



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Alaska

February 6, 2020

House State Affairs Committee
Alaska State House of Representatives
State Capitol
Juneau, AK 99801
by email: Hsta@akleg.gov

Re: HB 198 - Adding Anti-LGBT Bias as a Sentencing Aggravator

Dear Co-Chairs Fields and Kreiss-Tomkins, and Members of the House State Affairs Committee:

As you consider House Bill (HB) 198, the American Civil Liberties Union (ACLU) of Alaska urges you to take a more comprehensive approach to providing safety and protection against discrimination against lesbian, gay, bisexual, transgender and queer (LGBTQ) Alaskans. HB 198 takes too narrow an approach to provide meaningful protections against harm and discrimination for LGBTQ Alaskans. We neither support nor oppose the bill in its current form, and instead urge you to make specific improvements.

Alaska Statute provides for consideration of a number of “aggravating factors” during the commission of a felony crime that sentencing courts can factor in determining the length of the perpetrator’s prison sentence.¹ If the courts determine these aggravating factors apply to the circumstances of a crime, they can impose sentences outside the limits of the presumptive sentencing range for that crime. Included among the list of existing sentencing aggravators is the knowing targeting of a victim based on “race, sex, color, creed, physical or mental disability, ancestry, or national origin.”² HB 198 would add “sexual orientation or gender identity” to this list.

This formal acknowledgment that LGBTQ Alaskans are targeted for hate-motivated crimes simply for who they are reflects the unfortunate and unacceptable reality for our LGBTQ neighbors. It also sends an important message that crimes motivated

¹ Alaska Statute (AS) 12.55.155(c).

² *Ibid.* at subsection 22.

by anti-LGBTQ bias merit the same community condemnation as those motivated by other forms of bias already in Alaska's hate crimes law. We applaud the spirit of inclusivity that has prompted this bill.

If the goal, however, is to provide greater safety and protection from discrimination for LGBTQ Alaskans, this incarceration-only approach is limited both in its scope and effectiveness.

An Incarceration-Only Approach Does Not Make LGBTQ People Safer

Summarizing a large body of research related to crime deterrence, the United States Department of Justice has concluded, "increasing the severity of punishment does little to deter crime."³ The research finds that criminals generally know very little about the penalties associated with specific crimes, and do not calibrate their behavior accordingly. The evidence does not show that imposing a longer term of incarceration on a person convicted of a crime makes others less likely to commit similar crimes. Instead, some research shows that longer prison sentences lead to a greater likelihood of recidivism, as incarcerated individuals exit prison with diminished life prospects and having had extended exposure to other criminals.⁴

The research shows that the certainty of being caught and punished is a more effective deterrent than the severity of the punishment – that is, individuals are far less likely to commit a crime if they believe they will be caught.⁵

In addition, imprisonment is a limited and often counterproductive means of addressing the social disorders that lead to crime,⁶ and without affirmative measures to address the underlying causes of bias-based violence, it does not create conditions for greater safety for LGBTQ Alaskans.

³ "Five Things about Deterrence." U.S. Department of Justice National Institute for Justice, May 2016. Available at <https://nij.ojp.gov/topics/articles/five-things-about-deterrence>.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ See, e.g., Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. Rev. L. & Soc. Change 235 (2009); Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, U.S. Dep't of Health & Human Serv. & Urban Institute, *From Prison to Home: The Effect of Incarceration and Reentry on Children, Families and Communities* (2002), available at <http://aspe.hhs.gov/hsp/prison2home02/haney.pdf>; Dina Rose and Todd Clear, *Incarceration, Social Capital and Crime: Implications for Social Disorganization Theory*, 36 *Criminology* 441 (1998, rev. 2006).

As HB 198 *only* calls for longer terms of imprisonment, it can not stand alone as an effective deterrent of bias crimes against LGBTQ Alaskans.

An Incarceration-Only Approach Does Not Protect LGBTQ Alaskans from Discrimination

Research shows that LGBTQ individuals are disproportionately likely to experience poverty, food insecurity and homelessness (particularly youth homelessness).⁷ Yet LGBTQ Alaskans still lack state-level protections against discrimination in housing, employment, financial services and public accommodations.

The ability to discriminate with near-impunity in these aspects of everyday life leave our LGBTQ neighbors less likely to be able to meet basic needs and thrive in our communities. A statewide survey of 84 transgender Alaskans, conducted in 2015 and released in 2017, shows the impact of the lack of protections in our state.

In 2015 alone, 85% of the Alaskan transgender children who responded to the survey were verbally harassed, prohibited from dressing according to their gender identity, disciplined more harshly, or physically or sexually assaulted because they were transgender. In the adult population, 32% experienced some form of housing discrimination and 23% experienced homelessness.⁸ One in four (25%) adult respondents reported being forced to use the wrong restroom, were told to present in the wrong gender in order to keep their job, or had a boss or coworker share private information about their transgender status without permission. Seventeen percent were denied employment opportunities or fired because of their gender identity or expression.⁹ Nationally, one in ten transgender individuals has been physically assaulted in 2015,¹⁰ yet in Alaska, nearly half (47%) of transgender individuals do not feel comfortable asking police for help when they need it.¹¹

⁷ See, e.g., M.V. Lee Badgett *et al.* *LGBT Poverty in the United States: A Study of Differences between Sexual Orientation and Gender Identity Groups*. UCLA School of Law Williams Institute, October 2019; Taylor N.T. Brown *et al.* *Food Insecurity and SNAP Participation in the LGBT Community*. UCLA School of Law Williams Institute, July 2016; and Morton, M.H., Dworsky, A., & Samuels, G.M. (2017). *Missed opportunities: Youth homelessness in America. National estimates*. Chicago, IL: Chapin Hall at the University of Chicago.

⁸ 2015 U.S. Transgender Survey—Alaska State Report, *National Center for Transgender Equality* (August 2017), <http://www.fairanchorage.org/wp-content/uploads/2017/08/USTS-AK-State-Report.pdf>.

⁹ *Ibid.*

¹⁰ 2015 U.S. Transgender Survey Report—Executive Summary, *National Center for Transgender Equality* (December 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>.

¹¹ See *supra* note 7.

Real LGBT Protections for Alaskans Require a Comprehensive Approach

We encourage you to pursue a more comprehensive approach to providing safety and protection against discrimination than HB 198 currently provides LGBTQ Alaskans. The elements of a more comprehensive approach should include the following:

- Passage of HB 82 to provide civil non-discrimination protections to LGBTQ Alaskans;
- Dedicated law enforcement liaisons (whether Alaska State Troopers or local law enforcement agents) to the LGBTQ community in every region of the state, along with law enforcement training on LGBTQ discrimination and bias crimes, to enable law enforcement agencies to build trust within the LGBTQ community, spot bias-related activity early, and increase the likelihood that perpetrators of bias-motivated crimes are identified and caught; and
- A prevention model that includes educational programs – starting with anti-bullying measures in schools – that debunk stereotypes and promote respect and tolerance for difference, as well as community-based antiviolence programs.

General Concerns about Hate Crimes Laws

While HB 198 only contemplates amending Alaska’s existing hate crimes law, and not whether Alaska should have a hate crimes law, I nevertheless want to share two general concerns about these laws.

First, sentencing enhancements expand the powers of a criminal legal system that disproportionately impacts individuals from marginalized communities – in some cases, the very same communities hate crimes laws are purported to protect. For example, in Alaska, Alaska Natives and African-Americans are four times more likely to be incarcerated than white people.¹² The Legislature should analyze the manner in which the state has enforced its bias-crime statute to ensure that the law is not being used to prosecute disproportionately, or without legal justification, those individuals the state intended to protect by adopting penalty enhancements for bias crimes.

¹² *Blueprint for Smart Justice: Alaska*. American Civil Liberties Union, 2019. Available at <https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-AK.pdf>

In addition, any legislation in this area must be limited in its application to punishing the conduct of intentionally selecting the victim on the basis of discriminatory conduct. Bias-crime legislation should not permit enhanced penalties based on a defendant's constitutionally protected beliefs, opinions, expressions or associations, however distasteful those may be. Thus, evidence of a defendant's remarks, beliefs or membership in a group should not be admissible in any prosecution unless such evidence is directly and immediately related to the chain of events leading to the crime.

The discrimination that LGBTQ Alaskans experience is pervasive and abhorrent to the fair, free, and welcoming state we all want Alaska to become. Alaska needs a comprehensive approach that provides our LGBTQ neighbors safety and protection from discrimination in all aspects of everyday life – not just when a violent crime has been committed. I thank you for the opportunity to offer input and urge you to continue to pursue this issue until full equality for all Alaskans is achieved.

Sincerely,



Triada Stampas
Policy Director

cc: Representative Andy Josephson
Representative Gary Knopp
Representative Ivy Spohnholz
Representative Chris Tuck