

# STATE OF ALASKA

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## **CSHB 298(JUD)** **SEXUAL ASSAULT AND DOMESTIC VIOLENCE** **Sectional Analysis**

**Sections 1 and 2** correct an error made in 2007 when the legislature enacted AS 11.56.759, that adopted a class A misdemeanor if a sex offender violates specific conditions of probation or parole. One of the requirements of the crime is that the person have served the entire period of incarceration imposed for the crime. This is effective for probationers, but not for parolees, because a person is never on parole if he or she has served the entire period of incarceration. A member of the Parole Board brought this issue to our attention, because the statute has caused problems for the board in dealing with parolees. These sections remove parolees from the statute.

**Section 3** rewrites AS 11.56.840, failure to register as a sex offender in the second degree. The proposal is similar to current law, but it sets out the elements more clearly. The section also adopts an affirmative defense that unforeseeable circumstances outside the control of the person prevented him or her from registering, and that the person contacted the Department of Public Safety immediately upon being able to do so.

**Section 21** on page 11 of the bill adopts in uncodified law the legislative statement that the culpable mental state of knowing only applies to the sex offender or child kidnapper know that he or she is required to register. In the original version of the bill this provision was in the substantive part of the statute.

**Section 4** would raise a form of harassment in the second degree (that is, with intent to harass or annoy another person, the person subjects the other person to offensive physical contact) to harassment in first degree if the offensive physical contact is by the offender touching the other person's genitals, anus, or female breast. Harassment in the first degree is a class A misdemeanor; the second degree offense is a class B misdemeanor. There have been prosecutions recently involving offensive touching that occurred so quickly that the court concluded that the victim did not have time to convey lack of consent to the offender. The court reduced these charges from sexual assault to harassment in the second degree. This conduct is more serious than a class B misdemeanor; the bill would raise it to a class A misdemeanor.

**Sections 5, 6, and 7** address a problem with Alaska law prohibiting possession of child pornography that was raised by a recent decision of the Alaska Court of Appeals, *Worden v. State*, 213 P.3d 144 (Alaska App. 2009). *Worden* held that our current statute does not prohibit a

person from viewing child pornography on a computer; rather, the statute requires that the person must also save it on the computer to be considered to possess it. In response to this decision, the bill adopts the federal approach. It prohibits possession of child pornography, and it also prohibits a person from knowingly accessing child pornography on a computer with the intent to view it.

The bill adds to the child pornography law the prohibition of the depiction of a part of a child under 18 years of age that by manipulation appears to be engaged in conduct prohibited by AS 11.41.455(a). It also would prohibit material that appears to include a child under 18 years of age (often referred to as anime pornography) if the material is obscene.

**Section 8** proposes an affirmative defense to possession of child pornography that is similar to federal law. The affirmative defense would address a situation where a person finds child pornography on their computer, and did not obtain it themselves. The defense requires that there are three or less depictions, and the person, without showing the material to another person except law enforcement, destroys the depictions or contacts law enforcement and turns it over to them.

**Section 8** also adopts a definition of the “appears to include a child” for purposes of the prohibition of anime child pornography that references a definition of obscene.

**Sections 9, 10, 11, and 12** amend the crime that prohibits the electronic distribution of indecent material to minors by expanding the offense to prohibit any form of distribution of indecent material to minors, in addition to electronic distribution. It also adds a new element of the offense that the state must prove that requires the material to be harmful to a child. Whether the material is harmful to a child is defined in **Section 12**, that defines that term.

**Section 13** adds the crimes of human trafficking in the first and second degrees, distribution of child pornography, possession of child pornography, and distribution of indecent materials to minors to the crimes that are not eligible for a suspended imposition of sentence.

**Section 13** also includes an amendment that removes “substantially” when describing a crime in another jurisdiction that may be a predicate conviction that would disallow the use of a suspended imposition of sentence for other offenses. This conforms with other statutes that require that a predicate offense in another jurisdiction be only similar to an offense in Alaska. Examples include AS 12.55.145(a) (presumptive sentencing), AS 11.41.320(a)(5) (third degree assault), and AS 11.41.110(a)(5) (murder in the second degree).

**Section 14** adds to the conditions of probation that may be imposed on a person convicted of a sex offense. It gives the court discretion to order the person to submit e-mail addresses and other networking addresses to his or her probation officer, who would be required to give this information to the Troopers and to the local law enforcement agency. If the person was convicted of sexual abuse of a minor or an offense related to child pornography, it gives the court discretion

to prohibit the person from using an Internet site, communicating with children under 16 years of age, or possessing or using a computer.

**Section 15** amends the aggravating factor at sentencing that allows the court to increase a sentence above the sentencing range if the defendant knew that the victim was particularly vulnerable. It does this by adding the consumption of alcohol or drugs as factors that might make a victim particularly vulnerable.

**Section 16** adds two new aggravating factors to the sentencing law. First, it allows the court to increase a sentence above the sentencing range for a crime against a person (AS 11.41) committed against a person that the defendant was dating or with whom the defendant has engaged in a sexual relationship. Second, it allows the court to increase the sentence if the defendant is convicted of sexual abuse of a minor or distribution of indecent material to minors if the defendant is 10 years or more older than the victim.

**Sections 17 and 18** add a new provision to sex offender registration law that requires a person present in Alaska, who is convicted of an offense out of state that requires registration in that jurisdiction, to register in Alaska. This requirement would apply even if Alaska does not have a criminal provision similar to the crime in the other state that requires registration there. A person would have to register for 15 years if convicted of only one offense, and for life if convicted for two or more offenses.

**Section 19** authorizes the attorney general, in the investigation of online enticement of a minor, unlawful exploitation of a minor, and child pornography crimes, to issue a subpoena to an Internet service provider if there is reasonable cause to believe that the Internet service account has been used in the exploitation or attempted exploitation of children. The subpoena may require the provider to disclose the name, address, telephone connection records, and other information about the account. Other than use in the criminal case related to the subpoenaed materials, the information obtained must remain confidential.

**Section 20** amends Rule 16(b), Alaska Rules of Criminal Procedure, by adding a prohibition of copying or otherwise reproducing child pornography as part of the discovery process in a criminal prosecution. The material must still be available for inspection for the defendant, defense counsel, and any person the defense may seek to qualify as an expert witness at trial. Federal law has a similar provision. 18 U.S.C.A. § 3509(m).

**Section 21** provides a legislative statement that in a prosecution for failure to register as a sex offender, the state is not required to prove a culpable mental state for the conduct of not registering. The state would be required to prove that the defendant knew he or she was required to register as a sex offender.

**Sections 22 and 23** include applicability and effective date provisions.