

CHAPTER 5B – SEX OFFENSES CODE

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5B.1 - GENERAL MATTERS

5B.1.1 Purpose

The intent of this Chapter is to: 1) assist in protecting the community from sexual assault, abuse, and stalking, especially when such acts victimize our children, elders, families, and other vulnerable individuals; 2) provide offenders and their families with a resource for accountability, penance, and restitution for their harmful acts; 3) promote healing for individuals, families, families, and the community affected by these offenses, including appropriate rehabilitative treatment for offenders; and 4) protect the community from sex offenders and sexual predators.

5B.1.2 Need

This Chapter is necessary for the preservation of the public peace, health, safety, and the tribal family. The Tribe recognizes that incidents of sexual abuse, sexual exploitation and stalking ordinarily foster trauma in other aspects of the lives of victims, thereby disabling and delaying victims from reporting offenses.

5B.1.3 Conflicting Laws and Incorporation of Title 5 Provisions

Where there is conflict between this Chapter and any prior enacted provision in code, ordinance, or resolution, this Chapter will control. Any provisions in Title 5 that are not in conflict with this Chapter are incorporated by reference herein, including but not limited to §5.1.6, Violation of Federal or State Law.

5B.2 - DEFINITIONS

The definitions below shall apply to this Chapter only.

- (1) "Abduct" means to willfully restrain a person by either secreting or holding the person in a place where he is not likely to be found, or by use of threat to use deadly force.
- (2) "Consent" means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse and that the person indicating agreement has legal capacity to consent.
- (3) "Forcible compulsion" means physical force that overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be subject to a crime.
- (4) "Married" means one who is legally married to another.
- (5) "Mentally incapacitated" is a condition existing at the time of the crime that

- prevents a person from understanding the nature or consequences of the act of sexual intercourse or contact, whether that condition is produced by illness, defect, the influence of an intoxicating substance, with or without the mentally incapacitated person's consent, or from some other cause occurring with or without the mentally incapacitated person's consent.
- (6) "Physically or bodily helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.
 - (7) "Restrain" means to restrict a person's movements without legal authority in a manner which interferes substantially with his liberty.
 - (8) "Sexual conduct" means actual or simulated:
 - (a) Sexual intercourse, whether between persons of the same or opposite sex;
 - (b) Penetration of the vagina or rectum by any object, except when done as part of a recognized medical procedure;
 - (c) Bestiality;
 - (d) Masturbation, including but not limited to stroking or touching of either female or male sexual organs, including breasts and penis;
 - (e) Sadomasochistic abuse;
 - (f) Lewd exhibition of the genitals, breasts, pubic or rectal area of any person; or
 - (g) Defecation or urination for the purpose of the sexual stimulation of the viewer.
 - (9) "Simulated" means any depicting of the genitals or pubic or rectal area that gives the appearance of sexual conduct or incipient sexual conduct.
 - (10) "Visual medium" means:
 - (a) Any film, photograph, videotape, negative, slide, or photographic reproduction that contains or incorporates in any manner any film, photograph, videotape, negative, or slide; or
 - (b) Any disk, diskette, or other physical medium that allows an image to be displayed on a computer or other video screen and any image transmitted to a computer or other video screen by telephone line, cable, satellite, transmission, or other method.
 - (11) "Sexual contact" means any touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with intent to abuse, humiliate, harass, degrade, or arouse or gratify either party or a third party.
 - (12) "Sexual intercourse" has its ordinary meaning and occurs upon any penetration, however slight, of the vagina or anus by an object, or any part of the body, when committed on one person by another, whether such persons

are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

- (13) "Advances prostitution". A person "advances prostitution" if, acting other than as a prostitute or as a customer thereof, he causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.
- (14) "Profits from prostitution". A person "profits from prostitution" if, acting other than as a prostitute receiving compensation for personally rendered prostitution services, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of prostitution activity.

5B.3 - VICTIM TESTIMONY AND EVIDENCE

5B.3.1 Limitation of Evidence of Past Sexual Behavior; Procedure for Admission

- (1) In order to convict a person of any crime defined in this Chapter it shall not be necessary that the testimony of the alleged victim be corroborated.
- (2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, non-chastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3); provided, however, when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the crime.
- (3) In any prosecution for the crime of rape or for an attempt to commit, or an assault with an intent to commit any such crime, evidence of the victim's past sexual behavior, including but not limited to, 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. Such evidence may be admissible on the issue of consent only pursuant to the following procedure:
 - (a) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy

- of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim;
- (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, 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 corroborative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall issue an order stating what evidence may be introduced by the defendant, that order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.
- (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 shall require a hearing pursuant to subsection (3) concerning presentation and admission of such evidence.
- (5) A statement made by a child under the age of 10 describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence under this Section, if the court finds, in a hearing conducted outside the presence of a jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability, and the child either (i) testifies at the proceedings, or (ii) is unavailable as a witness; provided, however, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

5B.3.2 Defense to Prosecution of Sex Crimes

- (1) In prosecution of any offense within this Chapter in which lack of consent is based solely upon the victim's being bodily helpless, it is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the crime, the defendant reasonably believed that the victim was not mentally incapacitated and/or bodily helpless.
- (2) In any prosecution of any offense within this Chapter in which the crime or degree of the crime depends on the victim's age, it is no defense that the defendant merely believed the victim to be older. It is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of

the crime, the defendant reasonably believed the alleged victim to be older based upon the alleged victim's declaration of age.

5B.3.3 Sex of Parties Immaterial in Prostitution Offenses – No Defense

In any prosecution for prostitution, the sex of the two parties or prospective parties to the sexual conduct engaged in, contemplated, or solicited is immaterial, and it is not defense that:

- (1) Such persons were of the same sex; or
- (2) The person who received, agreed to receive, or solicited a fee was a male and the person who paid or agreed or offered to pay such fee was female.

5B.4 - SUBSTANTIVE SEX OFFENSES

5B.4.1 Child Rape in the First Degree

A person is guilty of Child Rape in the First Degree when the person engages in sexual abuse of a child with another person who is less than 12 years old.

Forcible compulsion or the ability to consent are not necessary elements to child rape in the first degree.

Child Rape in the First Degree is a Class AA offense.

5B.4.2 Child Rape in the Second Degree

A person is guilty of Child Rape in the Second Degree when such person engages in sexual abuse of a child with another person who is 12 years of age or older, but less than 16 years old.

Child Rape in the Second degree is a Class AA offense.

5B.4.3 Sexual Abuse of Children

A person is guilty of Sexual Abuse of Children if he knowingly:

- (1) Employs, uses, or permits the employment or use of a child in an exhibition of sexual conduct, actual or simulated;
- (2) Photographs, films, videotapes, or records a child engaging in sexual conduct, actual or simulated;
- (3) Persuades, entices, counsels, or procures a child to engage in sexual conduct, actual or simulated;
- (4) Processes, develops, prints, publishes, transports, distributes, sells, possesses with intent to sell, exhibits, or advertises material consisting of or including a photograph, photographic negative, undeveloped film, videotape, or recording representing a child engaging in sexual conduct, actual or simulated; or
- (5) Finances any of the activities described in this Section, knowing that the

activity is of the nature described in this Section.

- (6) For purposes of this Section, "child" means any person less than 16 years old.

Sexual Abuse of Children is a Class AA offense.

5B.4.4 Incest

- (1) A person is guilty of incest if he engages in sexual intercourse with a person whom he knows to be related to him, legitimately or illegitimately, as an ancestor, descendant, or sibling of either whole or half blood.
- (2) As used in this Section, "descendant" includes stepchildren and adopted children under the age of 18 years.

Incest is a Class AA offense.

5B.4.5 Indecent Liberties

A person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another:

- (1) By forcible compulsion; or
- (2) When the other person is less than 16 years of age; or
- (3) When the other person is incapable of consent by reason of being mentally incapacitated or physically helpless.

Indecent Liberties is a Class A offense.

5B.4.6 Prostitution

A person is guilty of prostitution if such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee.

Prostitution is a Class B offense.

5B.4.7 Promoting Prostitution in the First Degree

A person is guilty of promoting prostitution in the first degree if he knowingly:

- (1) Advances prostitution by compelling a person by threat or force to engage in prostitution or profits from prostitution or profits from prostitution that results from such threat or force; or
- (2) Advances or profits from prostitution of a person less than 18 years old.

Promoting prostitution in the first degree is a Class AA offense.

5B.4.8 Promoting Prostitution in the Second Degree

A person is guilty of promoting prostitution in the second degree if he knowingly:

- (1) Profits from prostitution; or
- (2) Advances prostitution.

Promoting prostitution in the second degree is a Class AA offense.

5B.4.9 Permitting Prostitution

A person is guilty of permitting prostitution if having possession or control of premises that he knows are being used for prostitution purposes, he fails without lawful excuse to make reasonable effort to halt or abate such use.

Permitting prostitution is a Class B offense.

5B.4.10 Public Indecency

A person is guilty of public indecency if he makes any open and obscene exposure of his person, or the person of another, knowing that such conduct is likely to cause reasonable affront or alarm.

Public indecency is a Class B offense unless such person exposes himself to a person under the age of 16 years, in which case public indecency is a Class A offense.

5B.4.11 Rape in the First Degree

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

- (1) Uses or threatens to use a deadly weapon; or
- (2) Kidnaps the victim; or
- (3) Inflicts serious bodily injury; or
- (4) Feloniously enters into the building or vehicle where the victim is situated.

Rape in the first degree is a Class AA offense.

5B.4.12 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, the person engages in sexual conduct with another person:

- (1) By forcible compulsion; or
- (2) When the victim is incapable of consent by reason of being bodily helpless or mentally incapacitated.

Rape in the second degree is a Class AA offense.

5B.4.13 Rape in the Third Degree

A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual conduct with another person:

- (1) Where the victim did not consent to sexual conduct with the perpetrator, as defined in this Chapter, and such lack of consent was clearly expressed by the victim's words or conduct; or

- (2) Where there is threat of substantial unlawful harm to property rights of the victim.

Rape in the third degree is a Class AA offense.

5B.4.14 Kidnapping in the First Degree

A person is guilty of kidnapping in the first degree if he willfully abducts a person under the age of 18 or another person with intent to:

- (1) hold him for ransom or reward, or as a shield or hostage; or
- (2) facilitate commission of any Class AA offense or flight thereafter; or
- (3) inflict bodily injury on him; or
- (4) inflict extreme mental distress on him or a third person; or
- (5) interfere with the performance of any governmental function; or
- (6) to attempt or commit sexual abuse of a child; or
- (7) to attempt or commit the crimes of rape or child rape.

Kidnapping in the first degree is a Class AA offense.