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 BILL ANALYSIS

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Senate Bill 158 (as enacted)
Senate Bill 760 (as enacted)
House Bills 4872 and 4873 (as enacted)
Sponsor: Senator Ron Jelinek (S.B. 158 & 760)
Representative Mark Meadows (H.B. 4872)
Representative Fran Amos (H.B. 4873)
Senate Committee: Judiciary
House Committee: Judiciary

PUBLIC ACT 577 of 2008
PUBLIC ACT 521 of 2008
PUBLIC ACTS 519 and 520 of 2008

Date Completed: 2-13-09

RATIONALE

Incidents in which children were left in a car on a hot day brought to light a 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 suggested that child abuse prohibitions and penalties should apply in situations in which a person knowingly and intentionally does something that poses an unreasonable risk of harm or injury to a child, and that the Penal Code

should include specific prohibitions and penalties for leaving young children unattended in a vehicle when that action poses an unreasonable risk of harm or injury to a child.

CONTENT

Senate Bill 158 amends the Michigan Penal Code 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, under the circumstances, poses an unreasonable risk of harm or injury 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 causes serious mental harm to a child.**
- **Provide that conduct that is a reasonable response to domestic violence is an affirmative defense to a prosecution for child abuse.**

House Bill 4872 amends the Michigan Penal Code to prohibit a person who is responsible for the care or welfare of a child under six years old from leaving that child unattended in a vehicle for a period of time that poses, or under circumstances that pose, an

unreasonable risk of harm or injury to the child. The bill prescribes graduated penalties based on the level of harm to the child.

Senate Bill 760 and House Bill 4873 amend the Code of Criminal Procedure to include felonies enacted in House Bill 4872 in the sentencing guidelines and revise the guidelines MCL citation for third-degree child abuse.

The bills will take effect on April 1, 2009. Senate Bill 760 was tie-barred to Senate Bill 158 and House Bill 4872. House Bill 4873 was tie-barred to House Bill 4872.

Senate Bill 158

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 is guilty of fourth-degree child abuse if he or she knowingly or intentionally commits an act that, under the circumstances, poses an unreasonable risk of harm or injury to a child, regardless of whether physical harm results.

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 is guilty of third-degree child abuse if he or she knowingly or intentionally commits an act that, under the circumstances, poses an unreasonable risk of harm or injury to a child, and the act results 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 is 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 is guilty of second-degree child abuse if his or her reckless act causes 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 is 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 has the burden of establishing the affirmative defense by a preponderance of the evidence.

As used in this provision, "domestic violence" means 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.)

House Bill 4872

The bill prohibits a person who is responsible for the care or welfare of a child under six years old from leaving that child unattended in a vehicle for a period of time that poses, or under circumstances that pose, an unreasonable risk of harm to the child. A violation is punishable as shown in Table 1.

Table 1

Result of Violation	Offense Level	Max. Imprisonment and/or Max. Fine
No physical harm	Misdemeanor	93 days; \$500
Physical harm other than serious physical harm	Misdemeanor	1 year; \$1,000
Serious physical harm	Felony	10 years; \$5,000
Death	Felony	15 years; \$10,000

The bill defines "unattended" as alone or without the supervision of an individual who is at least 13 and is not legally incapacitated.

Senate Bill 760 & House Bill 4873

Both bills include the felonies enacted by House Bill 4872 in the sentencing guidelines, as shown in Table 2.

Table 2

Offense	Felony Class & Category	Stat. Max. Sentence
Leaving child in vehicle resulting in serious physical harm	D-Person	10 years
Leaving child in vehicle resulting in death	B-Person	15 years

Senate Bill 760 also changes the sentencing guidelines Michigan Compiled Laws citation for third-degree child abuse to refer to the subsection in Senate Bill 158.

MCL 750.136b (S.B. 158)
 777.16g (S.B. 760 & H.B. 4873)
 750.135a (H.B. 4872)

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

Senate Bill 158 gives prosecutors a criminal charge to levy against a person who subjects a child to a situation that poses an unreasonable risk of harm or injury to the child. Leaving a child locked in a car in extreme weather conditions, for instance, poses such a risk. In addition, House Bill 4872 establishes specific prohibitions and penalties for leaving young children unattended in a vehicle under circumstances that pose an unreasonable risk of harm or injury. Every year there seem to be 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. Reportedly, however, there have been cases in which someone 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 could not be charged with child abuse because the action did not cause physical harm. Under Senate Bill 158, however, such an action constitutes either third-degree child abuse, if it causes physical harm to the child, or fourth-degree

child abuse, regardless of whether physical harm occurs. Also, under House Bill 4872, a person leaving a child under six unattended in a car is subject to prosecution for a new crime, and to penalties that increase in severity depending on the extent of harm or injury to the child.

Supporting Argument

Senate Bill 158 addresses what appears to be a gap in the circumstances that constitute the crime of second-degree child abuse. This felony 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 makes those provisions consistent by adding serious mental harm caused by a person's reckless act to 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 makes the violation level consistent in the two statutes by designating third-degree child abuse as a felony in the Penal Code.

Opposing Argument

Senate Bill 158 might 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, might be considered to pose an unreasonable risk of harm or injury to a child and be prosecuted as child abuse under the bill. It is even conceivable that an overzealous prosecutor might consider some

legal activity like smoking in a child's presence or keeping a legally owned and registered firearm in the home to be an act that poses an unreasonable risk of 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 will have to commit an act that, under the circumstances, poses an unreasonable risk of harm or injury. In all criminal cases, police, prosecutors, the judge, and jurors apply their discretion and judgment throughout the criminal justice process. If any of those individuals determines that the defendant did not knowingly or intentionally commit an act that, under the circumstances, posed an unreasonable risk of harm or injury to a child, the person will 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 will be factors to consider at each stage of a criminal case.

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bills will have an indeterminate fiscal impact on State and local government. There are no data to indicate how many additional offenders will be convicted of the child abuse offenses when the factors are expanded. In 2006, 115 offenders were convicted of second-degree child abuse or attempting the offense. Of these, 19 were sentenced to prison, 79 to probation, 13 to jail, and four to other types of sentences such as Holmes Youthful Trainee Act probation, or delayed or suspended sentences. In 2006, 167 offenders were convicted of third-degree child abuse. Eleven of these offenders were sentenced to prison, 129 to probation, 25 to jail, and two to another type of sentence.

There also are no data to indicate how many offenders will be convicted of the new offense involving leaving a child unattended in a vehicle. An offender convicted of the Class B felony under the bills will receive a sentencing guidelines minimum sentence range of 0-18 months to 117-160 months. An offender convicted of the Class D felony will receive a sentencing guidelines

minimum sentence range of 0-6 months to 43-76 months.

To the extent that the bills result in increased incarceration time, local governments will incur increased costs of incarceration in local facilities, which vary by county. The State will 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 \$32,000. Additional penal fine revenue will benefit public libraries.

Fiscal Analyst: Lindsay Hollander

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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.