



Senate Fiscal Agency  
P. O. Box 30036  
Lansing, Michigan 48909-7536



BILL ANALYSIS

Telephone: (517) 373-5383  
Fax: (517) 373-1986  
TDD: (517) 373-0543

Senate Bill 158 (Substitute S-2 as passed by the Senate)  
Senate Bill 760 (Substitute S-1 as passed by the Senate)  
Sponsor: Senator Ron Jelinek  
Committee: Judiciary

Date Completed: 8-18-08

### **RATIONALE**

Incidents in which children were left in a car on a hot day have brought to light a potential problem with the application of Michigan's child abuse laws. First- and second-degree child abuse involve knowing or intentional acts, omissions, or reckless acts that cause or are likely to cause serious physical harm or, in some cases, serious mental harm to a child. Third-degree child abuse involves a person's knowingly or intentionally causing physical harm, and fourth-degree child abuse involves a person's omission or reckless act that causes physical harm. ("Physical harm", "serious physical harm", and "serious mental harm" are defined terms in the Michigan Penal Code.) The child abuse prohibitions do not address situations in which a person knowingly and intentionally places a child in a situation that is likely to cause physical harm to a child. As a result, such a person cannot be convicted of third- or fourth-degree child abuse unless the child suffered actual physical harm, and cannot be convicted of first- or second-degree child abuse unless the incident involved serious harm. If, for instance, a child is found in a car on a very hot or very cold day before he or she suffers physical harm, the person who exposed the child to the likely harm might not be held criminally liable for his or her actions. Some people believe that child abuse prohibitions and penalties should apply in this type of situation.

### **CONTENT**

**Senate Bills 158 (S-2) and 760 (S-1) would amend the Michigan Penal Code**

**and the Code of Criminal Procedure, respectively, to do all of the following:**

- **Include in the factors that constitute third- and fourth-degree child abuse a person's knowing or intentional act that the person knew, or should have known, was likely to cause physical harm to a child.**
- **Designate third-degree child abuse as a felony rather than a misdemeanor.**
- **Include in the factors that constitute second-degree child abuse a person's reckless act that caused serious mental harm to a child.**
- **Provide that conduct that was a reasonable response to domestic violence would be an affirmative defense to a prosecution for child abuse.**
- **Revise the sentencing guidelines MCL citation for third-degree child abuse.**

The bills would take effect 90 days after their enactment. Senate Bill 760 (S-1) is tie-barred to Senate Bill 158.

### **Senate Bill 158 (S-2)**

#### **Fourth-Degree Child Abuse**

Currently, a person is guilty of fourth-degree child abuse, a misdemeanor punishable by up to one year's imprisonment, if his or her omission or reckless act causes physical harm to a child (an unemancipated person under 18 years old). Under the bill, a person also would be guilty of fourth-degree

child abuse if he or she knowingly or intentionally committed an act that he or she knew or should have known was likely to cause physical harm to a child, regardless of whether physical harm resulted.

### Third-Degree Child Abuse

Currently, a person is guilty of third-degree child abuse if he or she knowingly or intentionally causes physical harm to a child. Under the bill, a person also would be guilty of third-degree child abuse if he or she knowingly or intentionally committed an act that he or she knew or should have known was likely to cause physical harm to a child, and the act resulted in physical harm to a child.

Third-degree child abuse presently is a misdemeanor punishable by up to two years' imprisonment. Under the bill, the offense would be a felony subject to the same penalty.

### Second-Degree Child Abuse

Under the Penal Code, a person is guilty of second-degree child abuse, a felony punishable by up to four years' imprisonment, if any of the following apply:

- The person's omission causes serious physical harm or serious mental harm to a child.
- The person's reckless act causes serious physical harm to a child.
- The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child, regardless of whether harm results.
- The person knowingly or intentionally commits an act that is cruel to a child, regardless of whether harm results.

Under the bill, a person also would be guilty of second-degree child abuse if his or her reckless act caused serious mental harm to a child.

("Physical harm" means an injury to a child's physical condition. "Serious physical harm" means any physical injury to a child that seriously impairs the child's health or physical well-being, including brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut.

"Serious mental harm" means an injury to a child's mental condition or welfare that is not necessarily permanent but results in visibly demonstrable manifestations of a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.)

### Affirmative Defense

The bill specifies that it would be an affirmative defense to a prosecution for child abuse that the defendant's conduct involving the child was a reasonable response to an act of domestic violence in light of all the facts and circumstances known to the defendant at that time. The defendant would have the burden of establishing the affirmative defense by a preponderance of the evidence.

"Domestic violence" would mean that term as defined in the domestic violence prevention and treatment Act (MCL 400.1501), i.e., the occurrence of any of the following acts by a person that is not an act of self-defense:

- Causing or attempting to cause physical or mental harm to a family or household member.
- Placing a family or household member in fear of physical or mental harm.
- Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
- Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(An affirmative defense is new matter that constitutes a defense to a complaint, or evidence that outweighs the evidence against the defense.)

### **Senate Bill 760 (S-1)**

Under the sentencing guidelines in the Code of Criminal Procedure, the Michigan Compiled Laws (MCL) citation for third-degree child abuse is 750.136b(5). Under Senate Bill 158 (S-2), however, the penalty for third-degree child abuse would be specified in a different subsection, MCL 750.136b(6). Senate Bill 760 (S-1) would

change the citation in the sentencing guidelines to refer to the subsection in Senate Bill 158 (S-2).

MCL 750.136b (S.B. 158)  
777.16g (S.B. 760)

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

The bills would give prosecutors a criminal charge to levy against a person who subjected a child to something that the person knew or should have known likely would put the child in danger of physical harm. Leaving a child locked in a car in extreme weather conditions, for instance, is likely to result in physical harm to the child. Indeed, every year there seems to be a number of reports of children dying or being severely injured from exposure to excessive heat that builds up inside a car on a hot day. Any adult responsible for a child's welfare should be aware of the danger to a child in those conditions. There reportedly have been cases, however, in which another person noticed a child locked in a vehicle and the child was rescued, or the adult responsible for the child returned, before the child suffered serious physical harm as that term is defined in the Penal Code's child abuse provisions. Consequently, the adult who placed the child in danger cannot be charged with child abuse because the action did not cause physical harm. Under Senate Bill 158 (S-2), however, such an action would constitute either third-degree child abuse, if it did cause physical harm to the child, or fourth-degree child abuse, regardless of whether physical harm occurred.

### **Supporting Argument**

The bill would address what appears to be an oversight in the circumstances that constitute the crime of second-degree child abuse. Second-degree child abuse, which is a felony punishable by up to four years' imprisonment, includes a person's omission that causes serious physical harm or serious mental harm to a child. The offense also includes a person's reckless act that causes serious physical harm, but not serious mental harm, to a child. The bill would make those provisions consistent by

including serious mental harm caused by a person's reckless act in the elements of second-degree child abuse.

### **Supporting Argument**

Generally, crimes that are punishable by up to one year or less of imprisonment are identified in law as misdemeanors while crimes punishable by more than one year are identified as felonies. Third-degree child abuse, however, is designated in the Penal Code as a misdemeanor, despite the fact that it is punishable by up to two years' imprisonment. At the same time, third-degree child abuse is included in the sentencing guidelines (which apply only to felonies) because the Code of Criminal Procedure defines "felony" as a violation of a penal law for which the offender may be punished by death or by imprisonment for more than one year, or an offense expressly designated by law to be a felony. Senate Bill 158 (S-2) would make the violation level consistent in the two statutes by designating third-degree child abuse as a felony, rather than a misdemeanor, in the Penal Code.

### **Opposing Argument**

There is concern that Senate Bill 158 (S-2) could be enforced too broadly. For instance, a parent or other adult might leave a child in a warm car on a cold day while the adult runs into a store for just a couple of minutes. Also, there is a danger that legitimate and reasonable disciplinary behavior, such as paddling, could be considered child abuse under the bill. It is even conceivable that an overzealous prosecutor could consider some legal activity like smoking in a child's presence or keeping a legally owned and registered firearm in the home as committing an act that likely would cause physical harm to a child. Such actions should not be treated as child abuse.

**Response:** To be charged, prosecuted, and convicted, a person knowingly or intentionally would have had to commit an act that was likely to cause physical harm. As with all criminal cases, police, prosecutors, the judge, and jurors would have to apply their discretion and judgment throughout the criminal justice process. If any of those individuals determined that the person had not knowingly or intentionally committed an act that was likely to cause physical harm to a child, the person would not be held criminally liable. It stands to reason that the conditions under which a

child was left in a car, the type and degree of discipline administered, and the reasonableness of the person's actions would be factors to consider at each stage of a criminal case.

Legislative Analyst: Patrick Affholter

### **FISCAL IMPACT**

The bills would have an indeterminate fiscal impact on State and local government. There are no data to indicate how many additional offenders would be convicted of the child abuse offenses if the factors were expanded. In 2005, 101 offenders were convicted of second-degree child abuse or attempting the offense. Of these, 17 were sentenced to prison, 58 to probation, 26 to jail, and three to other types of sentences such as Holmes Youthful Trainee Act probation, or delayed or suspended sentences. In 2005, 127 offenders were convicted of third-degree child abuse. Eleven of these offenders were sentenced to prison, 94 to probation, 21 to jail, and one to another type of sentence. To the extent that the bills resulted in increased incarceration time, local governments would incur increased costs of incarceration in local facilities, which vary by county. The State would incur the cost of felony probation at an annual average cost of \$2,000, as well as the cost of incarceration in a State facility at an average annual cost of \$33,000. Additional penal fine revenue would benefit public libraries.

Fiscal Analyst: Lindsay Hollander

#### A0708\158a

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.