:

(1) creates this subdivision from existing text and makes nonsubstantive changes;
or

(2) a depiction of a child, created using an artificial intelligence application or other computer software, that to a reasonable person is virtually indistinguishable from an actual child younger than 18 years of age.

SECTION 7. Repealers: Sections 43.26(b) (relating to defining "promote," "sexual conduct," and "visual material") and (c) (relating to providing that affirmative defenses under certain provisions also apply to a prosecution under Section 43.26), Penal Code.

Repealers: Sections 43.26(d) (relating to providing that an offense under Subsection (a) is a felony of the third degree, except in certain circumstances) and (d-2) (relating to providing that the enhancement described in Subsection (d-1) is unavailable if the person is also prosecuted for conduct occurring in the same criminal episode), Penal Code.

Repealer: Section 43.26(i) (relating to providing that, for the purposes of conduct prohibited under this section, visual material to which that conduct applies includes certain depictions of a child), Penal Code.

Repealers: Sections 43.26(d-1) (relating to providing that certain punishments apply if an offense under this section occurred during the same criminal episode as an offense under Subsection (e)), as added by Chapter 93 (S.B. 1527), Acts of the 88th Legislature, Regular Session, 2023, and (d-1) (relating to providing that certain punishments apply if it is shown that the visual material depicted a child younger than 10 years of age at the time the image was made or the defendant has been previously convicted), as added by Chapter 1041 (S.B. 129), Acts of the 88th Legislature, Regular Session, 2023, Penal code.

SECTION 8. Makes application of this Act prospective.

SECTION 9. Effective date: September 1, 2025.