

**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 element of the offense.

**Money Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:



26 76-5-407, as last amended by Laws of Utah 2000, Chapter 128

27 76-5-416, as enacted by Laws of Utah 2018, Chapter 192

28 76-5b-203, as enacted by Laws of Utah 2014, Chapter 124

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

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

32 **76-5-407. Applicability of part -- "Penetration" or "touching" sufficient to**  
33 **constitute offense.**

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

36 (2) In any prosecution for:

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

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

41 (ii) unlawful sexual conduct with a 16 or 17 year old, a violation of Section  
42 76-5-401.2, involving sexual intercourse; or

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

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

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

48 (ii) unlawful sexual conduct with a 16 or 17 year old, a violation of Section  
49 76-5-401.2, involving acts of sodomy;

50 (iii) sodomy, a violation of Subsection 76-5-403(1);

51 (iv) forcible sodomy, a violation of Subsection 76-5-403(2);

52 (v) rape of a child, a violation of Section 76-5-402.1; or

53 (vi) object rape of a child, a violation of Section 76-5-402.3.

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

56 (a) sodomy on a child, a violation of Section 76-5-403.1; [or]

57 (b) sexual abuse of a child or aggravated sexual abuse of a child, a violation of Section  
58 [76-5-404.1](#);

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

60 (d) unlawful sexual conduct with a 16- or 17-year-old, a violation of Section  
61 [76-5-401.2](#);

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

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

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

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

67 **76-5-416. Indecent liberties -- Definition.**

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

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

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

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

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

77 Section 3. Section **76-5b-203** is amended to read:

78 **76-5b-203. Distribution of an intimate image -- Penalty.**

79 (1) As used in this section:

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

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

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

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

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

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

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

94 (ii) masturbation;

95 (iii) bestiality;

96 (iv) sadistic or masochistic activities;

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

99 (vi) visual depiction of nudity or partial nudity;

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

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

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

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

110 (a) the actor knows that the depicted individual has not given consent to the actor to  
111 distribute the intimate image;

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

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

116 (3) This section does not apply to:

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

118 (ii) prosecutorial agency functions;

- 119 (iii) the reporting of a criminal offense;
- 120 (iv) court proceedings or any other judicial proceeding; or
- 121 (v) lawful and generally accepted medical practices and procedures;
- 122 (b) an intimate image if the individual portrayed in the image voluntarily allows public
- 123 exposure of the image; [~~or~~]
- 124 (c) an intimate image that is portrayed in a lawful commercial setting[-]; or
- 125 (d) an intimate image that is related to a matter of public concern or interest.

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

- 132 (i) the distribution of an intimate image by the Internet service provider occurs only
- 133 incidentally through the provider's function of:
  - 134 (A) transmitting or routing data from one person to another person; or
  - 135 (B) providing a connection between one person and another person;
- 136 (ii) the provider does not intentionally aid or abet in the distribution of the intimate
- 137 image; and
- 138 (iii) the provider does not knowingly receive from or through a person who distributes
- 139 the intimate image a fee greater than the fee generally charged by the provider, as a specific
- 140 condition for permitting the person to distribute the intimate image.

141 (b) This section does not apply to a hosting company, as defined in Section  
142 [76-10-1230](#), if:

- 143 (i) the distribution of an intimate image by the hosting company occurs only
- 144 incidentally through the hosting company's function of providing data storage space or data
- 145 caching to a person;
- 146 (ii) the hosting company does not intentionally engage, aid, or abet in the distribution
- 147 of the intimate image; and
- 148 (iii) the hosting company does not knowingly receive from or through a person who
- 149 distributes the intimate image a fee greater than the fee generally charged by the provider, as a

150 specific condition for permitting the person to distribute, store, or cache the intimate image.

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

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

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