

SENATE BILL REPORT

ESHB 2424

As Reported by Senate Committee On:
Judiciary, February 26, 2010

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

Committee Activity: Judiciary: 2/24/10, 2/26/10 [DPA].

SENATE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended.

Signed by Senators Kline, Chair; Regala, Vice Chair; Carrell, Gordon, Hargrove, Kohl-Welles and Roach.

Staff: Karen Campbell (786-7448)

Background: Washington criminal law currently contains three felony prohibitions concerning depictions of a minor engaged in sexually explicit conduct. It is a Class C felony to knowingly deal in depictions of a minor engaged in sexually explicit conduct under RCW 9.68A.050. It is a Class C felony to knowingly send or bring into the state depictions of a minor engaged in sexually explicit conduct for sale or distribution under RCW 9.68A.060. It is a Class B felony to knowingly possess depictions of a minor engaged in sexually explicit conduct under RCW 9.68A.070. Sexually explicit conduct includes a list of sexual acts, actual or simulated, conducted with or upon a minor including the exhibition of private body parts or the touching of these areas for the purposes of sexual stimulation of the viewer.

Summary of Bill (Recommended Amendments): First and second degree offenses are created for the dealing, sending, and possession crimes. A person commits the first degree offenses if that person deals, sends, or possesses images of sexual acts, or the simulation of

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these acts, being conducted on or with a minor. The classification for the dealing and sending offenses is increased from a C to a B felony.

A person commits the second degree offenses if that person either knowingly deals, sends or possesses images of a minor that show the private body parts of the minor or the touching of these areas for the purposes of the sexual stimulation of the viewer. These offenses are classified as class C felonies.

The act clarifies the unit of prosecution for the dealing, sending and possession offenses. Each depiction or image of a minor engaged in sexually explicit conduct constitutes a separate offense for the first degree offenses. Each incident of dealing, sending or possession of one more more images constitutes a separate offense for the second degree offenses.

A new criminal offense is created prohibiting viewing of images of a minor engaged in sexually explicit conduct. A person commits this crime by intentionally viewing, over the Internet, any visual images or copies thereof of a minor engaged in sexually explicit conduct.

First and second degree offenses are created for this crime. A person commits the first degree offense if that person views, over the Internet, images of a minor engaged in sexually explicit conduct that involve images of various sexual acts conducted with or upon a minor whether actual or simulated. A person commits the second degree offense if the person views images showing the private body parts of a minor or the touching of these areas for purposes of sexual stimulation of the viewer. The first degree offense is classified as a Class B felony, the second degree offense is classified as a class C felony.

In a prosecution for viewing images of a minor engaged in sexually explicit conduct, the trier of fact must find a pattern of viewing the material. This is established by consideration of:

- the title, text, and content of the visual depiction;
- the Internet history, search terms, thumbnail images, and downloading activity of the accused;
- expert computer forensic testimony;
- the number of depictions of minors engaged in sexually explicit conduct;
- the defendant's access to and control over the electronic device and its contents upon which the depictions were found; and
- any other relevant evidence.

Each separate Internet session of viewing the prohibited material, over the Internet constitutes a separate offense. Internet session is defined as a period of time during which an Internet user, using a specific Internet protocol address visits, or is logged into an Internet site. The prosecution must prove beyond a reasonable doubt that the viewing was initiated by the user of the computer where the viewing occurred.

An affirmative defense is added to the dealing, sending, possession, and viewing offenses for persons with written authorization to assist law enforcement officers conducting official investigations of sex related crimes against minors.

Affirmative defenses are also created for university and legislative staff for whom viewing or possessing images of a minor engaged in sexually explicit conduct is an essential component

of authorized research. The research must be authorized in writing by a person with the institutional authority to grant such approval and the research activity must be approved prior to the possessing or viewing activity.

EFFECT OF CHANGES MADE BY JUDICIARY COMMITTEE (Recommended Amendments): The unit of prosecution is changed for the first degree offenses for trading, sending, and possessing depictions of minors engaged in sexually explicit conduct. Each depiction or image constitutes a separate offense. The third degree viewing offense is removed and the pay to view element is removed. The distinction between first and second degree viewing is based on the content of images viewed.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Engrossed Substitute House Bill: PRO: The penalties associated with trafficking in and possessing child pornography need to be increased. The consumers of these images need to be punished in order to stop the demand. Children are being victimized and exploited in these photographs and this must end. There must be a penalty for each image possessed because there are individual victims depicted in each photograph. Individuals do not, as a general rule, pay for this pornography. They trade and barter these images among themselves. Due to the serious nature of these offenses, it is important that they remain or be classified as B level felonies.

CON: Each incident of these crimes should be punished rather than the possession of each photograph. The penalties are too strict and may result in individuals being punished who just happen to stumble upon this material. It takes two seconds to view multiple images in a video. Punishing the viewing of each image is too harsh.

Persons Testifying: PRO: Lisa Johnson, Office of the King County Prosecuting Attorney; Lana Weinmann, Office of the Attorney General; Rob McKenna, Attorney General; Seth Dawson, The Children's Advocacy Centers of Washington; Dannie McQueen, Seattle Against Slavery.

CON: Bob Cooper, Washington Association of Criminal Defense Attorneys, Washington Defenders Association.