

**HOUSE . . . . . No. 76**

The Commonwealth of Massachusetts



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*February 7, 2019*

To the Honorable Senate and House of Representatives,

I am submitting for your consideration “An Act Relative to the Harmful Distribution of Sexually Explicit Visual Material.” This legislation responds to important concerns raised by the Governor’s Council to Address Sexual Assault and Domestic Violence regarding the laws governing how Massachusetts addresses the harmful distribution of sexually explicit visual materials by both adults and teenagers. I filed a nearly identical bill last session, and a new draft of that bill was reported favorably by the Joint Committee on the Judiciary. The issues addressed by this legislation continue to confront parents, educators, law enforcement, the courts and our communities today. Based on the thoughtful input of the Council, I continue to believe that this bill strikes the right balance among education, prevention, deterrence and punishment for our Commonwealth.

Under current law, minors who engage in peer to peer distribution of sexually explicit visual material are subject to prosecution for the distribution or possession of child pornography. These felony offenses are too severe a sanction for conduct that, while covered by the respective statutes, is not what lawmakers had in mind when they outlawed child pornography. The legislation I am filing today addresses this issue in three ways.

First, the legislation creates a presumption that any child charged with distributing or possessing child pornography should be placed in an educational diversion program rather than go through the juvenile justice process and potentially be committed to the Department of Youth Services. District Attorneys and the Attorney General will retain prosecutorial discretion to use the juvenile justice process in appropriate cases, but the default should be diversion rather than prosecution.

Second, for those cases in which the juvenile justice system is appropriate, this legislation gives law enforcement a new tool, allowing minors to be charged with a misdemeanor rather than a felony. Juveniles prosecuted for this new misdemeanor offense would be entitled to the same presumption that they should be diverted from the juvenile justice system.

Third, and most importantly, this legislation requires schools to provide age-appropriate education on the risks and harmful effects of the creation, possession, and distribution of sexually explicit visual depictions of minors as they relate to cyber-bullying. Using school’s existing cyber-bullying programming as a framework, this will promote prevention and early intervention, and reduce the number of teens engaged in harmful distribution of these sorts of images.

Finally, Massachusetts law has a gap when it comes to the conduct widely referred to as “revenge pornography.” We have laws punishing the non-consensual recording of sexually explicit images of

unsuspecting people. Our laws do not address, however, when a person takes a sexually explicit image or recording that was lawfully obtained and then distributes it with the intent to harm the person depicted and without that person's consent. The harm suffered by the victims of this misconduct can be significant, and our laws should recognize the serious nature of this behavior with a serious consequence. This legislation closes the gap in our law by creating a new felony offense and empowering judges in criminal proceedings to issue appropriate orders to restrain or prevent the future commission of the new offense. Over thirty other states have taken similar steps to protect their citizens by criminalizing this conduct. The citizens of Massachusetts deserve the same level of protections.

I urge your prompt enactment of this legislation.

Respectfully submitted

Charles D. Baker,  
*Governor*

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**In the One Hundred and Ninety-First General Court  
(2019-2020)**

An Act relative to the harmful distribution of sexually explicit visual material.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

SECTION 1. Section 37O of Chapter 71 of the General Laws, as appearing in the 2014 Official Edition, is hereby amended by striking out the second sentence of the definition of "Cyber-bullying" and inserting in place thereof the following sentence:-

Cyber-bullying shall also include: (i) the creation of a web page or blog in which the creator assumes the identity of another person; (ii) the knowing impersonation of another person as the author of posted content or messages; or (iii) the violation of sections 29D or 107 of chapter 272, if the creation, impersonation or violation creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying.

SECTION 2. Chapter 119 of the General Laws is hereby amended by inserting after section 39L the following section:-

Section 39M. If a child is alleged to be a juvenile delinquent by reason of violating sections 29B, 29C, or 29D of chapter 272, unless the district attorney or the attorney general objects in writing stating the reasons for his objection, the court shall, if arraignment has not yet occurred, indefinitely stay arraignment and direct that the

child enter and complete an educational diversion program approved by the district attorney or the attorney general. If the district attorney or the attorney general objects, the minor shall not be diverted and the case shall be arraigned in the ordinary course. If the court finds that the child has failed to complete the diversion program, the court shall bring the case forward, arraign the child and restore the delinquency complaint to the docket for further proceedings. If arraignment has already occurred, unless the district attorney or the attorney general objects in writing stating the reasons for his objection, at which point the case must proceed in the ordinary course, the court shall place the child on pretrial probation under section 87 of chapter 276. The conditions of such probation shall include, but not be limited to, completion of an educational diversion program approved by the district attorney or attorney general. If the child fails to substantially comply with the conditions of probation, the court shall restore the delinquency to the docket for trial or further proceedings.

SECTION 3. Section 24C of Chapter 265 of the General Laws as appearing in the 2014 Official Edition is hereby amended by inserting after the figure “265,” in line 8, the following words:-

or an arrest, investigation or complaint for unlawful sexual surveillance under section 105 of chapter 272, or an arrest, investigation or complaint for the harmful distribution of sexually explicit visual material under section 107 of said chapter 272.

SECTION 4. Chapter 272 of the General Laws is hereby amended by inserting after section 29C the following section:-

Section 29D. Whoever is a minor and violates sections 29B or 29C of this chapter may be charged with being a delinquent child or youthful offender in accordance with the provisions of chapter 119 or, in the sole discretion of the attorney for the Commonwealth, may instead be charged with being a delinquent child in accordance with the provisions of chapter 119 for engaging in peer to peer dissemination of explicit visual material, which shall be deemed a misdemeanor offense against the commonwealth. Adjudication as a delinquent child for engaging in peer to peer dissemination of explicit visual material shall not be deemed a "sex offense" under section 178C of chapter 6 of the general laws.

SECTION 5. Section 31 of Chapter 272 of the General Laws as so appearing is hereby amended by striking out, in lines 1 to 3, the words “twenty-eight, twenty-eight C, twenty-eight D, twenty-eight E, twenty-nine, twenty-nine A, twenty-nine B, thirty and thirty D,” and inserting in place thereof the following 10 figures:- 28, 28C, 28D, 28E, 29, 29A, 29B, 30, 30D and 107.

SECTION 6. Subsection (b) of section 105 of said chapter 272, as so appearing, is hereby amended by adding the following paragraph:-

Whoever willfully photographs, videotapes or electronically surveils another person who is nude or partially nude, when that person is in a gymnasium, athletic facility, restroom, or changing area, such that the person would have a reasonable expectation of privacy in not being so photographed, videotaped or electronically surveilled, and does so without that person's consent, shall be punished by imprisonment in the house of correction for not more than 2 ½ years or by a fine of not more than \$5,000, or by both such fine and imprisonment.

SECTION 7. Subsection (c) of said section 105 of said chapter 272, as so appearing, is hereby amended by striking out, in line 45, the words "and second" and inserting in place thereof the following words:- , second or fourth.

SECTION 8. Said Chapter 272 is hereby amended by adding the following section:-

Section 107. (a) As used in this section, the following terms shall have the following meanings:

"Distribute", give, sell, transfer, disseminate, publish, upload, circulate, broadcast, or engage in any other form of transmission, electronic or otherwise.

"Harm", physical injury, financial injury or substantial emotional distress.

"Identifiable", identifiable from the visual material itself or information offered in connection with the visual material.

"Partially nude", the exposure of the human genitals, buttocks, pubic area or female breast below a point immediately above the top of the areola.

(b) Whoever knowingly distributes visual material depicting another identifiable person who is nude, partially nude, or engaged in sexual conduct, when the distribution would cause a reasonable person to suffer harm, and does so with the intent to harm, harass, intimidate, threaten or coerce, or with reckless disregard for the likelihood that the person depicted or the person receiving will suffer harm, and, at the time of the distribution, knew or should have known that the depicted identifiable person did not consent to the distribution shall be punished by imprisonment in the state prison for not more than 5 years, or in the house of correction for

not more than 2 ½ years, or by a fine of not more than \$10,000, or both. For purposes of this subsection, consent to the creation of visual material shall not, by itself, constitute consent to the distribution of the visual material or any part, representation or reproduction thereof.

(c) Subsection (b) shall not apply to:

(1) visual material involving nudity, partial nudity or sexual conduct that is both (i) voluntary and (ii) in a public or commercial setting or in a place where a person does not have a reasonable expectation of privacy;

(2) distribution made in the public interest, including the reporting of unlawful conduct;

(3) lawful and common practices of: law enforcement, criminal reporting, corrections, legal proceedings, or medical treatment;

(4) distribution of visual material that constitutes a matter of public concern; or

(5) interactive computer services, as defined in 47 U.S.C. § 230(f)(2), or information services or telecommunications services, as defined in 47 U.S.C. § 153, for content solely provided by another person.

This subsection shall not preclude other remedies available at law.

(d) Whoever threatens to commit the crime set forth in subsection (b) shall be punished by imprisonment in the state prison for not more than 5 years, or in the house of correction for not more than 2 ½ years, or by a fine of not more than \$10,000, or both.

(e) In a prosecution under this section, a justice of the superior court, district court or juvenile court may issue appropriate orders to restrain or prevent the unlawful distribution of visual material in violation of this section.

(f) A copy of visual material that is part of any court record arising from a prosecution under this section shall not be open to public inspection and shall only be made available by court personnel to a law enforcement officer, prosecuting attorney, defendant's attorney, defendant, or victim connected to such prosecution for inspection, unless otherwise ordered by the court.

SECTION 9. Section 1 shall take effect on July 1, 2020.