

HOUSE BILL REPORT

ESHB 2424

As Passed Legislature

Title: An act relating to protecting children from sexual exploitation and abuse.

Brief Description: Protecting children from sexual exploitation and abuse.

Sponsors: House Committee on Public Safety & Emergency Preparedness (originally sponsored by Representatives O'Brien, Pearson, Hurst, Takko, Herrera, Chandler, Ross, Rodne, Dammeier, Condotta, Shea, Klippert, Smith, Walsh, Parker, McCune, Campbell, Johnson, Eddy, Morrell, Kelley, Short, Sullivan, Conway, Kagi, Roach, Kristiansen, Bailey, Haler, Schmick, Ericks, Warnick, Ormsby, Moeller and Hope; by request of Attorney General).

Brief History:

Committee Activity:

Public Safety & Emergency Preparedness: 1/12/10, 1/22/10 [DPS].

Floor Activity:

Passed House: 2/16/10, 98-0.

Senate Amended.

Passed Senate: 3/4/10, 46-0.

House Refuses to Concur.

Senate Amended.

Passed Senate: 3/10/10, 47-0.

House Concurred.

Passed House: 3/10/10, 97-0.

Passed Legislature.

Brief Summary of Engrossed Substitute Bill

- Creates a new offense for Viewing depictions of a minor engaged in sexually explicit conduct.
- Creates first and second degree offenses for offenses related to depictions of a minor engaged in sexually explicit conduct, and specifies units of prosecution.
- Creates affirmative defenses for individuals assisting a law enforcement investigation, legislative staff, and employees of higher education institutions.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- Modifies the definition of "predatory" for purposes of sex offender sentencing to include individuals providing home-based instruction.

HOUSE COMMITTEE ON PUBLIC SAFETY & EMERGENCY PREPAREDNESS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Hurst, Chair; O'Brien, Vice Chair; Pearson, Ranking Minority Member; Klippert, Assistant Ranking Minority Member; Appleton, Goodman, Kirby and Ross.

Staff: Alexa Silver (786-7190).

Background:

Offenses Related to Depictions of a Minor Engaged in Sexually Explicit Conduct.

A person is guilty of Dealing if he or she: (1) knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells any visual or printed matter depicting a minor engaged in sexually explicit conduct, or (2) possesses such matter with the intent to develop, duplicate, publish, print, disseminate, exchange, finance, attempt to finance, or sell it. Dealing is a class C felony with a seriousness level of VII.

A person is guilty of Sending or Bringing into the State if he or she knowingly sends or brings into the state for sale or distribution any visual or printed matter depicting a minor engaged in sexually explicit conduct. Sending or Bringing into the State is a class C felony with a seriousness level of VII.

A person is guilty of Possession if he or she knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct. Possession is a class B felony with a seriousness level of VI.

Unit of Prosecution.

In *State v. Sutherby*, the defendant, who was charged with 10 counts of Possession, argued that he should be sentenced for only one count. The Washington State Supreme Court agreed, holding that the proper unit of prosecution is per possession, rather than per image or per minor depicted, because the Legislature had proscribed the conduct of possessing child pornography.

Affirmative Defense.

In a prosecution for Dealing, Sending or Bringing into the State, or Possession, it is an affirmative defense that the defendant was a law enforcement officer conducting an official investigation of a sex-related crime against a minor.

Aggravating Factors.

In exceptional cases, a court may impose a sentence above or below the standard range if a mitigating or aggravating circumstance exists. The Sentencing Reform Act provides a list of aggravating factors that a court may consider in sentencing. Any factor that increases the defendant's sentence above the standard range, other than the fact of a prior conviction, must be proven to a jury beyond a reasonable doubt.

Predatory Sex Offenses.

In a prosecution for Rape of a Child in the first or second degree or Child Molestation in the first degree, if there is a finding that the offense was predatory, the minimum sentence is the greater of 25 years or the maximum term in the standard sentence range.

The term "predatory" is defined to mean:

- the perpetrator was a stranger to the victim;
- the perpetrator established a relationship with the victim, and a significant reason for doing so was the victimization of the victim; or
- the perpetrator was a:
 - teacher, counselor, volunteer, or other person of authority in a public or private school (excluding home-based instruction) where the victim was a student under the perpetrator's authority;
 - coach, trainer, volunteer, or other person of authority in a recreational activity in which the victim participated and was under the perpetrator's authority; or
 - pastor, elder, volunteer, or other person of authority in a church or religious organization where the victim was a participant under the perpetrator's authority.

Summary of Engrossed Substitute Bill:

Viewing of Depictions of a Minor Engaged in Sexually Explicit Conduct.

A person is guilty of the offense of Viewing if the person intentionally views over the Internet visual or printed matter depicting a minor engaged in sexually explicit conduct. To determine whether a person intentionally viewed such depictions, the tier of fact must consider the following: the title, text, and content of the matter; Internet history; search terms; thumbnail images; downloading activity; expert computer forensic testimony; the number of depictions; the defendant's access to and control over the electronic device upon which the depictions were found; and the contents of the electronic device upon which the depictions were found. The government has the burden to prove beyond a reasonable doubt that the computer user initiated the viewing.

First and Second Degree Offenses and Units of Prosecution.

For the offenses of Dealing, Sending or Bringing into the State, Possession, and Viewing, a person is guilty of a first degree offense when the depiction involves intercourse, penetration, masturbation, sadomasochistic abuse, and defecation or urination for the purpose of the viewer's sexual stimulation. A person is guilty of a second degree offense when the depiction shows the genitals or unclothed pubic or rectal areas or breasts, or the touching of

those areas, for the purpose of the viewer's sexual stimulation. The minor need not have known that he or she was participating in the depiction.

The unit of prosecution for Dealing, Sending or Bringing into the State, and Possession is per image for the first degree offenses and per incident for the second degree offenses. The unit of prosecution for Viewing is per Internet session, which is defined as a period of time during which a person uses a specific Internet protocol address and visits or is logged into an Internet site for an uninterrupted period of time.

- Dealing and Sending or Bringing into the State:
 - First degree – class B felony, seriousness level of VII
 - Second degree – class C felony, seriousness level of V
- Possession:
 - First degree – class B felony, seriousness level of VI
 - Second degree – class C felony, seriousness level of IV
- Viewing:
 - First degree – class B felony, seriousness level of IV
 - Second degree – unranked class C felony

Paying to view over the Internet depictions of a minor engaged in sexually explicit conduct is an aggravating factor that supports a sentence above the standard range for the offense of Viewing.

The chapter on sexual exploitation of children does not apply to lawful conduct between spouses.

Affirmative Defenses.

It is an affirmative defense in a prosecution for a crime related to the depiction of a minor engaged in sexually explicit conduct that the defendant had written authorization to assist a law enforcement officer in an investigation of a sex-related crime against a minor and was acting at the officer's direction.

It is an affirmative defense that the defendant was conducting research for an institution of higher education when the research was approved in advance and viewing or possession of the depictions was an essential component of the research. It is also an affirmative defense that the defendant was legislative staff conducting research requested by a legislator where viewing or possession of the depiction was an essential component of the research and directly related to a legislative activity.

The act is not intended to impact the immunity of Internet service providers who are required by federal law to report child pornography.

Predatory Sex Offenses.

The definition of “predatory” includes a perpetrator who was a teacher, counselor, volunteer, or other person in authority providing home-based instruction where the victim was a student

under the person's authority or supervision. The definition excludes the victim's parent or legal guardian.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support of original bill) Because Internet predation is changing, it is important that the definition of possession include intentionally viewing. Forensic examinations can show that viewing was not inadvertent when the person repeatedly returned to the same website, and prosecutors will use their discretion to not charge inadvertent viewing. In the *Sutherby* case, 150 images were found, but 10 charges were brought based on the number of victims and the time period. The sentencing court can merge counts for sentencing purposes when they involve the same course of conduct. The unit of prosecution should not be one; if a victim is penetrated by different people during different sessions of abuse, the person is victimized each time the image is viewed. People have gone unpunished for viewing and possessing multiple images. There should not be a volume discount.

(Opposed) There is some concern about what constitutes a "pattern" of intentionally viewing. This is a question that will come up in court based on what is in the computer's cache versus what was downloaded. There is also a concern about juveniles who may come across child pornography online multiple times even though they are not deliberately looking for the images.

Persons Testifying: (In support of original bill) Representative O'Brien, prime sponsor; Hunter Goodman and Lana Weinman, Office of the Attorney General; Lisa Johnson, King County Prosecutor's Office; and Mark Roe, Snohomish County Prosecuting Attorney.

(Opposed) Micheal Hanbey, Washington Defender Association and Washington Association of Criminal Defense Lawyers.

Persons Signed In To Testify But Not Testifying: None.