

---

HOUSE BILL 2177

---

State of Washington                      62nd Legislature                      2011 2nd Special Session

By Representatives Ladenburg, Dammeier, Jinkins, Zeiger, Darneille, Dahlquist, Seaquist, Angel, Kelley, Wilcox, Hurst, McCune, Kirby, Appleton, Green, Ryu, Warnick, and Finn

Read first time 12/14/11. Referred to Committee on Public Safety & Emergency Preparedness.

1            AN ACT Relating to protecting children from sexual exploitation;  
2 amending RCW 9.68A.001; and adding new sections to chapter 9.68A RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4            **Sec. 1.** RCW 9.68A.001 and 2010 c 227 s 1 are each amended to read  
5 as follows:

6            The legislature finds that the prevention of sexual exploitation  
7 and abuse of children constitutes a government objective of surpassing  
8 importance. The care of children is a sacred trust and should not be  
9 abused by those who seek commercial gain or personal gratification  
10 based on the exploitation of children.

11           The legislature further finds that the protection of children from  
12 sexual exploitation can be accomplished without infringing on a  
13 constitutionally protected activity. The definition of "sexually  
14 explicit conduct" and other operative definitions demarcate a line  
15 between protected and prohibited conduct and should not inhibit  
16 legitimate scientific, medical, or educational activities.

17           The legislature further finds that children engaged in sexual  
18 conduct for financial compensation are frequently the victims of sexual  
19 abuse. Approximately eighty to ninety percent of children engaged in

1 sexual activity for financial compensation have a history of sexual  
2 abuse victimization. It is the intent of the legislature to encourage  
3 these children to engage in prevention and intervention services and to  
4 hold those who pay to engage in the sexual abuse of children  
5 accountable for the trauma they inflict on children.

6 The legislature further finds that due to the changing nature of  
7 technology, offenders are now able to access child pornography in  
8 different ways and in increasing quantities. By amending current  
9 statutes governing depictions of a minor engaged in sexually explicit  
10 conduct, it is the intent of the legislature to ensure that intentional  
11 viewing of and dealing in child pornography over the internet is  
12 subject to a criminal penalty without limiting the scope of existing  
13 prohibitions on the possession of or dealing in child pornography,  
14 including the possession of electronic depictions of a minor engaged in  
15 sexually explicit conduct. It is also the intent of the legislature to  
16 clarify, in response to *State v. Sutherby*, 204 P.3d 916 (2009), the  
17 unit of prosecution for the statutes governing possession of and  
18 dealing in depictions of a minor engaged in sexually explicit conduct.  
19 It is the intent of the legislature that the first degree offenses  
20 under RCW 9.68A.050, 9.68A.060, and 9.68A.070 have a per depiction or  
21 image unit of prosecution, while the second degree offenses under RCW  
22 9.68A.050, 9.68A.060, and 9.68A.070 have a per incident unit of  
23 prosecution as established in *State v. Sutherby*, 204 P.3d 916 (2009).  
24 Furthermore, it is the intent of the legislature to set a different  
25 unit of prosecution for the new offense of viewing of depictions of a  
26 minor engaged in sexually explicit conduct such that each separate  
27 session of intentionally viewing over the internet of visual depictions  
28 or images of a minor engaged in sexually explicit conduct constitutes  
29 a separate offense.

30 The decisions of the Washington supreme court in *State v. Boyd*, 160  
31 W.2d 424, 158 P.3d 54 (2007), and *State v. Grenning*, 169 Wn.2d 47, 234  
32 P.3d 169 (2010), require prosecutors to duplicate and distribute  
33 depictions of a minor engaged in sexually explicit conduct ("child  
34 pornography") as part of the discovery process in a criminal  
35 prosecution. The legislature finds that the importance of protecting  
36 children from repeat exploitation in child pornography is not being  
37 given sufficient weight under these decisions. The importance of

1 protecting children from repeat exploitation in child pornography is  
2 based upon the following findings:

3 (1) Child pornography is not entitled to protection under the First  
4 Amendment and thus may be prohibited;

5 (2) The state has a compelling interest in protecting children from  
6 those who sexually exploit them, and this interest extends to stamping  
7 out the vice of child pornography at all levels in the distribution  
8 chain;

9 (3) Every instance of viewing images of child pornography  
10 represents a renewed violation of the privacy of the victims and a  
11 repetition of their abuse;

12 (4) Child pornography constitutes prima facie contraband, and as  
13 such should not be distributed to, or copied by, child pornography  
14 defendants or their attorneys;

15 (5) It is imperative to prohibit the reproduction of child  
16 pornography in criminal cases so as to avoid repeated violation and  
17 abuse of victims, so long as the government makes reasonable  
18 accommodations for the inspection, viewing, and examination of such  
19 material for the purposes of mounting a criminal defense. The  
20 legislature is also aware that the Adam Walsh child protection and  
21 safety act, P.L. 109-248, 120 Stat. 587 (2006), codified at 18 U.S.C.  
22 Sec. 3509(m), prohibits the duplication and distribution of child  
23 pornography as part of the discovery process in federal prosecutions.  
24 This federal law has been in effect since 2006, and upheld repeatedly  
25 as constitutional. Courts interpreting the Walsh act have found that  
26 such limitations can be employed while still providing the defendant  
27 due process. The legislature joins congress, and the legislatures of  
28 other states that have passed similar provisions, in protecting these  
29 child victims so that our justice system does not cause repeat  
30 exploitation, while still providing due process to criminal defendants.

31 NEW SECTION. Sec. 2. A new section is added to chapter 9.68A RCW  
32 to read as follows:

33 (1) In any criminal proceeding, any property or material that  
34 constitutes a depiction of a minor engaged in sexually explicit conduct  
35 shall remain in the care, custody, and control of either a law  
36 enforcement agency or the court.

1           (2) Notwithstanding the provisions of CrR 4.7, in any criminal  
2 proceeding, any property or material, including exhibits prepared in  
3 anticipation of trial, that constitute a depiction of a minor engaged  
4 in sexually explicit conduct shall remain in the care, custody, and  
5 control of a law enforcement agency until custody is transferred to the  
6 court. A court shall deny any request by the defendant to copy,  
7 photograph, duplicate, or otherwise reproduce any property or material  
8 that constitutes a depiction of a minor engaged in sexually explicit  
9 conduct so long as the property or material is made reasonably  
10 available to the defendant. Such property or material shall be deemed  
11 to be reasonably available to the defendant if the defendant's attorney  
12 or any individual the defendant may seek to qualify to furnish expert  
13 testimony at trial, has ample opportunity for inspection, viewing, and  
14 examination of the property or material at a law enforcement facility  
15 or at another facility agreed upon by the prosecutor and defendant's  
16 attorney. The defendant may view and examine the property and  
17 materials only while in the presence of his or her attorney.

18           (3) The court may direct that a mirror image of a computer hard  
19 drive containing such depictions be produced for use by a defense  
20 expert only upon a showing that an expert has been retained by the  
21 defense and is prepared to conduct a forensic examination while the  
22 mirror imaged hard drive remains in the care, custody, and control of  
23 a law enforcement agency or the court. Upon a substantial showing that  
24 the expert's analysis cannot be accomplished while the mirror imaged  
25 hard drive is kept within the care, custody, and control of a law  
26 enforcement agency or the court, the court may order its release to the  
27 expert for analysis for a limited time. If release is granted, the  
28 court shall issue a protective order setting forth such terms and  
29 conditions as are necessary to protect the rights of the victims, to  
30 document the chain of custody, and to protect physical evidence. At a  
31 minimum, such order should: (a) Identify, by name, who may possess the  
32 imaged hard drive; (b) identify, by name, who may have access to its  
33 contents; (c) prohibit any duplication or dissemination of its  
34 contents; (d) prohibit any viewing of its contents by other persons;  
35 (e) indicate a date by which the hard drive must be returned to the  
36 custody of the law enforcement agency or court; and (f) require the  
37 hard drive to stay within the state of Washington. Any possession of

1 a depiction of a minor engaged in sexually explicit conduct that is not  
2 in compliance with the protective order is a violation of this chapter.

3 NEW SECTION. **Sec. 3.** A new section is added to chapter 9.68A RCW  
4 to read as follows:

5 (1) Whenever a depiction of a minor engaged in sexually explicit  
6 conduct, regardless of its format, is marked as an exhibit in a  
7 criminal proceeding, the prosecutor shall seek an order sealing the  
8 exhibit at the close of the trial. Any exhibits sealed under this  
9 section shall be sealed with evidence tape in a manner that prevents  
10 access to, or viewing of, the depiction of a minor engaged in sexually  
11 explicit conduct and shall be labeled so as to identify its contents.  
12 Anyone seeking to view such an exhibit must obtain permission from the  
13 superior court after providing at least ten days notice to the  
14 prosecuting attorney. Appellate attorneys for the defendant and the  
15 state shall be given access to the exhibit, which must remain in the  
16 care and custody of either a law enforcement agency or the court. Any  
17 other person moving to view such an exhibit must demonstrate to the  
18 court that his or her reason for viewing the exhibit is of sufficient  
19 importance to justify another violation of the victim's privacy.

20 (2) Whenever the clerk of the court receives an exhibit of a  
21 depiction of a minor engaged in sexually explicit conduct, he or she  
22 shall store the exhibit in a secure location, such as a safe. The  
23 clerk may arrange for the transfer of such exhibits to a law  
24 enforcement agency evidence room for safekeeping provided the agency  
25 agrees not to destroy or dispose of the exhibits without an order of  
26 the court.

27 (3) If the criminal proceeding ends in a conviction, the clerk of  
28 the court shall destroy any exhibit containing a depiction of a minor  
29 engaged in sexually explicit conduct five years after the judgment is  
30 final, as determined by the provisions of RCW 10.73.090(3). Before any  
31 destruction, the clerk shall contact the prosecuting attorney and  
32 verify that there is no collateral attack on the judgment pending in  
33 any court. If the criminal proceeding ends in a mistrial, the clerk  
34 shall either maintain the exhibit or return it to the law enforcement  
35 agency that investigated the criminal charges for safekeeping until the  
36 matter is set for retrial. If the criminal proceeding ends in an

1 acquittal, the clerk shall return the exhibit to the law enforcement  
2 agency that investigated the criminal charges for either safekeeping or  
3 destruction.

4 NEW SECTION. **Sec. 4.** A new section is added to chapter 9.68A RCW  
5 to read as follows:

6 Any depiction of a minor engaged in sexually explicit conduct, in  
7 any format, distributed as discovery to defense counsel or an expert  
8 witness prior to the effective date of this section shall either be  
9 returned to the law enforcement agency that investigated the criminal  
10 charges or destroyed, if the case is no longer pending in superior  
11 court. If the case is still pending, the depiction shall be returned  
12 to the superior court judge assigned to the case or the presiding  
13 judge. The court shall order either the destruction of the depiction  
14 or the safekeeping of the depiction if it will be used at trial. It is  
15 not a defense to violations of this chapter for crimes committed after  
16 December 31, 2012, that the initial receipt of the depictions was done  
17 under the color of law through the discovery process.

--- END ---