

House Bill 3185

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Creates crime of causing child to witness sexually explicit conduct in first degree. Punishes by maximum of five years' imprisonment, \$125,000 fine, or both. Designates crime as sex crime.

Creates crime of causing child to witness sexually explicit conduct in second degree. Punishes by maximum of one year's imprisonment, \$6,250 fine, or both. Designates crime as sex crime.

Removes certain provisions relating to crime of endangering welfare of minor that cover similar conduct.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to crime; creating new provisions; amending ORS 137.225, 163.345, 163.575, 163.580, 181.594
3 and 475.245; and declaring an emergency.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1. Sections 2 and 3 of this 2013 Act are added to and made a part of ORS 163.305**
6 **to 163.467.**

7 **SECTION 2. (1) A person commits the crime of causing a child to witness sexually ex-**
8 **PLICIT CONDUCT IN THE FIRST DEGREE IF THE PERSON KNOWINGLY ENGAGES IN AN ACT OF SEXUALLY EXPLICIT**
9 **CONDUCT AS DEFINED IN ORS 163.665 WHILE KNOWING THAT THE ACT WILL BE WITNESSED BY A CHILD**
10 **UNDER 14 YEARS OF AGE.**

11 **(2) Causing a child to witness sexually explicit conduct in the first degree is a Class C**
12 **felony.**

13 **(3) The Oregon Criminal Justice Commission shall classify causing a child to witness**
14 **sexually explicit conduct in the first degree as a person felony and crime category 6 on the**
15 **crime seriousness scale of the sentencing guidelines.**

16 **SECTION 3. (1) A person commits the crime of causing a child to witness sexually ex-**
17 **PLICIT CONDUCT IN THE SECOND DEGREE IF THE PERSON ENGAGES IN AN ACT OF SEXUALLY EXPLICIT CON-**
18 **DUCT AS DEFINED IN ORS 163.665 WHILE KNOWING THAT THE ACT WILL BE WITNESSED BY A CHILD UNDER**
19 **18 YEARS OF AGE.**

20 **(2) Causing a child to witness sexually explicit conduct in the second degree is a Class**
21 **A misdemeanor.**

22 **SECTION 4. ORS 163.345 is amended to read:**

23 163.345. (1) In any prosecution under ORS 163.355, 163.365, 163.385, 163.395, 163.415, 163.425,
24 163.427 or 163.435 **or section 2 or 3 of this 2013 Act** in which the victim's lack of consent was due
25 solely to incapacity to consent by reason of being less than a specified age, it is a defense that the
26 actor was less than three years older than the victim at the time of the alleged offense.

27 (2) In any prosecution under ORS 163.408, when the object used to commit the unlawful sexual
28 penetration was the hand or any part thereof of the actor and in which the victim's lack of consent

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted.
New sections are in **boldfaced** type.

1 was due solely to incapacity to consent by reason of being less than a specified age, it is a defense
 2 that the actor was less than three years older than the victim at the time of the alleged offense.

3 (3) In any prosecution under ORS 163.445 in which the victim's lack of consent was due solely
 4 to incapacity to consent by reason of being less than a specified age, it is a defense that the actor
 5 was less than three years older than the victim at the time of the alleged offense if the victim was
 6 at least 15 years of age at the time of the alleged offense.

7 **SECTION 5.** ORS 163.575 is amended to read:

8 163.575. (1) A person commits the crime of endangering the welfare of a minor if the person
 9 knowingly:

10 [(a) *Induces, causes or permits an unmarried person under 18 years of age to witness an act of*
 11 *sexual conduct or sadomasochistic abuse as defined by ORS 167.060; or]*

12 [(b) (a) Permits a person under 18 years of age to enter or remain in a place where unlawful
 13 activity involving controlled substances is maintained or conducted; *or]*

14 [(c) (b) Induces, causes or permits a person under 18 years of age to participate in gambling
 15 as defined by ORS 167.117; *or]*

16 [(d) (c) Distributes, sells, or causes to be sold, tobacco in any form to a person under 18 years
 17 of age; or

18 [(e) (d) Sells to a person under 18 years of age any device in which tobacco, marijuana, cocaine
 19 or any controlled substance, as defined in ORS 475.005, is burned and the principal design and use
 20 of which is directly or indirectly to deliver tobacco smoke, marijuana smoke, cocaine smoke or
 21 smoke from any controlled substance into the human body including but not limited to:

22 (A) Pipes, water pipes, hookahs, wooden pipes, carburetor pipes, electric pipes, air driven pipes,
 23 corncob pipes, meerschaum pipes and ceramic pipes, with or without screens, permanent screens,
 24 hashish heads or punctured metal bowls;

25 (B) Carburetion tubes and devices, including carburetion masks;

26 (C) Bonges;

27 (D) Chillums;

28 (E) Ice pipes or chillers;

29 (F) Cigarette rolling papers and rolling machines; and

30 (G) Cocaine free basing kits.

31 (2) Endangering the welfare of a minor by violation of subsection (1)(a), (b)[, (c)] or [(e)] (d) of
 32 this section, involving other than a device for smoking tobacco, is a Class A misdemeanor.

33 (3) Endangering the welfare of a minor by violation of subsection [(1)(d)] (1)(c) of this section
 34 or by violation of subsection [(1)(e)] (1)(d) of this section, involving a device for smoking tobacco,
 35 is a Class A violation.

36 **SECTION 6.** ORS 181.594 is amended to read:

37 181.594. As used in this section and ORS 181.595, 181.596, 181.597, 181.603, 181.609, 181.826,
 38 181.830 and 181.833:

39 (1) "Another United States court" means a federal court, a military court, the tribal court of a
 40 federally recognized Indian tribe or a court of:

41 (a) A state other than Oregon;

42 (b) The District of Columbia;

43 (c) The Commonwealth of Puerto Rico;

44 (d) Guam;

45 (e) American Samoa;

1 (f) The Commonwealth of the Northern Mariana Islands; or

2 (g) The United States Virgin Islands.

3 (2) "Attends" means is enrolled on a full-time or part-time basis.

4 (3)(a) "Correctional facility" means any place used for the confinement of persons:

5 (A) Charged with or convicted of a crime or otherwise confined under a court order.

6 (B) Found to be within the jurisdiction of the juvenile court for having committed an act that
7 if committed by an adult would constitute a crime.

8 (b) "Correctional facility" applies to a state hospital or a secure intensive community inpatient
9 facility only as to persons detained therein charged with or convicted of a crime, or detained therein
10 after being found guilty except for insanity under ORS 161.290 to 161.370 or responsible except for
11 insanity under ORS 419C.411.

12 (4) "Institution of higher education" means a public or private educational institution that pro-
13 vides a program of post-secondary education.

14 (5) "Sex crime" means:

15 (a) Rape in any degree;

16 (b) Sodomy in any degree;

17 (c) Unlawful sexual penetration in any degree;

18 (d) Sexual abuse in any degree;

19 (e) Incest with a child victim;

20 (f) Using a child in a display of sexually explicit conduct;

21 (g) Encouraging child sexual abuse in any degree;

22 (h) Transporting child pornography into the state;

23 (i) Paying for viewing a child's sexually explicit conduct;

24 (j) Compelling prostitution;

25 (k) Promoting prostitution;

26 (L) Kidnapping in the first degree if the victim was under 18 years of age;

27 (m) Contributing to the sexual delinquency of a minor;

28 (n) Sexual misconduct if the offender is at least 18 years of age;

29 (o) Possession of materials depicting sexually explicit conduct of a child in the first degree;

30 (p) Kidnapping in the second degree if the victim was under 18 years of age, except by a parent
31 or by a person found to be within the jurisdiction of the juvenile court;

32 (q) Online sexual corruption of a child in any degree if the offender reasonably believed the
33 child to be more than five years younger than the offender;

34 (r) Sexual assault of an animal;

35 **(s) Causing a child to witness sexually explicit conduct in any degree;**

36 [(s)] (t) Any attempt to commit any of the crimes set forth in paragraphs (a) to [(r)] (s) of this
37 subsection;

38 [(t)] (u) Burglary, when committed with intent to commit any of the offenses listed in paragraphs
39 (a) to [(r) or (u)] (s) or (v) of this subsection; or

40 [(u)] (v) Public indecency or private indecency, if the person has a prior conviction for a crime
41 listed in this subsection.

42 (6) "Sex offender" means a person who:

43 (a) Has been convicted of a sex crime;

44 (b) Has been found guilty except for insanity of a sex crime;

45 (c) Is paroled to this state under ORS 144.610 after being convicted in another United States

1 court of a crime that would constitute a sex crime if committed in this state; or

2 (d) Is described in ORS 181.609 (1).

3 (7) “Works” or “carries on a vocation” means full-time or part-time employment for more than
 4 14 days within one calendar year whether financially compensated, volunteered or for the purpose
 5 of governmental or educational benefit.

6 **SECTION 7.** ORS 137.225, as amended by section 4, chapter 70, Oregon Laws 2012, is amended
 7 to read:

8 137.225. (1)(a) At any time after the lapse of three years from the date of pronouncement of
 9 judgment, any defendant who has fully complied with and performed the sentence of the court and
 10 whose conviction is described in subsection (5) of this section by motion may apply to the court
 11 where the conviction was entered for entry of an order setting aside the conviction; or

12 (b) At any time after the lapse of one year from the date of any arrest, if no accusatory in-
 13 strument was filed, or at any time after an acquittal or a dismissal of the charge, the arrested per-
 14 son may apply to the court that would have jurisdiction over the crime for which the person was
 15 arrested, for entry of an order setting aside the record of the arrest. For the purpose of computing
 16 the one-year period, time during which the arrested person has secreted himself or herself within
 17 or without this state is not included.

18 (2)(a) A copy of the motion and a full set of the defendant’s fingerprints shall be served upon
 19 the office of the prosecuting attorney who prosecuted the crime or violation, or who had authority
 20 to prosecute the charge if there was no accusatory instrument filed, and opportunity shall be given
 21 to contest the motion. The fingerprint card with the notation “motion for setting aside conviction,”
 22 or “motion for setting aside arrest record” as the case may be, shall be forwarded to the Department
 23 of State Police. Information resulting from the fingerprint search along with the fingerprint card
 24 shall be returned to the prosecuting attorney.

25 (b) When a prosecuting attorney is served with a copy of a motion to set aside a conviction
 26 under this section, the prosecuting attorney shall provide a copy of the motion and notice of the
 27 hearing date to the victim, if any, of the crime by mailing a copy of the motion and notice to the
 28 victim’s last-known address.

29 (c) When a person makes a motion under subsection (1)(a) of this section, the person must pay
 30 a fee of \$80 to the Department of State Police. The person shall attach a certified check payable to
 31 the Department of State Police in the amount of \$80 to the fingerprint card that is served upon the
 32 prosecuting attorney. The office of the prosecuting attorney shall forward the check with the fin-
 33 gerprint card to the Department of State Police.

34 (d) In addition to the fee established under paragraph (c) of this subsection, when a person
 35 makes a motion under subsection (1)(a) of this section the person must pay the filing fee established
 36 under ORS 21.135.

37 (3) Upon hearing the motion, the court may require the filing of such affidavits and may require
 38 the taking of such proofs as the court deems proper. The court shall allow the victim to make a
 39 statement at the hearing. Except as otherwise provided in subsection (14) of this section, if the court
 40 determines that the circumstances and behavior of the applicant from the date of conviction, or from
 41 the date of arrest as the case may be, to the date of the hearing on the motion warrant setting aside
 42 the conviction, or the arrest record as the case may be, the court shall enter an appropriate order
 43 that shall state the original arrest charge and the conviction charge, if any and if different from the
 44 original, date of charge, submitting agency and disposition. The order shall further state that posi-
 45 tive identification has been established by the Department of State Police and further identified as

1 to Department of State Police number or submitting agency number. Upon the entry of the order,
 2 the applicant for purposes of the law shall be deemed not to have been previously convicted, or ar-
 3 rested as the case may be, and the court shall issue an order sealing the record of conviction and
 4 other official records in the case, including the records of arrest whether or not the arrest resulted
 5 in a further criminal proceeding.

6 (4) The clerk of the court shall forward a certified copy of the order to such agencies as directed
 7 by the court. A certified copy must be sent to the Department of Corrections when the person has
 8 been in the custody of the Department of Corrections. Upon entry of the order, the conviction, ar-
 9 rest or other proceeding shall be deemed not to have occurred, and the applicant may answer ac-
 10 cordingly any questions relating to its occurrence.

11 (5) The provisions of subsection (1)(a) of this section apply to a conviction of:

12 (a) A Class B felony, except for a violation of ORS 166.429 or any crime classified as a person
 13 felony as that term is defined in the rules of the Oregon Criminal Justice Commission.

14 (b) A Class C felony, except for criminal mistreatment in the first degree under ORS 163.205
 15 when it would constitute child abuse as defined in ORS 419B.005 or any sex crime.

16 (c) The crime of possession of the narcotic drug marijuana when that crime was punishable as
 17 a felony only.

18 (d) A crime punishable as either a felony or a misdemeanor, in the discretion of the court, ex-
 19 cept for:

20 (A) Any sex crime; or

21 *[(B) The following crimes when they would constitute child abuse as defined in ORS 419B.005:]*

22 *[(i)]* **(B) Criminal mistreatment in the first degree under ORS 163.205 when it would constitute**
 23 **child abuse as defined in ORS 419B.005.;** *and]*

24 *[(ii) Endangering the welfare of a minor under ORS 163.575 (1)(a).]*

25 (e) A misdemeanor, including a violation of a municipal ordinance, for which a jail sentence may
 26 be imposed, except for *[endangering the welfare of a minor under ORS 163.575 (1)(a) when it would*
 27 *constitute child abuse as defined in ORS 419B.005 or]* any sex crime.

28 (f) A violation, whether under state law or local ordinance.

29 (g) An offense committed before January 1, 1972, that if committed after that date would be:

30 (A) A Class C felony, except for any sex crime or for *[the following crimes when they would*
 31 *constitute child abuse as defined in ORS 419B.005:]*

32 *[(i)]* criminal mistreatment in the first degree under ORS 163.205; *and]* **when it would consti-**
 33 **tute child abuse as defined in ORS 419B.005.**

34 *[(ii) Endangering the welfare of a minor under ORS 163.575 (1)(a).]*

35 (B) A crime punishable as either a felony or a misdemeanor, in the discretion of the court, ex-
 36 cept for any sex crime or for *[the following crimes when they would constitute child abuse as defined*
 37 *in ORS 419B.005:]*

38 *[(i)]* criminal mistreatment in the first degree under ORS 163.205; *and]* **when it would consti-**
 39 **tute child abuse as defined in ORS 419B.005.**

40 *[(ii) Endangering the welfare of a minor under ORS 163.575 (1)(a).]*

41 (C) A misdemeanor, except for *[endangering the welfare of a minor under ORS 163.575 (1)(a) when*
 42 *it would constitute child abuse as defined in ORS 419B.005 or]* any sex crime.

43 (D) A violation.

44 (6) Notwithstanding subsection (5) of this section, the provisions of subsection (1) of this section
 45 do not apply to:

1 (a) A conviction for a state or municipal traffic offense.

2 (b) A person convicted, within the 10-year period immediately preceding the filing of the motion
 3 pursuant to subsection (1) of this section, of any other offense, excluding motor vehicle violations,
 4 whether or not the other conviction is for conduct associated with the same criminal episode that
 5 caused the arrest or conviction that is sought to be set aside. Notwithstanding subsection (1) of this
 6 section, a conviction that has been set aside under this section shall be considered for the purpose
 7 of determining whether this paragraph is applicable.

8 (c) A person who at the time the motion authorized by subsection (1) of this section is pending
 9 before the court is under charge of commission of any crime.

10 (7) Notwithstanding subsection (5) of this section, the provisions of subsection (1)(a) of this sec-
 11 tion do not apply to:

12 (a) Criminal mistreatment in the second degree under ORS 163.200 if the victim at the time of
 13 the crime was 65 years of age or older; and

14 (b) Criminal mistreatment in the first degree under ORS 163.205 if the victim at the time of the
 15 crime was 65 years of age or older.

16 (8) Notwithstanding subsection (5) of this section, the provisions of subsection (1)(a) of this sec-
 17 tion do not apply to criminally negligent homicide under ORS 163.145, when that offense was
 18 punishable as a Class C felony.

19 (9) Notwithstanding subsection (5) of this section, the provisions of subsection (1)(a) of this sec-
 20 tion apply to a conviction for a Class B felony described in subsection (5)(a) of this section only if:

21 (a) Twenty years or more have elapsed from the date of the conviction sought to be set aside
 22 or of the release of the person from imprisonment for the conviction sought to be set aside, which-
 23 ever is later; and

24 (b) The person has not been convicted of or arrested for any other offense, excluding motor ve-
 25 hicle violations, after the date the person was convicted of the offense sought to be set aside.
 26 Notwithstanding subsection (1) of this section, a conviction or arrest that has been set aside under
 27 this section shall be considered for the purpose of determining whether this paragraph is applicable.

28 (10) The provisions of subsection (1)(b) of this section do not apply to:

29 (a) A person arrested within the three-year period immediately preceding the filing of the motion
 30 for any offense, excluding motor vehicle violations, and excluding arrests for conduct associated
 31 with the same criminal episode that caused the arrest that is sought to be set aside. An arrest that
 32 has been set aside under this section may not be considered for the purpose of determining whether
 33 this paragraph is applicable.

34 (b) An arrest for driving while under the influence of intoxicants if the charge is dismissed as
 35 a result of the person's successful completion of a diversion agreement described in ORS 813.200.

36 (11) The provisions of subsection (1) of this section apply to convictions and arrests that oc-
 37 curred before, as well as those that occurred after, September 9, 1971. There is no time limit for
 38 making an application.

39 (12) For purposes of any civil action in which truth is an element of a claim for relief or affir-
 40 mative defense, the provisions of subsection (3) of this section providing that the conviction, arrest
 41 or other proceeding be deemed not to have occurred do not apply and a party may apply to the
 42 court for an order requiring disclosure of the official records in the case as may be necessary in the
 43 interest of justice.

44 (13) Upon motion of any prosecutor or defendant in a case involving records sealed under this
 45 section, supported by affidavit showing good cause, the court with jurisdiction may order the reo-

1 pening and disclosure of any records sealed under this section for the limited purpose of assisting
 2 the investigation of the movant. However, such an order has no other effect on the orders setting
 3 aside the conviction or the arrest record.

4 (14) Unless the court makes written findings by clear and convincing evidence that granting the
 5 motion would not be in the best interests of justice, the court shall grant the motion and enter an
 6 order as provided in subsection (3) of this section if the defendant has been convicted of one of the
 7 following crimes and is otherwise eligible for relief under this section:

- 8 (a) Abandonment of a child, ORS 163.535.
- 9 (b) Attempted assault in the second degree, ORS 163.175.
- 10 (c) Assault in the third degree, ORS 163.165.
- 11 (d) Coercion, ORS 163.275.
- 12 (e) Criminal mistreatment in the first degree, ORS 163.205.
- 13 (f) Attempted escape in the first degree, ORS 162.165.
- 14 (g) Incest, ORS 163.525, if the victim was at least 18 years of age.
- 15 (h) Intimidation in the first degree, ORS 166.165.
- 16 (i) Attempted kidnapping in the second degree, ORS 163.225.
- 17 (j) Attempted robbery in the second degree, ORS 164.405.
- 18 (k) Robbery in the third degree, ORS 164.395.
- 19 (L) Supplying contraband, ORS 162.185.
- 20 (m) Unlawful use of a weapon, ORS 166.220.

21 (15) As used in this section, "sex crime" has the meaning given that term in ORS 181.594.

22 **SECTION 8.** ORS 163.580 is amended to read:

23 163.580. (1) Any person who sells any of the smoking devices listed in ORS 163.575 [(1)(e)] **(1)(d)**
 24 shall display a sign clearly stating that the sale of such devices to persons under 18 years of age
 25 is prohibited by law.

26 (2) Any person who violates this section commits a Class B violation.

27 **SECTION 9.** ORS 475.245 is amended to read:

28 475.245. Whenever any person pleads guilty to or is found guilty of possession of a controlled
 29 substance under ORS 475.752 (3), 475.814, 475.824, 475.834, 475.854, 475.864, 475.874, 475.884 or
 30 475.894, of endangering the welfare of a minor under ORS 163.575 [(1)(b)] **(1)(a)**, of frequenting a
 31 place where controlled substances are used under ORS 167.222 or of a property offense that is mo-
 32 tivated by a dependence on a controlled substance, the court, without entering a judgment of guilt
 33 and with the consent of the district attorney and the accused, may defer further proceedings and
 34 place the person on probation. Upon violation of a term or condition of probation, the court may
 35 enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and
 36 conditions, the court shall discharge the person and dismiss the proceedings against the person.
 37 Discharge and dismissal under this section shall be without adjudication of guilt and is not a con-
 38 viction for purposes of this section or for purposes of disqualifications or disabilities imposed by law
 39 upon conviction of a crime. There may be only one discharge and dismissal under this section with
 40 respect to any person.

41 **SECTION 10.** This 2013 Act being necessary for the immediate preservation of the public
 42 peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect
 43 on its passage.