

HOUSE BILL REPORT

ESHB 2424

As Amended by the Senate

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.

Brief Summary of Engrossed Substitute Bill

- Creates a new offense of intentionally viewing over the Internet visual depictions of a minor engaged in sexually explicit conduct.
- Clarifies that the unit of prosecution for dealing in, sending or bringing into the state, or possessing a depiction of a minor engaged in sexually explicit conduct is per item of visual or printed matter.
- Creates an affirmative defense for individuals assisting a law enforcement investigation of a sex-related crime against a minor.

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.

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.

Staff: Alexa Silver (786-7190).

Background:

Crimes Related to the Depiction of a Minor Engaged in Sexually Explicit Conduct.

A person is guilty of *dealing in* depictions of a minor engaged in sexually explicit conduct 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 such matter. Violation of this statute is a class C felony with a seriousness level of VII.

A person is guilty of *sending or bringing into the state* depictions of a minor engaged in sexually explicit conduct 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. Violation of this statute is a class C felony with a seriousness level of VII.

A person is guilty of *possession* of depictions of a minor engaged in sexually explicit conduct if he or she knowingly possesses "visual or printed matter" depicting a minor engaged in sexually explicit conduct. Violation of this statute is a class B felony with a seriousness level of VI.

"Visual or printed matter" means "any photograph or other material" containing a reproduction of a photograph. "Sexually explicit conduct" includes the exhibition of the unclothed genitals, pubic, or rectal areas of a minor or the breasts of a female minor for the purpose of the viewer's sexual stimulation.

Unit of Prosecution for Depictions of a Minor Engaged in Sexually Explicit Conduct.

In *State v. Sutherby*, the defendant was charged with 10 counts of possession of depictions of a minor engaged in sexually explicit conduct. At sentencing, the defendant argued that he should be sentenced for only one count of possession. The Washington State Supreme Court (Court) agreed, holding that the proper unit of prosecution is per possession, rather than per image or per minor depicted. The Court held that the Legislature had proscribed the conduct of possessing child pornography. It noted that "visual or printed matter" is defined as "*any* photograph or other material" and interpreted "any" to include "every" and "all" based on the dictionary definition and previous court cases.

Affirmative Defense.

In a prosecution for dealing in, sending or bringing into the state, or possessing depictions of a minor engaged in sexually explicit conduct, it is an affirmative defense that the defendant is a law enforcement officer conducting an official investigation of a sex-related crime against a minor.

Summary of Engrossed Substitute Bill:

Intentionally Viewing over the Internet Depictions of a Minor Engaged in Sexually Explicit Conduct.

Intentionally viewing over the Internet visual depictions of a minor engaged in sexually explicit conduct is a class B felony with a seriousness level of IV. The unit of prosecution for intentionally viewing is per separate Internet session. To determine whether a person intentionally viewed such depictions, a tier of fact can consider the following: the title, text, and content of the visual depiction; Internet history; search terms; thumbnail pictures; 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.

Law enforcement officers investigating intentional viewing over the Internet depictions of a minor engaged in sexually explicit conduct are not authorized to violate the constitutional right to privacy.

Unit of Prosecution for Possession, Dealing In, and Sending or Bringing Into the State Depictions of a Minor Engaged in Sexually Explicit Conduct.

The Legislature intends that each individual item of "visual or printed matter" is a separate violation for the purpose of determining the unit of prosecution for possession, dealing in, and sending or bringing into the state a depiction of a minor engaged in sexually explicit conduct. It is a class C felony to deal in or send or bring into the state "a visual or printed matter" depicting a minor engaged in sexually explicit conduct. It is a class B felony to possess "a visual or printed matter" depicting a minor engaged in sexually explicit conduct.

Definition.

"Internet session" is defined as a period of time during which a person is using a specific Internet protocol address and visits or is logged into an Internet site for an uninterrupted period of time. "Sexually explicit conduct" is defined to include depiction, rather than exhibition, of the unclothed genitals, pubic, or rectal areas of a minor or the breasts of a female minor for the purpose of the viewer's sexual stimulation. The minor need not have known that he or she was participating in the depiction. "Visual or printed matter" is defined as "a photograph or other material."

Affirmative Defense.

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

EFFECT OF SENATE AMENDMENT(S):

The Senate amendment creates first and second degree offenses for Dealing in, Sending or Bringing into the State, Possession of, and Intentionally Viewing Over the Internet depictions of a minor engaged in sexually explicit conduct. 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 unit of prosecution for Dealing in, 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 Intentionally Viewing is per Internet session. The Senate amendment creates an aggravating factor supporting a sentence above the standard range when the defendant paid to view over the Internet depictions of a minor engaged in sexually explicit conduct.

- Dealing In 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
- Intentionally Viewing:
 - First degree – class B felony, seriousness level of IV
 - Second degree – unranked class C felony

The Senate amendment creates affirmative defenses for legislative staff and a person conducting research for an institution of higher education. The defense applies when the research was approved in advance and viewing or possession of the visual or printed matter is an essential component of the research. For legislative staff, the research must be at the request of a legislative member and be directly related to and an essential component of a legislative activity.

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.