

SENATE BILL REPORT

SB 6397

As Reported by Senate Committee On:
Judiciary, February 5, 2010

Title: An act relating to viewing sexually explicit depictions of minors on the internet.

Brief Description: Addressing the viewing of sexually explicit depictions of minors on the internet.

Sponsors: Senators Kline, Pflug, Oemig, McDermott, Eide, Kauffman, Shin and McAuliffe.

Brief History:

Committee Activity: Judiciary: 1/22/10, 2/05/10 [DPS].

SENATE COMMITTEE ON JUDICIARY

Majority Report: That Substitute Senate Bill No. 6397 be substituted therefor, and the substitute bill do pass.

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. Finally, it is a Class B felony to knowingly possess depictions of a minor engaged in sexually explicit conduct under RCW 9.68A.070.

Summary of Bill: The bill as referred to committee not considered.

Summary of Bill (Recommended Substitute): The act clarifies that each depiction or image possessed constitutes a separate offense for all three of these crimes. This was in response to a Washington State Supreme Court decision, *State v. Sutherby*, 165 Wn. 2d 870 (2009) where the court found that the unit of prosecution for knowingly possessing depictions of a minor engaged in sexually explicit conduct was one count per possession of

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child pornography without regard to the number of images possessed or the number of minors depicted in the images possessed.

A new criminal offense is created prohibiting Viewing of Depictions of a Minor Engaged in Sexually Explicit Conduct. A person commits this crime by intentionally viewing over the internet any visual depiction or copy thereof of a minor engaged in sexually explicit conduct. This crime is a Class B felony and a sex offense.

In a prosecution for Viewing Depictions 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 for a sequential and uninterrupted period of time."

In a prosecution under either RCW 9.68A.050, 060, or 070, it is a defense that the person was specifically authorized, in writing, to assist a law enforcement officer and acted at the direction of the law enforcement officer while conducting an official investigation of a sex related crime against a minor.

Two defenses are created for university and legislative staff with written approval to conduct research where either viewing or possessing depictions of minors engaged in sexually explicit conduct is an essential component of the research. The elements of the defenses are as follows:

University Staff. It is a defense that: (1) the defendant was employed or enrolled at or conducting research in partnership or in cooperation with an institution of higher learning; and (2) the defendant was engaged in a research activity; and (3) the research activity was specifically approved prior to the possession or viewing activity, in writing, by a person with authority to grant such approval; and (4) the viewing or possession is an essential component of the authorized research.

Legislative Staff. It is a defense that: (1) the defendant was an employee of the Washington State Legislature engaged in research at the request of a member of the Legislature; and (2) the request for research is made prior to the possession or viewing activity being conducted in writing by a member of the Legislature; and (3) the research is directly related to a legislative activity; and (4) the viewing or possession of the visual or printed matter is an essential component of the legislative activity and requested research.

An additional element is added to the viewing crime requiring the prosecution to prove beyond a reasonable doubt that the viewing was initiated by the user of the computer where the viewing occurred.

EFFECT OF CHANGES MADE BY JUDICIARY COMMITTEE (Recommended Substitute As Passed Committee): The substitute creates a defense for university and legislative staff conducting legitimate research. The substitute bill also adds an additional element to the viewing crime.

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 Proposed Substitute As Heard in Committee:
PRO: This bill will protect children who are victims of sexual abuse. Sex offenders who view but do not download child pornography on the Internet are going unpunished and the victims uncounted for. Not only will being able to prosecute this crime serve to hold sex offenders accountable for their actions, but it will also help the public understand the severity of this offense and the resulting damage to children.

Persons Testifying: PRO: Lana Weinmann, Washington State Attorney General; Lisa Johnson, King County Prosecuting Attorney.