

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 2177

62nd Legislature
2012 Regular Session

Passed by the House March 3, 2012
Yeas 95 Nays 0

Speaker of the House of Representatives

Passed by the Senate March 1, 2012
Yeas 46 Nays 0

President of the Senate

Approved

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 2177** as passed by the House of Representatives and the Senate on the dates hereon set forth.

Chief Clerk

FILED

**Secretary of State
State of Washington**

SUBSTITUTE HOUSE BILL 2177

AS AMENDED BY THE SENATE

Passed Legislature - 2012 Regular Session

State of Washington 62nd Legislature 2012 Regular Session

By House Public Safety & Emergency Preparedness (originally sponsored by Representatives Ladenburg, Dammeier, Jinkins, Zeiger, Darneille, Dahlquist, Seaquist, Angel, Kelley, Wilcox, Hurst, McCune, Kirby, Appleton, Green, Ryu, Warnick, and Finn)

READ FIRST TIME 01/31/12.

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) Despite any request by the defendant or prosecution, any
2 property or material that constitutes a depiction of a minor engaged in
3 sexually explicit conduct shall not be copied, photographed,
4 duplicated, or otherwise reproduced, so long as the property or
5 material is made reasonably available to the parties. Such property or
6 material shall be deemed to be reasonably available to the parties if
7 the prosecution, defense counsel, or any individual sought to be
8 qualified to furnish expert testimony at trial has ample opportunity
9 for inspection, viewing, and examination of the property or material at
10 a law enforcement facility or a neutral facility approved by the court
11 upon petition by the defense.

12 (3) The defendant may view and examine the property and materials
13 only while in the presence of his or her attorney. If the defendant is
14 proceeding pro se, the court will appoint an individual to supervise
15 the defendant while he or she examines the materials.

16 (4) The court may direct that a mirror image of a computer hard
17 drive containing such depictions be produced for use by an expert only
18 upon a showing that an expert has been retained and is prepared to
19 conduct a forensic examination while the mirror imaged hard drive
20 remains in the care, custody, and control of a law enforcement agency
21 or the court. Upon a substantial showing that the expert's analysis
22 cannot be accomplished while the mirror imaged hard drive is kept
23 within the care, custody, and control of a law enforcement agency or
24 the court, the court may order its release to the expert for analysis
25 for a limited time. If release is granted, the court shall issue a
26 protective order setting forth such terms and conditions as are
27 necessary to protect the rights of the victims, to document the chain
28 of custody, and to protect physical evidence.

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

31 (1) Whenever a depiction of a minor engaged in sexually explicit
32 conduct, regardless of its format, is marked as an exhibit in a
33 criminal proceeding, the prosecutor shall seek an order sealing the
34 exhibit at the close of the trial. Any exhibits sealed under this
35 section shall be sealed with evidence tape in a manner that prevents
36 access to, or viewing of, the depiction of a minor engaged in sexually
37 explicit conduct and shall be labeled so as to identify its contents.

1 Anyone seeking to view such an exhibit must obtain permission from the
2 superior court after providing at least ten days notice to the
3 prosecuting attorney. Appellate attorneys for the defendant and the
4 state shall be given access to the exhibit, which must remain in the
5 care and custody of either a law enforcement agency or the court. Any
6 other person moving to view such an exhibit must demonstrate to the
7 court that his or her reason for viewing the exhibit is of sufficient
8 importance to justify another violation of the victim's privacy.

9 (2) Whenever the clerk of the court receives an exhibit of a
10 depiction of a minor engaged in sexually explicit conduct, he or she
11 shall store the exhibit in a secure location, such as a safe. The
12 clerk may arrange for the transfer of such exhibits to a law
13 enforcement agency evidence room for safekeeping provided the agency
14 agrees not to destroy or dispose of the exhibits without an order of
15 the court.

16 (3) If the criminal proceeding ends in a conviction, the clerk of
17 the court shall destroy any exhibit containing a depiction of a minor
18 engaged in sexually explicit conduct five years after the judgment is
19 final, as determined by the provisions of RCW 10.73.090(3). Before any
20 destruction, the clerk shall contact the prosecuting attorney and
21 verify that there is no collateral attack on the judgment pending in
22 any court. If the criminal proceeding ends in a mistrial, the clerk
23 shall either maintain the exhibit or return it to the law enforcement
24 agency that investigated the criminal charges for safekeeping until the
25 matter is set for retrial. If the criminal proceeding ends in an
26 acquittal, the clerk shall return the exhibit to the law enforcement
27 agency that investigated the criminal charges for either safekeeping or
28 destruction.

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

31 Any depiction of a minor engaged in sexually explicit conduct, in
32 any format, distributed as discovery to defense counsel or an expert
33 witness prior to the effective date of this section shall either be
34 returned to the law enforcement agency that investigated the criminal
35 charges or destroyed, if the case is no longer pending in superior
36 court. If the case is still pending, the depiction shall be returned
37 to the superior court judge assigned to the case or the presiding

1 judge. The court shall order either the destruction of the depiction
2 or the safekeeping of the depiction if it will be used at trial. It is
3 not a defense to violations of this chapter for crimes committed after
4 December 31, 2012, that the initial receipt of the depictions was done
5 under the color of law through the discovery process.

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