



# Office of the Ohio Public Defender

Timothy Young, State Public Defender

## **Testimony in Opposition of Sub. HB68 Sexual Conduct Involving an Impaired Prison Sponsor Representative Anielski**

Chairman Bacon, Vice Chair Dolan, Ranking Member Thomas, and members of the Senate Judiciary Committee, thank you for the opportunity to testify on behalf of the Ohio Public Defender in opposition of Sub. HB68.

As this committee knows, Sub. HB68 includes “impaired persons” as possible victims of (1) pandering obscenity involving a minor, (2) pandering sexually oriented matter involving a minor, and (3) illegal use of a minor in a nudity-oriented material or performance. Under the bill, an “impaired person” is “a person whose ability to resist or consent is substantially impaired because of a mental or physical condition or because of advance aged...” Witnesses have testified regarding the bill’s impact on the elderly, but an impaired person could also be an individual with an intellectual disability or a physical or mental handicap that impairs their ability to consent.

OPD has concern because Sub. HB68 does not excluded impaired persons from being charged under the bill. For this reason, the bill will likely be susceptible to an “as applied” constitutional challenge. When an individual is in the same protected class as the victim, prosecuting that individual may be a due process and equal protection violation. In the case *In re D.B.*, the Ohio Supreme Court held that it was unconstitutional to prosecute a 12-year-old boy for rape of a victim under the age of 13 because it violated his rights to due process and equal protection.<sup>1</sup> The Court found that D.B. could not be prosecuted for this offense because he was in the same protected class as the victim, children under 13-years-old.<sup>2</sup> A similar

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<sup>1</sup> *In re D.B.*, 129 Ohio St.3d 104, 2011-Ohio-2671.

<sup>2</sup> *Id.*

argument can be made if an impaired person is prosecuted pursuant to Sub. HB68. That individual would also be a part of the class of individuals sought to be protected under the bill. Therefore, that individual would also have an argument that their constitutional rights are being violated. This is especially problematic because all the offenses included in the bill require the individual to be placed on the sexual offender registry as a Tier II offender. In a world of cell phones and cameras, it is not hard to image a case where an individual with an intellectual disability creates sexual or nudity-oriented material depicting a peer.

To avoid litigation of this issue, the Sub. HB68 should include language that specifies that impaired persons, and minors since they are also a protected class under the bill, are not subject to prosecution under the offenses in the bill.

Thank you for the opportunity to testify today before your committee. I am happy to answer questions at this time.

