BILL ANALYSIS

BACKGROUND AND PURPOSE

The bill sponsor has informed the committee that with the advancement of technology comes new forms of crimes that state law may not be able to address within the current construction of a given statute; this is true of deepfake technology and artificial intelligence, which individuals can use to create sexually explicit visual material of a person or a likeness of a person. The bill sponsor has further informed the committee that predators are currently taking advantage of the fact that the state's child pornography statutes do not clearly address the use of deepfake technology and are creating artificial, sexually explicit visual material involving children. S.B. 1621 seeks to address such use of deepfake technology by revising the state's child pornography statute, creating new offenses for computer-generated child pornography, and providing for enhanced penalties for these offenses.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill expressly does one or more of the following: creates a criminal offense, increases the punishment for an existing criminal offense or category of offenses, or changes the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

Expansion of Conduct Constituting Possession or Promotion of Child Pornography; Prosecution

S.B. 1621 amends the Penal Code to expand the conduct constituting the offenses of possession or promotion of child pornography to include the condition that the person should have known that the depiction is of a child younger than 18 years of age at the time the image of the child was made among the conditions that, in addition to committing the requisite conduct involving possession or promotion of the visual material, qualifies as constituting the applicable offense.

S.B. 1621 establishes that, in the prosecution of such offenses, the state is not required to prove the identity of the child in the depiction and there is a rebuttable presumption that the depiction is of an actual child, and not of a computer-generated child. The bill defines "depiction of a computer-generated child," with respect to an image of a child contained in visual material, as a depiction that meets the following conditions:
- appears to be a child younger than 18 years of age;
- is created using an artificial intelligence application or other computer software; and
- that to a reasonable person is virtually indistinguishable from an actual child younger than 18 years of age.

The bill also expands the definition of "visual material" for purposes of the bill's provisions to include a file in any digital format that allows an image to be displayed on a video screen and any image transmitted to a video screen by any method.

Penalties for Possession of Child Pornography

S.B. 1621 repeals provisions doing the following with respect to penalties for the possession of child pornography:
- establishing penalties ranging from a third degree felony to a first degree felony;
- enhancing the penalty for the offense to a first degree felony, and increasing the minimum term of confinement in the Texas Department of Criminal Justice (TDCJ), for certain conduct constituting the offense if it is shown on the trial of the offense that the person engaged in conduct that constituted the promotion of child pornography during the same criminal episode; and
- increasing the penalty for the offense to the next higher category, and increasing the minimum term of confinement in TDCJ, for certain conduct constituting the offense and for a subsequent conviction and establishing that either enhancement is unavailable if the person is also prosecuted for the promotion of child pornography during the same criminal episode.

Instead, S.B. 1621 retains the third degree felony for the offense, the penalty enhancements ranging from a second degree felony to a first degree felony based on the number of previous convictions of the offense or the number of visual depictions contained in the visual material, and the penalty enhancement to a first degree felony punishable by imprisonment in TDCJ for life or for any term of not more than 99 years or less than 25 years based on the actor's employment or receipt of state funds for the care of the child depicted by the visual material. However, the bill expands the conditions under which such penalty enhancements apply as follows:
- with respect to the enhancement to a second degree felony, includes the condition that the actor has been previously convicted one time of any public indecency offense or an offense for which a reportable conviction or adjudication requires a person to register under the sex offender registration program;
- with respect to the enhancement to a first degree felony, includes the condition that the actor has been previously convicted two or more times of an offense or any combination of offenses relating to public indecency or for which a reportable conviction or adjudication requires a person to register under the sex offender registration program; and
- with respect to the enhancement to a first degree felony punishable by imprisonment in TDCJ, includes the condition that the actor displayed the visual material or caused the visual material to be displayed in a school library, which is defined as a library of a public or private primary or secondary school.

The bill also retains the provision increasing the penalty to the next higher category for an offense of possession of child pornography depicting a child younger than 10 years of age and increasing the minimum term of confinement in TDCJ to 15 years for an offense of possession of child pornography depicting a child younger than 10 years of age and for which the penalty is enhanced to a first degree felony.

Penalties for Promotion of Child Pornography

S.B. 1621 expands the conditions under which the penalty for the offense of promotion of child pornography is enhanced from a second degree felony to a first degree felony by including the following among the conditions:
- that the actor has been previously convicted one or more times of any public indecency offense or an offense for which a reportable conviction or adjudication requires a person to register under the sex offender registration program; and

- that the actor 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 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.

S.B. 1621 enhances the penalty for the offense to a first degree felony with a minimum term of imprisonment in TDCJ 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 50 or more visual depictions of a child engaging in sexual conduct or a videotape or film that visually depicts conduct constituting sexual assault with respect to a depiction of a child.

Possession of Computer-Generated Child Pornography; Penalties

S.B. 1621 creates the state jail felony offense of possession of computer-generated child pornography for a person who 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 who does either of the following:
- knows or should have known that such depiction 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.

S.B. 1621 enhances the penalty for the offense as follows:
- to a third degree felony if it is shown on the trial of the offense that the actor:
  - has been previously convicted one time of a public indecency offense or an offense for which a reportable conviction or adjudication requires a person to register under the sex offender registration program; or
  - possesses visual material that contains 10 or more visual depictions of a computer-generated child engaging in sexual conduct but fewer than 50 such depictions;
- to a second degree felony 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 relating to public indecency or for which a reportable conviction or adjudication requires a person to register under the sex offender registration program; or
  - possesses visual material that contains 50 or more visual depictions of a computer-generated child engaging in sexual conduct; and
- to a second degree felony with a minimum term of imprisonment in TDCJ 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 at a licensed child-care facility or a licensed residential child-care facility, an employee at a residential treatment facility, or an employee at a shelter or facility that serves youth and that receives state funds; or
  - the actor displayed the visual material or caused the visual material to be displayed in a school library.

The bill also increases the penalty for the offense to the next higher category, provided that the minimum term of imprisonment is 10 years and it is shown on the trial of the offense 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.

Promotion of Computer-Generated Child Pornography; Penalties

S.B. 1621 creates the third degree felony offense of promotion of computer-generated child pornography for a person who intentionally or knowingly promotes or possesses with intent to

promote visual material that contains a visual depiction of a computer-generated child engaging in sexual conduct and who does either of the following:
- knows or should have known that the depiction 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.

S.B. 1621 enhances the penalty for the offense as follows:
- to a second degree felony if it is shown on the trial of the offense that the actor:
  - has been previously convicted one or more times of a public indecency offense or offense for which a reportable conviction or adjudication requires a person to register under the sex offender registration program;
  - 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; 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; and
- to a second degree felony with a minimum term of imprisonment in TDCJ of 10 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 50 or more visual depictions of a computer-generated child engaging in sexual conduct.

Defense to Prosecution for Child Pornography Offenses

S.B. 1621 extends the applicability of the following defenses to prosecution for an offense of possession or promotion of child pornography to an actor with respect to the offense of possession or promotion of computer-generated child pornography created by the bill:
- the defense that the actor is a law enforcement officer or school administrator who as follows:
  - possessed or accessed the visual material in good faith solely as a result of an allegation of a violation of an offense for the electronic transmission of certain visual material depicting a minor;
  - allowed other law enforcement or school administrative personnel to possess or access the material only as appropriate based on that allegation; and
  - took reasonable steps to destroy the material within an appropriate period following the allegation; and
- the affirmative defense that the conduct was for a bona fide educational, medical, psychological, psychiatric, judicial, law enforcement, or legislative purpose.

The bill repeals the existing affirmative defense for the possession or promotion of child pornography that the actor is not more than two years older than the depicted child but establishes as an affirmative defense to the offense of promotion of possession or promotion of computer-generated child pornography that the actor is not more than two years older than the depicted child.

Unlawful Disclosure or Promotion of Intimate Visual Material; Certain Visual Material Depicting a Minor or Child

S.B. 1621 revises the definition of "visual material" for purposes of the offense of unlawful disclosure or promotion of intimate visual material to include a file in any digital format that allows an image to be displayed on a video screen and any image transmitted to a video screen by any method.

S.B. 1621 includes a depiction of a minor or child, created using an artificial intelligence application or other computer software, that to a reasonable person is virtually indistinguishable from an actual minor or child younger than 18 years of age among the visual material to which

the offenses of electronic transmission of certain visual material depicting a minor and possession or promotion of lewd visual material depicting a child apply.

Prohibition Against Availability and Disclosure of Property or Material Constituting Child Pornography

S.B. 1621 amends the Code of Criminal Procedure to specify that, for purposes of the prohibition against a court making available or allowing to be made available for copying or dissemination to the public property or material that constitutes child pornography and the duty of a court to allow the discovery of such property or material, child pornography includes property or material the applicable actor knows or should have known to contain a visual depiction of a computer-generated child engaging in sexual conduct 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.

Applicability

S.B. 1621 applies only to an offense committed on or after the bill's effective date. An offense committed before the bill's effective date is governed by the law in effect on the date the offense was committed, and the former law is continued in effect for that purpose. For these purposes, an offense was committed before the bill's effective date if any element of the offense was committed before that date.

Repealed Provisions

S.B. 1621 repeals the following provisions:
- Sections 43.26(b), (c), (d), (d-2), and (i), Penal Code;
- Section 43.26(d-1), Penal Code, as added by Chapter 93 (S.B. 1527), Acts of the 88th Legislature, Regular Session, 2023; and
- Section 43.26(d-1), Penal Code, as added by Chapter 1041 (S.B. 129), Acts of the 88th Legislature, Regular Session, 2023.

EFFECTIVE DATE

September 1, 2025.