

Lower Elwha Klallam Sex Offenses Code

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CHAPTER 1	GENERAL PROVISIONS	1
1.1	Preamble and Purpose	1
1.2	Findings and Intent	1
1.3	Conflicting Laws	1
1.4	Statute of Limitations for Sexual Offenses	2
1.5	Sentencing Goals	2
1.6	Sentencing Schedule for Sexual and Stalking Offenses	3
1.7	Civil Penalties for Sexual and Stalking Offenses	3
1.8	Authority to Amend	3
CHAPTER 2	DEFINITIONS	4
2.1	Sexual Intercourse	4
2.2	Sexual Contact	4
2.3	Mental Incapacity	4
2.4	Physically Helpless	4
2.5	Forcible Compulsion	4
2.6	Legal Consent	4
2.7	Vulnerable Adult	5
2.8	Abuse of a Supervisory Position	5
2.9	Person with Supervisory Authority or Position	5
2.10	Sexual or Sexually Explicit Conduct	5
2.11	Juvenile, Minor, and Child	5
2.12	Elder	5
CHAPTER 3	VICTIM TESTIMONY AND EVIDENCE	5
CHAPTER 4	EVIDENCE OF CHILD	7
CHAPTER 5	SEXUAL OFFENSES	8
5.1	Rape in the First Degree	8
5.2	Rape in the Second Degree	8
5.3	Child Molestation in the First Degree	9
5.4	Child Molestation in the Second Degree	9
5.5	Child Molestation in the Third Degree	9
5.6	Indecent Exposure	9
5.7	Incest	9
5.8	Indecent Liberties in the First Degree	9
5.9	Indecent Liberties in a Second Degree	10
5.10	Patronizing a Juvenile Prostitute	10
5.11	Communicating with a Minor for Immoral Purposes	10
5.12	Sexual Exploitation	11
5.13	Depiction of a Minor or Vulnerable Adult Engaged in Sexual Intercourse or Sexually Explicit Context	11
5.14	Transportation of a Minor or Vulnerable Adult for Illegal Activity	12
5.15	Coercion or Enticement of Minor or Vulnerable Adult	12
5.16	False Imprisonment	12
5.17	Kidnapping	12
5.18	Gang Rape	12
5.19	Stalking	13
5.20	Failure to Register as a Sex Offender or Otherwise Comply with the Lower Elwha Klallam Sex Offender Registration Ordinance	13

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1. General Provisions

1.1 Preamble and Purpose. Only an informed community can stop victimization of its people. The laws and legal system are tools assisting the community in this effort. The purposes of this code are as follows:

- a) To assist in protecting the community from sexual assault, abuse, and stalking, especially when such acts victimize our precious children, respected elders, families, and other vulnerable individuals;
- b) To provide offenders and their families with a resource for accountability, penance, and restitution for their harmful acts;
- c) To promote healing for individuals, families, and the community affected by these offenses, including appropriate rehabilitative treatment for offenders; and
- d) To protect the community from convicted sex offenders and sexual predators.

1.2 Findings and Intent. This code is necessary for the preservation of the public peace, health, safety, and the tribal family. The Tribe recognizes that incidents of sexual exploitation and stalking ordinarily foster trauma in other aspects of the lives of victims, thereby disabling and delaying victims from reporting offenses. Cultural factors involving the sense of privacy exacerbate the ability of many Indian victims to disclose intimate matters, particularly those of aggravated character. Given the tragic intergenerational occurrence of sexual offenses, there is a unique tribal need to provide for effective reporting of domestic violence, sexual offenses, and stalking and appropriate consequences for those acts within the Tribe's jurisdiction.

1.3 Conflicting Laws. Where there is conflict between this code and any prior enacted code, ordinance, or resolution, this code will control. The following sections of the Elwha Justice Code are specifically repealed as superseded by this code: 9.5.13 Stalking; 9.6.2 Kidnapping in the First Degree; 9.6.3 Kidnapping in the Second Degree; 9.17 Rape-Public

Indecency-Prostitution-Sex Crimes, including all subsections; and §9.24 Obscenity and Child Pornography, including all subsections.

1.4 Statute of Limitations for Sexual Offenses

a) Except as provided in subsection 1.4(b) below, prosecution for sexual offenses may not be commenced after whichever is the greater of the following prescribed periods:

- i) 15 years after the victim's 30th birthday;
- ii) 10 years after the commission of the offense; or
- iii) 10 years after the recovery of repressed memories of childhood sexual abuse, which repressed memory has been verified by a mental health expert who has appropriate medical or cultural qualifications.

b) Prosecution for sexual offenses that had become time-barred before July 18, 2011, under the then-current statute of limitations remain time-barred.

c) The periods of limitation prescribed in subsection 1.4(a) do not run during any time when the person charged is not usually, publicly, and physically resident within the jurisdiction of the Tribe.

1.5 Sentencing Goals

Sentencing delivered under this code is specifically intended to promote public safety and facilitate healing within our families and community. The following goals shall be considered in sentencing:

- a) Providing safety for the victims and for other potential victims shall be the highest priority considered in sentencing;
- b) Requiring restitution to the victim or his family, imposing fines, time in jail, or both, provides the offender an opportunity to take public responsibility for his offenses—imposition of these sanctions also makes a statement to the community as to the seriousness of the crime;

- c) Sex-offender evaluation and treatment (when indicated) shall be of equal priority to the restitution, fines, and jail time described in 1.5(b);
- d) Significant suspended sentences can provide an incentive for the offender to complete court-ordered rehabilitative treatment and restitution; and
- e) Civil penalties will be pursued in those cases where the Tribe lacks criminal jurisdiction over an offender.

1.6 Criminal Sentencing Schedule for Sexual and Stalking Offenses

- a) The sentence for a felony offense shall be imprisonment for less than 365 days in jail, a maximum fine of \$5,000, or both. Completion of a sexual deviancy evaluation and any treatment, if recommended, is mandatory for felony sexual offenses.
- b) The sentence for a gross misdemeanor offense shall be imprisonment for less than 365 days in jail, a maximum fine of \$4,000, or both. Completion of a sexual deviancy evaluation and any treatment, if recommended, is mandatory unless the offender can show cause to the Tribal Court why a sexual deviancy evaluation is not warranted in their case.
- c) The sentence for a misdemeanor offense shall be imprisonment of less than 210 days in jail, a maximum fine of \$3,000, or both.

1.7 Civil Penalties for Sexual and Stalking Offenses

In cases where the Tribe does not have criminal jurisdiction over an offender who has committed an offense under this code, the offender shall be subject to a fine of \$500, exclusion from tribal territory, and any other sanction or action permitted under tribal law. There is hereby recognized a corresponding civil penalty for every offense in this code. This provision does not limit the Tribe's ability to pursue all sanctions permitted under tribal law, including criminal penalties, in cases where the Tribe does have criminal jurisdiction over the offender.

1.8 Authority to Amend

The Tribe's Business Committee is authorized to amend this title as the need may arise in the Business Committee's determination.

Sex Offenses Code

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2. Definitions

Words in this code shall have the meaning given to them in this section unless the context clearly indicates another meaning. If the meaning of a word is not clear, the court shall construe the meaning of the word in harmony with the purpose of this code. As used in this code, words in the singular also include the plural, words in the plural also include the singular, and words indicating one gender include the other gender, as the case may require.

2.1 'Sexual intercourse' means penetration, however slight and regardless of duration, of the vagina, mouth, or anus by the sex organ of another or an object attached to another, unless such penetration is accomplished solely for a medically recognized treatment or diagnostic purpose.

2.2 'Sexual contact' means any touching, with or without a foreign object, of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of any person.

2.3 'Mental incapacity' is a certifiable condition existing at the time of the offense that prevents a person from understanding the nature or consequences of the act of sexual intercourse or sexual contact.

2.4 'Physically helpless' means a person who is unconscious, impaired as a result of alcohol or other drug consumption, or who for any other reason is physically or mentally unable to communicate unwillingness to act or to be the recipient of sexual intercourse or other sexual contact by another person.

2.5 'Forcible compulsion' means: physical force that overcomes resistance; or a threat, express or implied, that places a person in fear of death to, physical injury to, or kidnapping of, herself or another person or an animal, or damage to property or rights to property.

2.6 'Legal consent' means that there are actual words or conduct indicating freely given agreement to have sexual intercourse or contact. No person under the age of 14, or who has mental incapacity or is physically helpless as defined under this code, is capable of giving legal consent to sexual intercourse or sexual contact.

2.7 ‘Vulnerable adult’ means any person who is over the age of 18 but is incapable of giving legal consent to sexual intercourse or sexual contact because of mental incapacity, physical helplessness, or for any other reason.

2.8 ‘Abuse of a supervisory position’ means when any person who holds a supervisory position over a child, vulnerable adult, or elder, and has sexual intercourse or sexual contact with that child, vulnerable adult, or elder.

2.9 ‘Person with supervisory authority or position’ means any person who is a teacher, home health care provider, day care provider, minister, scout leader, physician, or holds a similar position of authority and trust over a child, vulnerable adult, or elder.

2.10 ‘Sexual or Sexually Explicit Conduct’ means:

a) Being in an undressed state for the purpose of sexual gratification of the offender or any other; or sexual intercourse or simulated sexual intercourse; or

b) Bestiality, masturbation, sadistic or masochistic abuse, or graphic or simulated lascivious exhibition of the genitals or pubic area of any person.

2.11 ‘Juvenile,’ ‘Minor,’ and “Child” mean any person aged 17 or younger.

2.12 ‘Elder’ means any person aged 55 or older.

3. Victim Testimony and Evidence

3.1 It shall not be necessary that the testimony of an alleged victim be corroborated to convict a person of any crime under this code.

3.2 Evidence of the victim’s past sexual behavior, including the victim’s marital history, divorce history, or general reputation for promiscuity, non-chastity, or sexual mores contrary to the community standard, is inadmissible on the issue of credibility and is inadmissible to prove the victim’s consent except as provided in 3.3 of this section.

Notwithstanding the previous sentence, when the alleged victim has engaged in sexual intercourse or contact with the offender in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the offender and the alleged victim may be admissible on the issue of consent.

3.3 In any prosecution for the crime of rape or for an attempt to commit rape, or an assault with an intent to commit rape, evidence of the victim's past sexual behavior, including the victim's marital behavior, divorce history, or general reputation for promiscuity, non-chastity, or sexual mores contrary to community standards, is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent only in accordance with the following procedure:

a) The defendant shall make a written pretrial motion to the court, with a copy delivered to the prosecutor on the same day, stating that the defense has an offer of proof that the past sexual behavior of the victim is relevant to the issue of the victim's consent.

b) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.

c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.

d) At the conclusion of the hearing, the court shall issue an order admitting the evidence only if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim: is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and its exclusion would result in denial of substantial justice to the defendant. The order shall state what evidence the defendant may introduce, which order may include the nature of the questions to be permitted. The defendant may then offer evidence in accordance with the order of the court.

3.4 Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior, but the court may require a hearing under 3.3 of this code concerning that evidence.

4 Evidence of Child

4.1 Recognizing the legislative purpose of finding the truth while protecting, to the extent constitutionally permitted, the child from trauma, the Tribal Court may adopt rules of procedure regarding the admissibility of video-taped depositions or testimony by closed-circuit television. The protection of child witnesses in sexual assault and physical abuse cases is a substantial and compelling interest of the Tribe. Sexual and physical abuse cases are among the most difficult cases to prosecute, in part because frequently no witnesses exist except the child victim. When abuse is prosecuted, a child victim may suffer serious emotional and mental trauma from exposure to the abuser or from testifying in open court. In rare cases, the child is so traumatized that the child is unable to testify at trial and is unavailable as a witness, or the child's ability to communicate in front of the jury or defendant is so reduced that the truth-seeking function of trial is impaired. In other cases, the child is able to proceed to trial but suffers long-lasting trauma as a result of testifying in court or in front of their abuser. The creation of procedural devices designed to enhance the truth-seeking process and to shield child victims from the trauma of exposure to the abuser and the courtroom is a compelling tribal interest.

4.2 A statement made by a child under the age of 10 describing any act or attempt of sexual contact performed with or on the child by another, that is not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings and criminal proceedings, including juvenile offense adjudications of the Tribe, when:

a) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

b) The child either:

i) Testifies at the proceedings; or

ii) Is unavailable as a witness and the statement was made in a deposition or in any other circumstance where the defendant was able to question the witness; or

- iii) Is unavailable as a witness due to the actions of the defendant.

4.3 A statement may not be admitted under 4.2 of this code unless the proponent of the statement informs the other party of his intention to offer the statement, and the particulars of the statement, sufficiently in advance of the proceedings to provide the adverse party a fair opportunity to prepare to meet the statement.

5. Sexual Offenses

5.1 Rape in the First Degree

A person is guilty of rape in the first degree when he engages in sexual intercourse with another person by forcible compulsion where the offender or an accessory:

- a) Uses or threatens to use any sort of object as a weapon on a victim who was reasonably afraid that weapon could cause serious physical injury;
- b) Kidnaps the victim;
- c) Inflicts serious physical injury; or
- d) Unlawfully enters into the building or vehicle where the victim is situated.

Rape in the first degree is a felony offense.

5.2 Rape in the Second Degree

A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, he or she knowingly engages in sexual intercourse with another person:

- a) By forcible compulsion;
- b) When the victim is incapable of legal consent and the underlying facts supporting the lack of legal consent should have been clear to a reasonable person; or
- c) When the victim is a minor, developmentally disabled, an elder, or a vulnerable adult, and the offender is a person who has supervisory authority over the victim.

Rape in the second degree is a felony offense.

5.3 Child Molestation in the First Degree

A person is guilty of child molestation in the first degree when she has sexual contact with a child under the age of 14 and is at least 24 months older than the victim. Child molestation in the first degree is a felony offense.

5.4 Child Molestation in the Second Degree

A person is guilty of child molestation in the second degree when he has sexual contact with a child aged 14 or 15 and is at least 36 months older than the victim. Child molestation in the second degree is a gross misdemeanor offense.

5.5 Child Molestation in the Third Degree

A person is guilty of child molestation in the third degree when she has sexual contact with a child aged 16 or 17 and is at least 72 months older and not married to the victim. Child molestation in the third degree is a gross misdemeanor offense.

5.6 Indecent Exposure

A person is guilty of indecent exposure when:

a) He makes any open exposure or prolonged indecent gestures involving the genitals, buttocks, or female breasts knowing that such exposure or prolonged indecent gestures is likely to cause reasonable affront or alarm; or

b) Masturbates, even though covered, knowing that such masturbation may be observed by a juvenile or an elder, or in any public or open place.

Indecent exposure is a misdemeanor offense.

5.7 Incest

Reserved.

5.8 Indecent Liberties in the First Degree

A person is guilty of indecent liberties in the first degree when she knowingly engages in sexual contact with another through forcible compulsion. Indecent liberties in the first degree is a gross misdemeanor offense.

5.9 Indecent Liberties in the Second Degree

A person is guilty of indecent liberties in the second degree when he knowingly engages in sexual contact with another person without that person's legal consent. Indecent liberties in the second degree is a misdemeanor offense.

5.10 Patronizing a Juvenile Prostitute

A person is guilty of patronizing a juvenile prostitute when he either:

- a) Engages in sexual intercourse or sexual contact with a juvenile when the juvenile consents due to having been offered or provided money or other compensation by any person;
- b) Agrees or offers to engage in sexual intercourse or sexual contact with a juvenile when the juvenile consents due to having been offered or provided money or other compensation by any person; or
- c) Is a parent, legal guardian, or person having custody or control of a minor or vulnerable adult and permits or causes that minor or vulnerable adult to engage in sexual intercourse or sexual contact with a juvenile prostitute.

Patronizing a juvenile prostitute under the age of 16 is a felony offense. Patronizing a juvenile prostitute aged 16 or 17 is a gross misdemeanor offense.

5.11 Communicating with a Minor for Immoral Purposes

A person is guilty of communicating with a minor for immoral purposes when he communicates with a minor and expresses sexual intent for the purpose of sexual gratification, a form of sexual exploitation. Communicating with a minor for immoral purposes is a misdemeanor offense, unless the person has previously been convicted of any sexual offense or any other felony in any jurisdiction, in which case it is a gross misdemeanor offense.

Sex Offenses Code

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5.12 Sexual Exploitation

a) A person is guilty of sexual exploitation in the first degree if she:

i. Compels or induces a minor or vulnerable adult by promise, threat, or force to engage in sexually explicit conduct, knowing or believing the conduct will be photographed or otherwise memorialized or part of a live performance;

ii. Aids or causes the minor or vulnerable adult to engage in sexually explicit conduct, knowing the conduct will be photographed or part of a live performance; or

iii. Is a parent, legal guardian, or person having custody or control of a minor or vulnerable adult and permits or causes that minor or vulnerable adult to engage in sexually explicit conduct, knowing the conduct will be photographed or part of a live performance.

Sexual exploitation in the first degree is a gross misdemeanor offense, unless the victim is under the age of 16 or the perpetrator has previously been convicted of a sexual offense or any felony in any jurisdiction, in which case it is a felony offense.

b) A person is guilty of sexual exploitation in the second degree if he:

i. Provides a minor or vulnerable adult with a photograph or other video depiction of sexually explicit conduct; or

ii. Is a parent, legal guardian, or person having custody or control of a minor or vulnerable adult and permits or causes that minor or vulnerable adult to view a photograph or other video depiction of sexually explicit conduct.

Sexual exploitation in the second degree is a misdemeanor offense, unless the victim is under the age of 16 or unless the perpetrator has previously been convicted of a sexual offense or any felony in any jurisdiction, in which case it is a gross misdemeanor offense.

5.13 Depiction of a Minor or Vulnerable Adult Engaged in Sexual Intercourse or Sexually Explicit Conduct

It is unlawful to possess, import, distribute, or deal in depictions of a minor or vulnerable adult engaged in sexual intercourse or other sexually explicit conduct. Depiction of a minor or vulnerable adult engaged in sexual intercourse or sexually explicit conduct is a gross misdemeanor offense.

If a person is closely related to the minor depicted in a photograph or other depiction of a prepubescent or adolescent child in an undressed state, and the depiction is not one that was obviously created or possessed for sexual gratification, that relationship shall create a rebuttable presumption of a lack of intent of personal sexual gratification.

5.14 Transportation of a Minor or Vulnerable Adult for Illegal Activity. A person who transports a minor or vulnerable adult outside of the jurisdiction of the Tribe for the purpose of committing an act outside of tribal jurisdiction with that minor or vulnerable adult, which such act would otherwise be an offense under this code, shall be guilty of transportation of minor or vulnerable adult for illegal activity, a felony offense.

5.15 Coercion or Enticement of a Minor or Vulnerable Adult. A person who coerces, entices, or induces a minor or vulnerable adult to commit an act that is an offense under this code shall be guilty of coercion or enticement of minor or vulnerable adult, a gross misdemeanor offense.

5.16 False Imprisonment. A person who intentionally restrains another person's freedom of movement by means of force, threats, or show of apparent authority shall be guilty of false imprisonment. False imprisonment is a gross misdemeanor offense, except:

- a. False imprisonment of a minor or vulnerable adult is a felony offense; and
- b. False imprisonment for the purpose of committing an offense under this code is a felony offense.

5.17 Kidnapping. A person who intentionally restrains another person's freedom of movement for a substantial length of time by means of force, threats, or show of apparent authority, or who moves another person a significant distance, shall be guilty of kidnapping. Kidnapping is a felony offense.

5.18 Gang Rape. A person who does any of the following shall be guilty of gang rape:

- a. Participates with another person in committing any act that constitutes an offense under sections 5.1, 5.2, 5.8, 5.9, or 5.12(a) of this code;
- b. Plans the commission of any act that constitutes an offense under sections 5.1, 5.2, 5.8, 5.9, or 5.12(a) of this code and the plan results in the offense being committed;
or
- c. Assists one or more other persons in committing any act that would constitute an offense under sections 5.1, 5.2, 5.8, 5.9, or 5.12(a) of this code.

Gang rape is a felony offense.

5.19 Stalking

It is unlawful to willfully, maliciously, and repeatedly follow or harass another person with the intent to place that person in reasonable fear for her safety, the safety of her family or pets, or the safety of her employment or personal property.

Stalking is a misdemeanor offense, unless the victim is a minor or unless the perpetrator has previously been convicted of a sexual or stalking offense or any felony in any jurisdiction, in which case it is a gross misdemeanor offense.

5.20 Failure to Register as a Sex Offender or Otherwise Comply with the Lower Elwha Klallam Sex Offender Registration Ordinance.

It is unlawful for any person required to register as a sex offender by the Lower Elwha Klallam Sex Offender Registration Ordinance to fail to: register; perform any other action required by that ordinance; or refrain from taking any action prohibited by that ordinance. Failure to register as a sex offender or otherwise comply with the Lower Elwha Klallam Sex Offender Registration Ordinance is a felony offense.