

# HB0270S01 compared with HB0270

~~text~~ shows text that was in HB0270 but was deleted in HB0270S01.

Inserted text shows text that was not in HB0270 but was inserted into HB0270S01.

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Representative Michael K. McKell proposes the following substitute bill:

## CRIMINAL CODE AMENDMENTS

2019 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Michael K. McKell**

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

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### LONG TITLE

#### General Description:

This bill amends provisions relating to distribution of an intimate image and indecent liberties.

#### Highlighted Provisions:

This bill:

- ▶ changes the intent provisions for the crime of distribution of an intimate image from intent to cause emotional distress to knowing that the distribution would cause a reasonable person emotional distress~~;~~

~~;~~

- ▶ provides that indecent liberties includes the touching of certain areas of the body or causing certain areas of the body to be touched; and
- ▶ adds particular offenses to provisions in which any touching is sufficient as an

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element of the offense.

### Money Appropriated in this Bill:

None

### Other Special Clauses:

None

### Utah Code Sections Affected:

AMENDS:

76-5-407, as last amended by Laws of Utah 2000, Chapter 128

76-5-416, as enacted by Laws of Utah 2018, Chapter 192

76-5b-203, as enacted by Laws of Utah 2014, Chapter 124

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

Section 1. Section 76-5-407 is amended to read:

**76-5-407. Applicability of part -- "Penetration" or "touching" sufficient to constitute offense.**

(1) The provisions of this part do not apply to consensual conduct between persons married to each other.

(2) In any prosecution for:

(a) the following offenses, any sexual penetration, however slight, is sufficient to constitute the relevant element of the offense:

(i) unlawful sexual activity with a minor, a violation of Section 76-5-401, involving sexual intercourse;

(ii) unlawful sexual conduct with a 16 or 17 year old, a violation of Section 76-5-401.2, involving sexual intercourse; or

(iii) rape, a violation of Section 76-5-402; or

(b) the following offenses, any touching, however slight, is sufficient to constitute the relevant element of the offense:

(i) unlawful sexual activity with a minor, a violation of Section 76-5-401, involving acts of sodomy;

(ii) unlawful sexual conduct with a 16 or 17 year old, a violation of Section 76-5-401.2, involving acts of sodomy;

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- (iii) sodomy, a violation of Subsection 76-5-403(1);
- (iv) forcible sodomy, a violation of Subsection 76-5-403(2);
- (v) rape of a child, a violation of Section 76-5-402.1; or
- (vi) object rape of a child, a violation of Section 76-5-402.3.

(3) In any prosecution for the following offenses, any touching, even if accomplished through clothing, is sufficient to constitute the relevant element of the offense:

- (a) sodomy on a child, a violation of Section 76-5-403.1; ~~[or]~~
- (b) sexual abuse of a child or aggravated sexual abuse of a child, a violation of Section

76-5-404.1~~;~~

~~;~~

(c) sexual abuse of a minor, a violation of Section 76-5-401.1;

(d) unlawful sexual conduct with a 16- or 17-year-old, a violation of Section

76-5-401.2;

(e) forcible sexual abuse, a violation of Section 76-5-404;

(f) custodial sexual relations, a violation of Section 76-5-412; or

(g) custodial sexual relations or misconduct with youth receiving state services, a violation of 76-5-413.

Section 2. Section 76-5-416 is amended to read:

### **76-5-416. Indecent liberties -- Definition.**

As used in this part, "takes indecent liberties" means:

(1) the actor touching the ~~[actor's]~~ victim's genitals, anus, buttocks, pubic area, or female breast ~~[against any part of the body of the victim];~~

(2) causing any part of the ~~[victim]~~ victim's body to touch the actor's or another's genitals, pubic area, anus, buttocks, or female breast;

(3) simulating or pretending to engage in sexual intercourse with the victim, including genital-genital, oral-genital, anal-genital, or oral-anal intercourse; or

(4) causing the victim to simulate or pretend to engage in sexual intercourse with the actor or another, including genital-genital, oral-genital, anal-genital, or oral-anal intercourse.

Section ~~{1}~~3. Section **76-5b-203** is amended to read:

### **76-5b-203. Distribution of an intimate image -- Penalty.**

(1) As used in this section:

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(a) "Distribute" means selling, exhibiting, displaying, wholesaling, retailing, providing, giving, granting admission to, providing access to, or otherwise transferring or presenting an image to another individual, with or without consideration.

(b) "Intimate image" means any visual depiction, photograph, film, video, recording, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, that depicts:

(i) exposed human male or female genitals or pubic area, with less than an opaque covering;

(ii) a female breast with less than an opaque covering, or any portion of the female breast below the top of the areola; or

(iii) the individual engaged in any sexually explicit conduct.

(c) "Sexually explicit conduct" means actual or simulated:

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) masturbation;

(iii) bestiality;

(iv) sadistic or masochistic activities;

(v) exhibition of the genitals, pubic region, buttocks, or female breast of any individual;

(vi) visual depiction of nudity or partial nudity;

(vii) fondling or touching of the genitals, pubic region, buttocks, or female breast; or

(viii) explicit representation of the defecation or urination functions.

(d) "Simulated sexually explicit conduct" means a feigned or pretended act of sexually explicit conduct that duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.

(2) An actor commits the offense of distribution of intimate images if the actor~~[, with the intent to cause emotional distress or harm,]~~ knowingly or intentionally distributes to any third party any intimate image of an individual who is 18 years of age or older and knows or should know that the distribution would cause a reasonable person to suffer emotional distress or harm, if:

(a) the actor knows that the depicted individual has not given consent to the actor to

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distribute the intimate image;

(b) the intimate image was created by or provided to the actor under circumstances in which the individual has a reasonable expectation of privacy; and

(c) actual emotional distress or harm is caused to the person as a result of the distribution under this section.

(3) This section does not apply to:

(a) (i) lawful practices of law enforcement agencies;

(ii) prosecutorial agency functions;

(iii) the reporting of a criminal offense;

(iv) court proceedings or any other judicial proceeding; or

(v) lawful and generally accepted medical practices and procedures;

(b) an intimate image if the individual portrayed in the image voluntarily allows public exposure of the image; ~~[or]~~

(c) an intimate image that is portrayed in a lawful commercial setting~~[-]; or~~

(d) an intimate image that is related to a matter of public concern or interest.

(4) (a) This section does not apply to an Internet service provider or interactive computer service, as defined in 47 U.S.C. Sec. 230(f)(2), a provider of an electronic communications service as defined in 18 U.S.C. Sec. 2510, a telecommunications service, information service, or mobile service as defined in 47 U.S.C. Sec. 153, including a commercial mobile service as defined in 47 U.S.C. Sec. 332(d), or a cable operator as defined in 47 U.S.C. Sec. 522, if:

(i) the distribution of an intimate image by the Internet service provider occurs only incidentally through the provider's function of:

(A) transmitting or routing data from one person to another person; or

(B) providing a connection between one person and another person;

(ii) the provider does not intentionally aid or abet in the distribution of the intimate image; and

(iii) the provider does not knowingly receive from or through a person who distributes the intimate image a fee greater than the fee generally charged by the provider, as a specific condition for permitting the person to distribute the intimate image.

(b) This section does not apply to a hosting company, as defined in Section

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76-10-1230, if:

(i) the distribution of an intimate image by the hosting company occurs only incidentally through the hosting company's function of providing data storage space or data caching to a person;

(ii) the hosting company does not intentionally engage, aid, or abet in the distribution of the intimate image; and

(iii) the hosting company does not knowingly receive from or through a person who distributes the intimate image a fee greater than the fee generally charged by the provider, as a specific condition for permitting the person to distribute, store, or cache the intimate image.

(c) A service provider, as defined in Section 76-10-1230, is not negligent under this section if it complies with Section 76-10-1231.

(5) (a) Distribution of an intimate image is a class A misdemeanor except under Subsection (5)(b).

(b) Distribution of an intimate image is a third degree felony on a second or subsequent conviction for an offense under this section that arises from a separate criminal episode as defined in Section 76-1-401.