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**SUBSTITUTE HOUSE BILL 2573**

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**State of Washington**

**55th Legislature**

**1998 Regular Session**

**By** House Committee on Criminal Justice & Corrections (originally sponsored by Representatives Lambert, Carrell, Costa and Thompson)

Read first time 02/04/98. Referred to Committee on .

1 AN ACT Relating to custodial sexual misconduct; amending RCW  
2 43.43.830 and 70.125.030; reenacting and amending RCW 9.94A.320; adding  
3 new sections to chapter 9A.44 RCW; and prescribing penalties.

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

5 NEW SECTION. **Sec. 1.** A new section is added to chapter 9A.44 RCW  
6 to read as follows:

7 (1) A person is guilty of custodial sexual misconduct in the first  
8 degree when the person has sexual intercourse with another person:

9 (a) Who is a resident of any public or private facility used for  
10 the incarceration, imprisonment, detention, or housing of adult or  
11 juvenile inmates or criminal defendants or is otherwise under  
12 correctional supervision, and the perpetrator is an employee or  
13 contract personnel of a correctional agency and is known or believed by  
14 the resident or person under correctional supervision to be a person  
15 (i) who has actual, implied, or apparent authority over the victim, or  
16 (ii) who has the actual, implied, or apparent ability to influence the  
17 terms, conditions, duration, or fact of incarceration or correctional  
18 supervision;

1 (b) Who is being detained, under arrest, or in the custody of a law  
2 enforcement officer and the perpetrator is a law enforcement officer.

3 (2) Consent of the victim is not a defense to a prosecution under  
4 this section.

5 (3) Custodial sexual misconduct in the first degree is a class C  
6 felony.

7 NEW SECTION. **Sec. 2.** A new section is added to chapter 9A.44 RCW  
8 to read as follows:

9 (1) A person is guilty of custodial sexual misconduct in the second  
10 degree when the person has sexual contact with another person:

11 (a) Who is a resident of any public or private facility used for  
12 the incarceration, imprisonment, detention, or housing of adult or  
13 juvenile inmates or criminal defendants or is otherwise under  
14 correctional supervision, and the perpetrator is an employee or  
15 contract personnel of a correctional agency and is known or believed by  
16 the resident or person under correctional supervision to be a person  
17 (i) who has actual, implied, or apparent authority over the victim, or  
18 (ii) who has the actual, implied, or apparent ability to influence the  
19 terms, conditions, duration, or fact of incarceration or correctional  
20 supervision;

21 (b) Who is being detained, under arrest, or in the custody of a law  
22 enforcement officer and the perpetrator is a law enforcement officer.

23 (2) Consent of the victim is not a defense to a prosecution under  
24 this section.

25 (3) Custodial sexual misconduct in the second degree is a gross  
26 misdemeanor.

27 **Sec. 3.** RCW 9.94A.320 and 1997 c 365 s 4, 1997 c 346 s 3, 1997 c  
28 340 s 1, 1997 c 338 s 51, 1997 c 266 s 15, and 1997 c 120 s 5 are each  
29 reenacted and amended to read as follows:

30 TABLE 2

31 CRIMES INCLUDED WITHIN EACH SERIOUSNESS LEVEL

32	XV	Aggravated Murder 1 (RCW 10.95.020)
33	XIV	Murder 1 (RCW 9A.32.030)
34		Homicide by abuse (RCW 9A.32.055)
35		Malicious explosion 1 (RCW 70.74.280(1))

1 XIII Murder 2 (RCW 9A.32.050)  
 2 Malicious explosion 2 (RCW 70.74.280(2))  
 3 Malicious placement of an explosive 1 (RCW  
 4 70.74.270(1))  
 5 XII Assault 1 (RCW 9A.36.011)  
 6 Assault of a Child 1 (RCW 9A.36.120)  
 7 Rape 1 (RCW 9A.44.040)  
 8 Rape of a Child 1 (RCW 9A.44.073)  
 9 Malicious placement of an imitation device  
 10 1 (RCW 70.74.272(1)(a))  
 11 XI Rape 2 (RCW 9A.44.050)  
 12 Rape of a Child 2 (RCW 9A.44.076)  
 13 Manslaughter 1 (RCW 9A.32.060)  
 14 X Kidnapping 1 (RCW 9A.40.020)  
 15 Child Molestation 1 (RCW 9A.44.083)  
 16 Malicious explosion 3 (RCW 70.74.280(3))  
 17 Over 18 and deliver heroin or narcotic from  
 18 Schedule I or II to someone under 18  
 19 (RCW 69.50.406)  
 20 Leading Organized Crime (RCW  
 21 9A.82.060(1)(a))  
 22 Indecent Liberties (with forcible  
 23 compulsion) (RCW 9A.44.100(1)(a))  
 24 IX Assault of a Child 2 (RCW 9A.36.130)  
 25 Robbery 1 (RCW 9A.56.200)  
 26 Explosive devices prohibited (RCW  
 27 70.74.180)  
 28 Malicious placement of an explosive 2 (RCW  
 29 70.74.270(2))  
 30 Over 18 and deliver narcotic from Schedule  
 31 III, IV, or V or a nonnarcotic from  
 32 Schedule I-V to someone under 18 and 3  
 33 years junior (RCW 69.50.406)  
 34 Controlled Substance Homicide (RCW  
 35 69.50.415)

1 Sexual Exploitation (RCW 9.68A.040)  
2 Inciting Criminal Profiteering (RCW  
3 9A.82.060(1)(b))  
4 Vehicular Homicide, by being under the  
5 influence of intoxicating liquor or  
6 any drug (RCW 46.61.520)

7 VIII Arson 1 (RCW 9A.48.020)  
8 Promoting Prostitution 1 (RCW 9A.88.070)  
9 Selling for profit (controlled or  
10 counterfeit) any controlled substance  
11 (RCW 69.50.410)  
12 Manufacture, deliver, or possess with  
13 intent to deliver heroin or cocaine  
14 (RCW 69.50.401(a)(1)(i))  
15 Manufacture, deliver, or possess with  
16 intent to deliver methamphetamine (RCW  
17 69.50.401(a)(1)(ii))  
18 Possession of ephedrine or pseudoephedrine  
19 with intent to manufacture  
20 methamphetamine (RCW 69.50.440)  
21 Vehicular Homicide, by the operation of any  
22 vehicle in a reckless manner (RCW  
23 46.61.520)  
24 Manslaughter 2 (RCW 9A.32.070)

25 VII Burglary 1 (RCW 9A.52.020)  
26 Vehicular Homicide, by disregard for the  
27 safety of others (RCW 46.61.520)  
28 Introducing Contraband 1 (RCW 9A.76.140)  
29 Indecent Liberties (without forcible  
30 compulsion) (RCW 9A.44.100(1) (b) and  
31 (c))  
32 Child Molestation 2 (RCW 9A.44.086)  
33 Dealing in depictions of minor engaged in  
34 sexually explicit conduct (RCW  
35 9.68A.050)

1           Sending, bringing into state depictions of  
2           minor engaged in sexually explicit  
3           conduct (RCW 9.68A.060)  
4           Involving a minor in drug dealing (RCW  
5           69.50.401(f))  
6           Drive-by Shooting (RCW 9A.36.045)  
7           Unlawful Possession of a Firearm in the  
8           first degree (RCW 9.41.040(1)(a))  
9           Malicious placement of an explosive 3 (RCW  
10           70.74.270(3))  
  
11       VI       Bribery (RCW 9A.68.010)  
12           Rape of a Child 3 (RCW 9A.44.079)  
13           Intimidating a Juror/Witness (RCW  
14           9A.72.110, 9A.72.130)  
15           Malicious placement of an imitation device  
16           2 (RCW 70.74.272(1)(b))  
17           Incest 1 (RCW 9A.64.020(1))  
18           Manufacture, deliver, or possess with  
19           intent to deliver narcotics from  
20           Schedule I or II (except heroin or  
21           cocaine) (RCW 69.50.401(a)(1)(i))  
22           Intimidating a Judge (RCW 9A.72.160)  
23           Bail Jumping with Murder 1 (RCW  
24           9A.76.170(2)(a))  
25           Theft of a Firearm (RCW 9A.56.300)  
  
26       V       Persistent prison misbehavior (RCW  
27           9.94.070)  
28           Criminal Mistreatment 1 (RCW 9A.42.020)  
29           Abandonment of dependent person 1 (RCW  
30           9A.42.060)  
31           Rape 3 (RCW 9A.44.060)  
32           Sexual Misconduct with a Minor 1 (RCW  
33           9A.44.093)  
34           Custodial Sexual Misconduct 1 (RCW  
35           9A.44.--- (section 1 of this act))  
36           Child Molestation 3 (RCW 9A.44.089)  
37           Kidnapping 2 (RCW 9A.40.030)  
38           Extortion 1 (RCW 9A.56.120)

1 Incest 2 (RCW 9A.64.020(2))  
2 Perjury 1 (RCW 9A.72.020)  
3 Extortionate Extension of Credit (RCW  
4 9A.82.020)  
5 Advancing money or property for  
6 extortionate extension of credit (RCW  
7 9A.82.030)  
8 Extortionate Means to Collect Extensions of  
9 Credit (RCW 9A.82.040)  
10 Rendering Criminal Assistance 1 (RCW  
11 9A.76.070)  
12 Bail Jumping with class A Felony (RCW  
13 9A.76.170(2)(b))  
14 Sexually Violating Human Remains (RCW  
15 9A.44.105)  
16 Delivery of imitation controlled substance  
17 by person eighteen or over to person  
18 under eighteen (RCW 69.52.030(2))  
19 Possession of a Stolen Firearm (RCW  
20 9A.56.310)

21 IV Residential Burglary (RCW 9A.52.025)  
22 Theft of Livestock 1 (RCW 9A.56.080)  
23 Robbery 2 (RCW 9A.56.210)  
24 Assault 2 (RCW 9A.36.021)  
25 Escape 1 (RCW 9A.76.110)  
26 Arson 2 (RCW 9A.48.030)  
27 Commercial Bribery (RCW 9A.68.060)  
28 Bribing a Witness/Bribe Received by Witness  
29 (RCW 9A.72.090, 9A.72.100)  
30 Malicious Harassment (RCW 9A.36.080)  
31 Threats to Bomb (RCW 9.61.160)  
32 Willful Failure to Return from Furlough  
33 (RCW 72.66.060)  
34 Hit and Run--Injury Accident (RCW  
35 46.52.020(4))  
36 Hit and Run with Vessel--Injury Accident  
37 (RCW 88.12.155(3))  
38 Vehicular Assault (RCW 46.61.522)

1 Manufacture, deliver, or possess with  
2 intent to deliver narcotics from  
3 Schedule III, IV, or V or nonnarcotics  
4 from Schedule I-V (except marijuana or  
5 methamphetamines) (RCW 69.50.401  
6 (a)(1) (iii) through (v))  
7 Influencing Outcome of Sporting Event (RCW  
8 9A.82.070)  
9 Use of Proceeds of Criminal Profiteering  
10 (RCW 9A.82.080 (1) and (2))  
11 Knowingly Trafficking in Stolen Property  
12 (RCW 9A.82.050(2))  
13 III Criminal Gang Intimidation (RCW 9A.46.120)  
14 Criminal Mistreatment 2 (RCW 9A.42.030)  
15 Abandonment of dependent person 2 (RCW  
16 9A.42.070)  
17 Extortion 2 (RCW 9A.56.130)  
18 Unlawful Imprisonment (RCW 9A.40.040)  
19 Assault 3 (RCW 9A.36.031)  
20 Assault of a Child 3 (RCW 9A.36.140)  
21 Custodial Assault (RCW 9A.36.100)  
22 Unlawful possession of firearm in the  
23 second degree (RCW 9.41.040(1)(b))  
24 Harassment (RCW 9A.46.020)  
25 Promoting Prostitution 2 (RCW 9A.88.080)  
26 Willful Failure to Return from Work Release  
27 (RCW 72.65.070)  
28 Burglary 2 (RCW 9A.52.030)  
29 Introducing Contraband 2 (RCW 9A.76.150)  
30 Communication with a Minor for Immoral  
31 Purposes (RCW 9.68A.090)  
32 Patronizing a Juvenile Prostitute (RCW  
33 9.68A.100)  
34 Escape 2 (RCW 9A.76.120)  
35 Perjury 2 (RCW 9A.72.030)  
36 Bail Jumping with class B or C Felony (RCW  
37 9A.76.170(2)(c))  
38 Intimidating a Public Servant (RCW  
39 9A.76.180)

1 Tampering with a Witness (RCW 9A.72.120)  
2 Manufacture, deliver, or possess with  
3 intent to deliver marijuana (RCW  
4 69.50.401(a)(1)(iii))  
5 Delivery of a material in lieu of a  
6 controlled substance (RCW  
7 69.50.401(c))  
8 Manufacture, distribute, or possess with  
9 intent to distribute an imitation  
10 controlled substance (RCW  
11 69.52.030(1))  
12 Recklessly Trafficking in Stolen Property  
13 (RCW 9A.82.050(1))  
14 Theft of livestock 2 (RCW 9A.56.080)  
15 Securities Act violation (RCW 21.20.400)

16 II Unlawful Practice of Law (RCW 2.48.180)  
17 Malicious Mischief 1 (RCW 9A.48.070)  
18 Possession of Stolen Property 1 (RCW  
19 9A.56.150)  
20 Theft 1 (RCW 9A.56.030)  
21 Class B Felony Theft of Rental, Leased, or  
22 Lease-purchased Property (RCW  
23 9A.56.096(4))  
24 Trafficking in Insurance Claims (RCW  
25 48.30A.015)  
26 Unlicensed Practice of a Profession or  
27 Business (RCW 18.130.190(7))  
28 Health Care False Claims (RCW 48.80.030)  
29 Possession of controlled substance that is  
30 either heroin or narcotics from  
31 Schedule I or II (RCW 69.50.401(d))  
32 Possession of phencyclidine (PCP) (RCW  
33 69.50.401(d))  
34 Create, deliver, or possess a counterfeit  
35 controlled substance (RCW  
36 69.50.401(b))

1 Computer Trespass 1 (RCW 9A.52.110)  
2 Escape from Community Custody (RCW  
3 72.09.310)  
4 I Theft 2 (RCW 9A.56.040)  
5 Class C Felony Theft of Rental, Leased, or  
6 Lease-purchased Property (RCW  
7 9A.56.096(4))  
8 Possession of Stolen Property 2 (RCW  
9 9A.56.160)  
10 Forgery (RCW 9A.60.020)  
11 Taking Motor Vehicle Without Permission  
12 (RCW 9A.56.070)  
13 Vehicle Prowl 1 (RCW 9A.52.095)  
14 Attempting to Elude a Pursuing Police  
15 Vehicle (RCW 46.61.024)  
16 Malicious Mischief 2 (RCW 9A.48.080)  
17 Reckless Burning 1 (RCW 9A.48.040)  
18 Unlawful Issuance of Checks or Drafts (RCW  
19 9A.56.060)  
20 Unlawful Use of Food Stamps (RCW 9.91.140  
21 (2) and (3))  
22 False Verification for Welfare (RCW  
23 74.08.055)  
24 Forged Prescription (RCW 69.41.020)  
25 Forged Prescription for a Controlled  
26 Substance (RCW 69.50.403)  
27 Possess Controlled Substance that is a  
28 Narcotic from Schedule III, IV, or V  
29 or Non-narcotic from Schedule I-V  
30 (except phencyclidine) (RCW  
31 69.50.401(d))

32 **Sec. 4.** RCW 43.43.830 and 1996 c 178 s 12 are each amended to read  
33 as follows:

34 Unless the context clearly requires otherwise, the definitions in  
35 this section apply throughout RCW 43.43.830 through 43.43.840.

36 (1) "Applicant" means:

37 (a) Any prospective employee who will or may have unsupervised  
38 access to children under sixteen years of age or developmentally

1 disabled persons or vulnerable adults during the course of his or her  
2 employment or involvement with the business or organization;

3 (b) Any prospective volunteer who will have regularly scheduled  
4 unsupervised access to children under sixteen years of age,  
5 developmentally disabled persons, or vulnerable adults during the  
6 course of his or her employment or involvement with the business or  
7 organization under circumstances where such access will or may involve  
8 groups of (i) five or fewer children under twelve years of age, (ii)  
9 three or fewer children between twelve and sixteen years of age, (iii)  
10 developmentally disabled persons, or (iv) vulnerable adults; or

11 (c) Any prospective adoptive parent, as defined in RCW 26.33.020.

12 (2) "Business or organization" means a business or organization  
13 licensed in this state, any agency of the state, or other governmental  
14 entity, that educates, trains, treats, supervises, houses, or provides  
15 recreation to developmentally disabled persons, vulnerable adults, or  
16 children under sixteen years of age, including but not limited to  
17 public housing authorities, school districts, and educational service  
18 districts.

19 (3) "Civil adjudication" means a specific court finding of sexual  
20 abuse or exploitation or physical abuse in a dependency action under  
21 RCW 13.34.040 or in a domestic relations action under Title 26 RCW. In  
22 the case of vulnerable adults, civil adjudication means a specific  
23 court finding of abuse or financial exploitation in a protection  
24 proceeding under chapter 74.34 RCW. It does not include administrative  
25 proceedings. The term "civil adjudication" is further limited to court  
26 findings that identify as the perpetrator of the abuse a named  
27 individual, over the age of eighteen years, who was a party to the  
28 dependency or dissolution proceeding or was a respondent in a  
29 protection proceeding in which the finding was made and who contested  
30 the allegation of abuse or exploitation.

31 (4) "Conviction record" means "conviction record" information as  
32 defined in RCW 10.97.030(3) relating to a crime against children or  
33 other persons committed by either an adult or a juvenile. It does not  
34 include a conviction for an offense that has been the subject of an  
35 expungement, pardon, annulment, certificate of rehabilitation, or other  
36 equivalent procedure based on a finding of the rehabilitation of the  
37 person convicted, or a conviction that has been the subject of a  
38 pardon, annulment, or other equivalent procedure based on a finding of  
39 innocence. It does include convictions for offenses for which the

1 defendant received a deferred or suspended sentence, unless the record  
2 has been expunged according to law.

3 (5) "Crime against children or other persons" means a conviction of  
4 any of the following offenses: Aggravated murder; first or second  
5 degree murder; first or second degree kidnaping; first, second, or  
6 third degree assault; first, second, or third degree assault of a  
7 child; first, second, or third degree rape; first, second, or third  
8 degree rape of a child; first or second degree robbery; first degree  
9 arson; first degree burglary; first or second degree manslaughter;  
10 first or second degree extortion; indecent liberties; incest; vehicular  
11 homicide; first degree promoting prostitution; communication with a  
12 minor; unlawful imprisonment; simple assault; sexual exploitation of  
13 minors; first or second degree criminal mistreatment; child abuse or  
14 neglect as defined in RCW 26.44.020; first or second degree custodial  
15 interference; first or second degree custodial sexual misconduct;  
16 malicious harassment; first, second, or third degree child molestation;  
17 first or second degree sexual misconduct with a minor; first or second  
18 degree rape of a child; patronizing a juvenile prostitute; child  
19 abandonment; promoting pornography; selling or distributing erotic  
20 material to a minor; custodial assault; violation of child abuse  
21 restraining order; child buying or selling; prostitution; felony  
22 indecent exposure; criminal abandonment; or any of these crimes as they  
23 may be renamed in the future.

24 (6) "Crimes relating to financial exploitation" means a conviction  
25 for first, second, or third degree extortion; first, second, or third  
26 degree theft; first or second degree robbery; forgery; or any of these  
27 crimes as they may be renamed in the future.

28 (7) "Disciplinary board final decision" means any final decision  
29 issued by a disciplining authority under chapter 18.130 RCW or the  
30 secretary of the department of health for the following businesses or  
31 professions:

- 32 (a) Chiropractic;
- 33 (b) Dentistry;
- 34 (c) Dental hygiene;
- 35 (d) Massage;
- 36 (e) Midwifery;
- 37 (f) Naturopathy;
- 38 (g) Osteopathic medicine and surgery;
- 39 (h) Physical therapy;

- 1 (i) Physicians;
- 2 (j) Practical nursing;
- 3 (k) Registered nursing; and
- 4 (l) Psychology.

5 "Disciplinary board final decision," for real estate brokers and  
6 salespersons, means any final decision issued by the director of the  
7 department of licensing for real estate brokers and salespersons.

8 (8) "Unsupervised" means not in the presence of:

9 (a) Another employee or volunteer from the same business or  
10 organization as the applicant; or

11 (b) Any relative or guardian of any of the children or  
12 developmentally disabled persons or vulnerable adults to which the  
13 applicant has access during the course of his or her employment or  
14 involvement with the business or organization.

15 (9) "Vulnerable adult" means "vulnerable adult" as defined in  
16 chapter 74.34 RCW, except that for the purposes of requesting and  
17 receiving background checks pursuant to RCW 43.43.832, it shall also  
18 include adults of any age who lack the functional, mental, or physical  
19 ability to care for themselves.

20 (10) "Financial exploitation" means the illegal or improper use of  
21 a vulnerable adult or that adult's resources for another person's  
22 profit or advantage.

23 (11) "Agency" means any person, firm, partnership, association,  
24 corporation, or facility which receives, provides services to, houses  
25 or otherwise cares for vulnerable adults.

26 **Sec. 5.** RCW 70.125.030 and 1996 c 123 s 6 are each amended to read  
27 as follows:

28 As used in this chapter and unless the context indicates otherwise:

29 (1) "Core services" means treatment services for victims of sexual  
30 assault including information and referral, crisis intervention,  
31 medical advocacy, legal advocacy, support, and system coordination.

32 (2) "Department" means the department of community, trade, and  
33 economic development.

34 (3) "Law enforcement agencies" means police and sheriff's  
35 departments of this state.

36 (4) "Personal representative" means a friend, relative, attorney,  
37 or employee or volunteer from a community sexual assault program or  
38 specialized treatment service provider.

1 (5) "Rape crisis center" means a community-based social service  
2 agency which provides services to victims of sexual assault.

3 (6) "Community sexual assault program" means a community-based  
4 social service agency that is qualified to provide and provides core  
5 services to victims of sexual assault.

6 (7) "Sexual assault" means one or more of the following:

7 (a) Rape or rape of a child;

8 (b) Assault with intent to commit rape or rape of a child;

9 (c) Incest or indecent liberties;

10 (d) Child molestation;

11 (e) Sexual misconduct with a minor;

12 (f) Custodial sexual misconduct;

13 (g) Crimes with a sexual motivation; or

14 (~~(g)~~) (h) An attempt to commit any of the aforementioned  
15 offenses.

16 (8) "Specialized services" means treatment services for victims of  
17 sexual assault including support groups, therapy, specialized sexual  
18 assault medical examination, and prevention education to potential  
19 victims of sexual assault.

20 (9) "Victim" means any person who suffers physical and/or mental  
21 anguish as a proximate result of a sexual assault.

22 NEW SECTION. Sec. 6. A new section is added to chapter 9A.44 RCW  
23 to read as follows:

24 (1) Notwithstanding any other provision of law, upon conviction of  
25 the employee (a) for violation of section 1 or 2 of this act, or (b)  
26 for violation of another section of this chapter on allegations which  
27 led to charging under section 1 or 2 of this act, the employee's  
28 employment shall be terminated.

29 (2) Nothing in this section shall be construed to limit or restrict  
30 the authority of the employer to take appropriate disciplinary action,  
31 up to and including dismissal, prior to conviction, pursuant to other  
32 constitutional, statutory, regulatory, or contractual authority.

33 (3) For the purposes of this section, "employee" means any person  
34 subject to section 1 or 2 of this act.

35 NEW SECTION. Sec. 7. A new section is added to chapter 9A.44 RCW  
36 to read as follows:

1       (1) When an employee or former employee is convicted (a) for  
2 violation of section 1 or 2 of this act, or (b) for violation of  
3 another section of this chapter on allegations which led to charging  
4 under section 1 or 2 of this act, a cause of action shall exist for the  
5 employer against the employee or former employee for any expenses  
6 incurred by the employer as a result of the criminal actions of the  
7 employee or former employee, including third-party civil judgment.

8       (2) The lack of a conviction for the employee's actions shall not  
9 be construed to limit any other statutory or common law rights or  
10 remedies for indemnification available to the employer.

11       (3) For the purposes of this section, "employee" means any person  
12 subject to section 1 or 2 of this act.

--- END ---