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Bill Analysis

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Primary Sponsor: Sen. N. Manning

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SUMMARY

Criminal prohibition against sexting

- Prohibits any person under age 19 from creating, distributing, or possessing sexually explicit digital material that depicts a minor through a telecommunications device, provided the person is not more than four years older than the minor depicted.
- Provides exceptions to the prohibition above if the minor depicted is the person's self, spouse, or child, or the child of another if the material is possessed or distributed for certain specific lawful purposes.
- Provides that a person who violates the prohibition, does not complete a diversion program, and is convicted of or pleads guilty to the violation is guilty of "possession of sexually explicit digital material," a first degree misdemeanor, and provides a penalty of eight hours of community service unless a judge determines that a different penalty is necessary.
- Provides that the provisions described in the preceding dot point also apply with respect to a juvenile who violates the prohibition, does not complete a diversion program, and is adjudicated a delinquent child for committing the violation.
- Provides an affirmative defense to a charge of possession of sexually explicit digital material if the person charged did not solicit the sexually explicit material, did not share the material with others, and deleted or destroyed the material upon receipt.
- Provides that prosecution of a person for possession of sexually explicit digital material does not preclude prosecution of that person for any other offense, except that if the charges involve the same conduct and victim, the person may be convicted of only one of the charges.

Sexting educational diversion program

- Requires courts to offer a sexting educational diversion program of a specified nature for certain qualified persons charged with possession of sexually explicit digital material.
- Sets requirements for the curriculum and conditions of participation for persons who participate in a sexting educational diversion program.
- Requires dismissal of charges if a person successfully completes the sexting educational diversion program.
- Requires that a person charged with possession of sexually explicit digital material be brought to trial or before the juvenile court if the person refuses to participate in diversion or participates in a diversion program and violates its conditions.

DETAILED ANALYSIS

Criminal prohibition against sexting

Prohibition

The bill prohibits any person under age 19 from purposely creating, producing, distributing, presenting, transmitting, posting, exchanging, disseminating, or possessing through a telecommunications device any sexually explicit digital material. But this prohibition applies only when the person is not more than four years older than the minor depicted in the material.¹

As used in the bill, the term “telecommunications device” includes a computer, computer network, scanner, telephone, or pager.² “Sexually explicit digital material” is defined as any photograph or other visual depiction of a minor who is at least 13 years old in any condition of nudity or is involved in any sexual activity prohibited in the Sex Offense Law – R.C Chapter 2907. The bill states that distribution of sexually explicit digital material by a person under age 19 may commonly be referred to as “sexting.”³

Exemptions

The prohibition described above does not apply to any of the following:⁴

- The creation, production, or possession by a person under age 19 of sexually explicit digital material depicting the person’s self or spouse, if the person does not subsequently distribute, present, transmit, post, print, disseminate, or exchange that material.

¹ R.C. 2907.324(B).

² R.C. 2907.324(A)(1)(c), by reference to R.C. 2913.01, not in the bill.

³ R.C. 2907.324(A)(1)(b) and (A)(2).

⁴ R.C. 2907.324(E)(1) to (5).

- The creation, production, or possession by a person under age 19 of sexually explicit digital material depicting the person’s child.
- The distribution, presentation, transmission, posting, exchanging, or disseminating (hereafter collectively referred to as “distribution”) by a person under age 19 of sexually explicit digital material depicting the person’s child if the material is shared through any such conduct for a *bona fide* artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing *bona fide* studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material.
- The creation, production, or distribution by a person under age 19 of sexually explicit digital material depicting a child other than the person’s child if both of the following apply:
 - The material is created, produced, or distributed for a *bona fide* artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing *bona fide* studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material.
 - The child’s parents, guardian, or custodian consent in writing to the depiction of the minor in the sexually explicit digital material and to the specific manner in which the material is to be distributed.
- The possession by a person under age 19 of sexually explicit digital material depicting a child other than the person’s child if either of the following applies:
 - The person is a physician, psychologist, sociologist, scientist, teacher, person pursuing *bona fide* studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material and the person possesses the material for a *bona fide* artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose.
 - The person knows that the child’s parents, guardian, or custodian has consented in writing to the depiction of the minor in the sexually explicit digital material and to the manner in which the material is used.

Penalty

The bill provides for a diversion program, described below under “**Sexting educational diversion program**,” for a person who violates the prohibition described above. A person who violates the prohibition, who does not participate and complete such a program, and who is convicted of, pleads guilty to, or is adjudicated a delinquent child for committing the violation is guilty of “possession of sexually explicit digital material.” The bill classifies the offense as a first degree misdemeanor, but rather than the ordinary penalty for a first degree misdemeanor, except as otherwise described in this paragraph, the offender must be sentenced to serve, or if a delinquent child, have a disposition order imposed requiring the

child to serve, eight hours of community service. However, a court is not required to impose a sentence or disposition of community service if it determines that the interests of justice and public safety, or with respect to a delinquent child, the well-being of the child, require a different sentence or order of disposition.⁵

Affirmative defense

The bill states that it is an affirmative defense to a charge of possession of sexually explicit digital material that the person charged did not solicit the material, did not subsequently distribute or print the material, and deleted or destroyed the material upon receiving it.⁶

Prosecution of other offenses

The bill provides that, notwithstanding an existing provision regarding resolving conflicts between statutory provisions (see the next paragraph), prosecution of a person for possession of sexually explicit digital material does not preclude prosecution of that person for any other offense. An act that would qualify as possession of sexually explicit digital material or any other existing offense may be prosecuted under the bill, the section containing the existing criminal prohibition, or both. However, if the charges are based on the same conduct and involve the same victim, the indictment or information may contain counts for all such offenses, but the defendant may be “convicted” of (i.e., found guilty of committing and sentenced for) only one.⁷

The existing provision regarding resolving conflicts between statutory provisions specifies that: (1) if a general provision conflicts with a special or local provision, they must be construed, if possible, so that effect is given to both, and (2) if the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.⁸

Sexting educational diversion program

Establishing diversionary programs

The bill requires that each municipal court, county court, juvenile court, and court of common pleas must make use of a sexting educational diversion program or another diversionary-type program that is feasible for persons charged with possession of sexually explicit digital material (hereafter, “diversionary program for persons charged with possession of sexually explicit digital material”). To comply with this requirement, the court may develop and operate the program, may use a program developed by another court or by a prosecutor’s office, or may use another program that is relevant and appropriate for the purposes of sexting

⁵ R.C. 2907.324(D)(1) and (2).

⁶ R.C. 2907.324(F).

⁷ R.C. 2907.324(G).

⁸ R.C. 1.51, not in the bill.

educational diversion. The court using the diversionary program must adopt procedural rules for its operation.⁹

Persons eligible to participate

Once a court begins offering an appropriate diversionary program for persons charged with possession of sexually explicit digital material, except as otherwise described in this paragraph, the court may allow any person charged with possession of sexually explicit digital material to enter the program, as an alternative to prosecution for the offense. However, a person who previously has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for committing a sex-related offense may not be allowed to enter the diversion program in lieu of prosecution. A “sex-related offense” is defined for purposes of this provision as the offense of possession of sexually explicit digital material, a violation of any other prohibition set forth in R.C. Chapter 2907, or a violation of any ordinance of a municipal corporation that is substantially equivalent to the prohibition against possession of sexually explicit digital material or of any other prohibition set forth in R.C. Chapter 2907.¹⁰

Required curriculum

The bill requires each diversionary program for persons charged with possession of sexually explicit digital material to address all of the following issues and topics:¹¹

- The legal consequences of and penalties for sharing sexually explicit digital materials, including a review of applicable federal and state statutes.
- The nonlegal consequences of sharing sexually explicit digital materials, including the effect on relationships, the possible loss of educational and employment opportunities, and the possibility of being barred or removed from school programs and extracurricular activities.
- How the unique characteristics of cyberspace and the Internet, including searchability, replicability, and an infinite audience, can produce long-term and unforeseen consequences for sharing sexually explicit digital materials.
- The connection between bullying and cyber-bullying and the sharing of sexually explicit digital materials.
- All other topics that the court overseeing the program considers to be relevant.

⁹ R.C. 2907.324(C)(1).

¹⁰ R.C. 2907.324(C)(1) and (A)(1)(a).

¹¹ R.C. 2907.324(C)(2).

Conditions of participation

To participate in a diversionary program for persons charged with possession of sexually explicit digital material, a person charged with committing that offense must do the following:¹²

- Waive, in writing and contingent upon successful completion of the program, all of the following that are relevant and applicable to the charge and the person:
 - If the person is charged in a municipal court, county court, or court of common pleas, the person’s right to a speedy trial, the preliminary hearing, the time period within which the grand jury may consider an indictment against the person, and arraignment, unless the hearing, indictment, or arraignment has already occurred.
 - If the person is charged in juvenile court, the procedures comparable to those above that are applicable in juvenile court, unless the particular procedure has already occurred.
- Agree, in writing, to the tolling while in the program of all periods of limitation established by statutes or rules of court that are applicable to possession of sexually explicit digital material and to the conditions of the diversionary program.

Effect of completion or failure to complete diversion

If a person charged with possession of sexually explicit digital material enters a diversionary program for persons charged with committing that offense and satisfactorily completes the program, the court must dismiss the charges against the person. If the person charged is offered an opportunity to enter such a diversionary program and chooses not to enter the program, or if the person enters such a program and violates its conditions, the person may be brought to trial or before the juvenile court upon the charges in the manner provided by law. Regarding a person who violates the conditions of diversion, the waiver previously executed (see “**Conditions of participation**”) is void on the date the person is removed from the program for the violation.¹³

HISTORY

Action	Date
Introduced	11-20-19

S0239-I-133/ts

¹² R.C. 2907.324(C)(3).

¹³ R.C. 2907.324(C)(4).