

## HB0077S01 compared with HB0077

~~deleted text~~ shows text that was in HB0077 but was deleted in HB0077S01.

Inserted text shows text that was not in HB0077 but was inserted into HB0077S01.

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Representative Michael K. McKell proposes the following substitute bill:

### CRIMINAL CODE AMENDMENTS

2018 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Michael K. McKell**

Senate Sponsor: \_\_\_\_\_

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#### LONG TITLE

##### General Description:

This bill defines the term "indecent liberties."

##### Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ provides factors the court may consider before determining whether a defendant's actions amount to indecent liberties;
- ▶ amends provisions of Section 78A-6-105 and Section 78B-2-308 to incorporate the definition of "indecent liberties" included in this bill; and
- ▶ makes technical changes.

##### Money Appropriated in this Bill:

None

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### Other Special Clauses:

None

### Utah Code Sections Affected:

#### AMENDS:

**78A-6-105**, as last amended by Laws of Utah 2017, Chapters 181, 330, and 401

**78B-2-308**, as last amended by Laws of Utah 2016, Chapter 379

#### ENACTS:

**76-5-416**, Utah Code Annotated 1953

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*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section **76-5-416** is enacted to read:

**76-5-416. Indecent liberties -- Definition -- Factors to be considered by the court.**

(1) As used in this part, "indecent liberties" means conduct determined by the trier of fact to be of equal magnitude of gravity to the touching, over or under clothing, of the anus, buttocks, or any part of the genitals of another individual, or the touching, over or under clothing, of the breast of a female individual.

(2) To determine whether an individual's conduct constitutes indecent liberties ~~as defined in~~ under Subsection (1), the trier of fact ~~may~~ shall consider the totality of the circumstances, including:

(a) the duration of the conduct;

(b) the ~~intrusiveness~~ nature of ~~the conduct against~~ the victim's ~~person~~ participation;

~~(c) whether the victim requested that the conduct stop;~~

~~(d)~~ (c) whether the conduct stopped upon the victim's request;

~~(e)~~ (d) the nature of the relationship between the victim and the perpetrator; and

~~(f)~~ (e) the victim's age; ~~and~~;

~~(g) whether the victim was forced to participate in the conduct.~~

~~(h)~~ Section 2. Section **78A-6-105** is amended to read:

**78A-6-105. Definitions.**

As used in this chapter:

(1) (a) "Abuse" means:

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- (i) (A) nonaccidental harm of a child;
- (B) threatened harm of a child;
- (C) sexual exploitation;
- (D) sexual abuse; or
- (E) human trafficking of a child in violation of Section 76-5-308.5; or
- (ii) that a child's natural parent:
  - (A) intentionally, knowingly, or recklessly causes the death of another parent of the child;
  - (B) is identified by a law enforcement agency as the primary suspect in an investigation for intentionally, knowingly, or recklessly causing the death of another parent of the child; or
  - (C) is being prosecuted for or has been convicted of intentionally, knowingly, or recklessly causing the death of another parent of the child.
- (b) "Abuse" does not include:
  - (i) reasonable discipline or management of a child, including withholding privileges;
  - (ii) conduct described in Section 76-2-401; or
  - (iii) the use of reasonable and necessary physical restraint or force on a child:
    - (A) in self-defense;
    - (B) in defense of others;
    - (C) to protect the child; or
    - (D) to remove a weapon in the possession of a child for any of the reasons described in Subsections (1)(b)(iii)(A) through (C).
- (2) "Abused child" means a child who has been subjected to abuse.
- (3) "Adjudication" means a finding by the court, incorporated in a decree, that the facts alleged in the petition have been proved. A finding of not competent to proceed pursuant to Section 78A-6-1302 is not an adjudication.
- (4) "Adult" means [~~a person~~] an individual 18 years of age or over, except that [~~a person~~] an individual 18 years or over under the continuing jurisdiction of the juvenile court pursuant to Section 78A-6-120 shall be referred to as a minor.
- (5) "Board" means the Board of Juvenile Court Judges.
- (6) "Child" means [~~a person~~] an individual under 18 years of age.
- (7) "Child placement agency" means:

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(a) a private agency licensed to receive a child for placement or adoption under this code; or

(b) a private agency that receives a child for placement or adoption in another state, which agency is licensed or approved where such license or approval is required by law.

(8) "Clandestine laboratory operation" means the same as that term is defined in Section 58-37d-3.

(9) "Commit" means, unless specified otherwise:

(a) with respect to a child, to transfer legal custody; and

(b) with respect to a minor who is at least 18 years of age, to transfer custody.

(10) "Court" means the juvenile court.

(11) "Criminogenic risk factors" means evidence-based factors that are associated with a minor's likelihood of reoffending.

(12) "Delinquent act" means an act that would constitute a felony or misdemeanor if committed by an adult.

(13) "Dependent child" includes a child who is homeless or without proper care through no fault of the child's parent, guardian, or custodian.

(14) "Deprivation of custody" means transfer of legal custody by the court from a parent or the parents or a previous legal custodian to another person, agency, or institution.

(15) "Detention" means home detention and secure detention as defined in Section 62A-7-101 for the temporary care of a minor who requires secure custody in a physically restricting facility:

(a) pending court disposition or transfer to another jurisdiction; or

(b) while under the continuing jurisdiction of the court.

(16) "Detention risk assessment tool" means an evidence-based tool established under Section 78A-6-124, on and after July 1, 2018, that assesses a minor's risk of failing to appear in court or reoffending pre-adjudication and designed to assist in making detention determinations.

(17) "Division" means the Division of Child and Family Services.

(18) "Evidence-based" means a program or practice that has had multiple randomized control studies or a meta-analysis demonstrating that the program or practice is effective for a specific population or has been rated as effective by a standardized program evaluation tool.

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(19) "Formal probation" means a minor is under field supervision by the probation department or other agency designated by the court and subject to return to the court in accordance with Section 78A-6-123 on and after July 1, 2018.

(20) "Formal referral" means a written report from a peace officer or other person informing the court that a minor is or appears to be within the court's jurisdiction and that a case must be reviewed.

(21) "Group rehabilitation therapy" means psychological and social counseling of one or more [~~persons~~] individuals in the group, depending upon the recommendation of the therapist.

(22) "Guardianship of the person" includes the authority to consent to:

- (a) marriage;
- (b) enlistment in the armed forces;
- (c) major medical, surgical, or psychiatric treatment; or
- (d) legal custody, if legal custody is not vested in another person, agency, or institution.

(23) "Habitual truant" means the same as that term is defined in Section 53A-11-101.

(24) "Harm" means:

- (a) physical or developmental injury or damage;
- (b) emotional damage that results in a serious impairment in the child's growth, development, behavior, or psychological functioning;
- (c) sexual abuse; or
- (d) sexual exploitation.

(25) (a) "Incest" means engaging in sexual intercourse with [~~a person~~] an individual whom the perpetrator knows to be the perpetrator's ancestor, descendant, brother, sister, uncle, aunt, nephew, niece, or first cousin.

(b) The relationships described in Subsection (25)(a) include:

- (i) blood relationships of the whole or half blood, without regard to legitimacy;
- (ii) relationships of parent and child by adoption; and
- (iii) relationships of stepparent and stepchild while the marriage creating the relationship of a stepparent and stepchild exists.

(26) "Intake probation" means a period of court monitoring that does not include field supervision, but is overseen by a juvenile probation officer, during which a minor is subject to

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return to the court in accordance with Section 78A-6-123 on and after July 1, 2018.

(27) "Intellectual disability" means:

(a) significantly subaverage intellectual functioning, an IQ of approximately 70 or below on an individually administered IQ test, for infants, a clinical judgment of significantly subaverage intellectual functioning;

(b) concurrent deficits or impairments in present adaptive functioning, the [person's] individual's effectiveness in meeting the standards expected for the [person's] individual's age by the [person's] individual's cultural group, in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety; and

(c) the onset is before the [person] individual reaches the age of 18 years.

(28) "Legal custody" means a relationship embodying the following rights and duties:

(a) the right to physical custody of the minor;

(b) the right and duty to protect, train, and discipline the minor;

(c) the duty to provide the minor with food, clothing, shelter, education, and ordinary medical care;

(d) the right to determine where and with whom the minor shall live; and

(e) the right, in an emergency, to authorize surgery or other extraordinary care.

(29) "Material loss" means an uninsured:

(a) property loss;

(b) out-of-pocket monetary loss;

(c) lost wages; or

(d) medical expenses.

(30) "Mental disorder" means a serious emotional and mental disturbance that severely limits a minor's development and welfare over a significant period of time.

(31) "Minor" means:

(a) a child; or

(b) [a person] an individual who is:

(i) at least 18 years of age and younger than 21 years of age; and

(ii) under the jurisdiction of the juvenile court.

(32) "Mobile crisis outreach team" means a crisis intervention service for minors or

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families of minors experiencing behavioral health or psychiatric emergencies.

(33) "Molestation" means that [~~a person~~] an individual, with the intent to arouse or gratify the sexual desire of any [~~person~~] individual:

- (a) touches the anus or any part of the genitals of a child;
- (b) takes indecent liberties, as defined in Section 76-5-416, with a child; or
- (c) causes a child to take indecent liberties, as defined in Section 76-5-416, with the perpetrator or another individual.

(34) "Natural parent" means a minor's biological or adoptive parent, and includes the minor's noncustodial parent.

(35) (a) "Neglect" means action or inaction causing:

(i) abandonment of a child, except as provided in Title 62A, Chapter 4a, Part 8, Safe Relinquishment of a Newborn Child;

(ii) lack of proper parental care of a child by reason of the fault or habits of the parent, guardian, or custodian;

(iii) failure or refusal of a parent, guardian, or custodian to provide proper or necessary subsistence, education, or medical care, or any other care necessary for the child's health, safety, morals, or well-being;

(iv) a child to be at risk of being neglected or abused because another child in the same home is neglected or abused; or

(v) abandonment of a child through an unregulated custody transfer.

(b) The aspect of neglect relating to education, described in Subsection (35)(a)(iii), means that, after receiving a notice of compulsory education violation under Section 53A-11-101.5, the parent or guardian fails to make a good faith effort to ensure that the child receives an appropriate education.

(c) A parent or guardian legitimately practicing religious beliefs and who, for that reason, does not provide specified medical treatment for a child, is not guilty of neglect.

(d) (i) Notwithstanding Subsection (35)(a), a health care decision made for a child by the child's parent or guardian does not constitute neglect unless the state or other party to the proceeding shows, by clear and convincing evidence, that the health care decision is not reasonable and informed.

(ii) Nothing in Subsection (35)(d)(i) may prohibit a parent or guardian from exercising

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the right to obtain a second health care opinion and from pursuing care and treatment pursuant to the second health care opinion, as described in Section 78A-6-301.5.

(36) "Neglected child" means a child who has been subjected to neglect.

(37) "Nonjudicial adjustment" means closure of the case by the assigned probation officer without judicial determination upon the consent in writing of:

(a) the assigned probation officer; and

(b) (i) the minor; or

(ii) the minor and the minor's parent, legal guardian, or custodian.

(38) "Not competent to proceed" means that a minor, due to a mental disorder, intellectual disability, or related condition as defined, lacks the ability to:

(a) understand the nature of the proceedings against them or of the potential disposition for the offense charged; or

(b) consult with counsel and participate in the proceedings against them with a reasonable degree of rational understanding.

(39) "Physical abuse" means abuse that results in physical injury or damage to a child.

(40) "Probation" means a legal status created by court order following an adjudication on the ground of a violation of law or under Section 78A-6-103, whereby the minor is permitted to remain in the minor's home under prescribed conditions.

(41) "Protective supervision" means a legal status created by court order following an adjudication on the ground of abuse, neglect, or dependency, whereby the minor is permitted to remain in the minor's home, and supervision and assistance to correct the abuse, neglect, or dependency is provided by the probation department or other agency designated by the court.

(42) "Related condition" means a condition closely related to intellectual disability in accordance with 42 C.F.R. Part 435.1010 and further defined in Rule R539-1-3, Utah Administrative Code.

(43) (a) "Residual parental rights and duties" means those rights and duties remaining with the parent after legal custody or guardianship, or both, have been vested in another person or agency, including:

(i) the responsibility for support;

(ii) the right to consent to adoption;

(iii) the right to determine the child's religious affiliation; and

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(iv) the right to reasonable parent-time unless restricted by the court.

(b) If no guardian has been appointed, "residual parental rights and duties" also include the right to consent to:

(i) marriage;

(ii) enlistment; and

(iii) major medical, surgical, or psychiatric treatment.

(44) "Secure facility" means any facility operated by or under contract with the Division of Juvenile Justice Services, that provides 24-hour supervision and confinement for youth offenders committed to the division for custody and rehabilitation pursuant to Subsection 78A-6-117(2)(d).

(45) "Severe abuse" means abuse that causes or threatens to cause serious harm to a child.

(46) "Severe neglect" means neglect that causes or threatens to cause serious harm to a child.

(47) "Sexual abuse" means:

(a) an act or attempted act of sexual intercourse, sodomy, incest, or molestation by an adult directed towards a child;

(b) an act or attempted act of sexual intercourse, sodomy, incest, or molestation committed by a child towards another child if:

(i) there is an indication of force or coercion;

(ii) the children are related, as described in Subsection (25);

(iii) there have been repeated incidents of sexual contact between the two children, unless the children are 14 years of age or older; or

(iv) there is a disparity in chronological age of four or more years between the two children; or

(c) engaging in any conduct with a child that would constitute an offense under any of the following, regardless of whether the ~~[person]~~ individual who engages in the conduct is actually charged with, or convicted of, the offense:

(i) Title 76, Chapter 5, Part 4, Sexual Offenses, except for Section 76-5-401, if the alleged perpetrator of an offense described in Section 76-5-401 is a minor;

(ii) child bigamy, Section 76-7-101.5;

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- (iii) incest, Section 76-7-102;
  - (iv) lewdness, Section 76-9-702;
  - (v) sexual battery, Section 76-9-702.1;
  - (vi) lewdness involving a child, Section 76-9-702.5; or
  - (vii) voyeurism, Section 76-9-702.7.
- (48) "Sexual exploitation" means knowingly:
- (a) employing, using, persuading, inducing, enticing, or coercing any child to:
    - (i) pose in the nude for the purpose of sexual arousal of any ~~[person]~~ individual; or
    - (ii) engage in any sexual or simulated sexual conduct for the purpose of photographing, filming, recording, or displaying in any way the sexual or simulated sexual conduct;
  - (b) displaying, distributing, possessing for the purpose of distribution, or selling material depicting a child:
    - (i) in the nude, for the purpose of sexual arousal of any ~~[person]~~ individual; or
    - (ii) engaging in sexual or simulated sexual conduct; or
    - (c) engaging in any conduct that would constitute an offense under Section 76-5b-201, sexual exploitation of a minor, regardless of whether the ~~[person]~~ individual who engages in the conduct is actually charged with, or convicted of, the offense.
- (49) "Shelter" means the temporary care of a child in a physically unrestricted facility pending court disposition or transfer to another jurisdiction.
- (50) "Status offense" means a violation of the law that would not be a violation but for the age of the offender.
- (51) "Substance abuse" means the misuse or excessive use of alcohol or other drugs or substances.
- (52) "Substantiated" means the same as that term is defined in Section 62A-4a-101.
- (53) "Supported" means the same as that term is defined in Section 62A-4a-101.
- (54) "Termination of parental rights" means the permanent elimination of all parental rights and duties, including residual parental rights and duties, by court order.
- (55) "Therapist" means:
- (a) ~~[a person]~~ an individual employed by a state division or agency for the purpose of conducting psychological treatment and counseling of a minor in its custody; or
  - (b) any other ~~[person]~~ individual licensed or approved by the state for the purpose of

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conducting psychological treatment and counseling.

(56) "Unregulated custody transfer" means the placement of a child:

(a) with [~~a person~~] an individual who is not the child's parent, step-parent, grandparent, adult sibling, adult uncle or aunt, or legal guardian, or a friend of the family who is an adult and with whom the child is familiar, or a member of the child's federally recognized tribe;

(b) with the intent of severing the child's existing parent-child or guardian-child relationship; and

(c) without taking:

(i) reasonable steps to ensure the safety of the child and permanency of the placement; and

(ii) the necessary steps to transfer the legal rights and responsibilities of parenthood or guardianship to the [~~person~~] individual taking custody of the child.

(57) "Unsubstantiated" means the same as that term is defined in Section 62A-4a-101.

(58) "Validated risk and needs assessment" means an evidence-based tool that assesses a minor's risk of reoffending and a minor's criminogenic needs.

(59) "Without merit" means the same as that term is defined in Section 62A-4a-101.

Section 3. Section **78B-2-308** is amended to read:

**78B-2-308. Legislative findings -- Civil actions for sexual abuse of a child --**

**Window for revival of time barred claims.**

(1) The Legislature finds that:

(a) child sexual abuse is a crime that hurts the most vulnerable in our society and destroys lives;

(b) research over the last 30 years has shown that it takes decades for children and adults to pull their lives back together and find the strength to face what happened to them;

(c) often the abuse is compounded by the fact that the perpetrator is a member of the victim's family and when such abuse comes out, the victim is further stymied by the family's wish to avoid public embarrassment;

(d) even when the abuse is not committed by a family member, the perpetrator is rarely a stranger and, if in a position of authority, often brings pressure to bear on the victim to ensure silence;

(e) in 1992, when the Legislature enacted the statute of limitations requiring victims to

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sue within four years of majority, society did not understand the long-lasting effects of abuse on the victim and that it takes decades for the healing necessary for a victim to seek redress;

(f) the Legislature, as the policy-maker for the state, may take into consideration advances in medical science and understanding in revisiting policies and laws shown to be harmful to the citizens of this state rather than beneficial; and

(g) the Legislature has the authority to change old laws in the face of new information, and set new policies within the limits of due process, fairness, and justice.

(2) As used in this section:

(a) "Child" means [~~a person~~] an individual under 18 years of age.

(b) "Discovery" means when [~~a person~~] a victim knows or reasonably should know that the injury or illness was caused by the intentional or negligent sexual abuse.

(c) "Injury or illness" means either a physical injury or illness or a psychological injury or illness. A psychological injury or illness need not be accompanied by physical injury or illness.

(d) "Molestation" means that [~~a person~~] an individual, with the intent to arouse or gratify the sexual desire of any [~~person~~] individual:

(i) touches the anus, buttocks, or genitalia of any child, or the breast of a female child;

(ii) takes indecent liberties, as defined in Section 76-5-416, with a child; or

(iii) causes a child to take indecent liberties, as defined in Section 76-5-416, with the perpetrator or another [~~person~~] individual.

(e) "Negligently" means a failure to act to prevent the child sexual abuse from further occurring or to report the child sexual abuse to law enforcement when the adult who could act knows or reasonably should know of the child sexual abuse and is the victim's parent, stepparent, adoptive parent, foster parent, legal guardian, ancestor, descendant, brother, sister, uncle, aunt, first cousin, nephew, niece, grandparent, stepgrandparent, or any [~~person~~] individual cohabiting in the child's home.

(f) "Perpetrator" means an individual who has committed an act of sexual abuse.

(g) "Sexual abuse" means acts or attempted acts of sexual intercourse, sodomy, or molestation by an adult directed towards a child.

(h) "Victim" means an individual who was intentionally or negligently sexually abused. It does not include individuals whose claims are derived through another individual who was

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sexually abused.

(3) (a) A victim may file a civil action against a perpetrator for intentional or negligent sexual abuse suffered as a child at any time.

(b) A victim may file a civil action against a non-perpetrator for intentional or negligent sexual abuse suffered as a child:

(i) within four years after the [~~person~~] individual attains the age of 18 years; or

(ii) if a victim discovers sexual abuse only after attaining the age of 18 years, that [~~person~~] individual may bring a civil action for such sexual abuse within four years after discovery of the sexual abuse, whichever period expires later.

(4) The victim need not establish which act in a series of continuing sexual abuse incidents caused the injury complained of, but may compute the date of discovery from the date of discovery of the last act by the same perpetrator which is part of a common scheme or plan of sexual abuse.

(5) The knowledge of a custodial parent or guardian may not be imputed to [~~a person~~] an individual under the age of 18 years.

(6) A civil action may be brought only against a living [~~person~~] individual who:

(a) intentionally perpetrated the sexual abuse;

(b) would be criminally responsible for the sexual abuse in accordance with Section 76-2-202; or

(c) negligently permitted the sexual abuse to occur.

(7) A civil action against [~~a person listed~~] an individual described in Subsection (6)(a) or (b) for sexual abuse that was time barred as of July 1, 2016, may be brought within 35 years of the victim's 18th birthday, or within three years of the effective date of this Subsection (7), whichever is longer.

(8) A civil action may not be brought as provided in Subsection (7) for:

(a) any claim that has been litigated to finality on the merits in a court of competent jurisdiction prior to July 1, 2016, however termination of a prior civil action on the basis of the expiration of the statute of limitations does not constitute a claim that has been litigated to finality on the merits; and

(b) any claim where a written settlement agreement was entered into between a victim and a defendant or perpetrator, unless the settlement agreement was the result of fraud, duress,

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or unconscionability. There is a rebuttable presumption that a settlement agreement signed by the victim when the victim was not represented by an attorney admitted to practice law in this state at the time of the settlement was the result of fraud, duress, or unconscionability.

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**Legislative Review Note**

**Office of Legislative Research and General Counsel†**