

Memo

To: Alaska Criminal Justice Commission

From: Troy Payne, Director, Alaska Justice Information Center

Date: August 12, 2021

Re: Estimating the impact of HB 5's changes to AS 11.41.436(a) and AS 11.41.438

Background

At the May 25, 2021 Plenary Meeting of the Alaska Criminal Justice Commission, the Commission requested that the Alaska Justice Information Center (AJiC) attempt to estimate the potential impacts of HB 5, "An Act relating to sexual abuse of a minor; relating to sexual assault; relating to the code of military justice; relating to consent; relating to the testing of sexual assault examination kits, and providing for an effective date".

AJiC provides technical assistance to the Alaska Criminal Justice Commission and has access to data provided to the Commission under AS 44.19.645. These data allow AJiC to estimate some of the potential impacts of HB 5, with several limitations.

Our analysis is limited to statutory changes in criminal sentences for activity that is currently unlawful. With the data available, we cannot estimate the impacts of criminalizing behavior that is currently lawful. We also cannot estimate the impacts of changing the definition of consent, nor can we estimate the impacts of changing the timeline for sexual assault kit processing.

The analysis presented here can only *partially* estimate potential impacts of Sections 3 and 4 of HB 5. These sections would change certain acts from a Sexual Assault of a Minor (SAM) 2 to a SAM 1; and would change certain other acts from a SAM 3 to a SAM 2. As we describe in more detail below, we cannot estimate the complete impact of these sections.

What HB 5 would change in Sections 3 and 4

Section 3 of HB 5 would add this to the definition of a SAM 1 at AS 11.41.434(a)(4):

being 18 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, 15, 16, or 17 years of age and at least 10 years younger than the offender, or aids, induces, causes, or encourages a person who is 13, 14, 15, 16, or 17 years of age and at least 10 years younger than the offender to engage in sexual penetration with another person.

SAM 1 is an Unclassified Felony and is punishable by a presumptive sentence of 20-99 years, depending on the criminal history of the defendant and the existence of mitigators or aggravators.

Current law already criminalizes some acts covered by Section 3 of HB 5 as SAM 2. SAM 2 is a Class B Felony and is punishable by a presumptive sentence of 5-99 years, depending on the criminal history of the defendant and the existence of mitigators or aggravators. AS 11.41.436(a)(1) currently reads:

being 17 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 15 years of age and at least four years younger than the offender, or aids, induces, causes, or encourages a person who is 13, 14, or 15 years of age and at least four years younger than the offender to engage in sexual penetration with another person.

Compared to current law, Section 3 of HB 5 would:

1. Increase the punishment for offenders who are 18 years of age or older, and who are 10 years older than victims who are 13, 14, or 15 from a statutory minimum of 5 years (SAM 2, Class B Felony) to a minimum of 20 years (SAM 1, Unclassified Felony);
2. Criminalize sexual penetration of 16- or 17-year-old victims by offenders who are older than 26 or 27 (respectively).

Section 4 of HB 5 would amend AS 11.41.436(a)(1) to limit its applicability to instances where the offender is 17 or older and the victim is 13, 14, or 15 and the age difference is 4-9 years. Section 4 would also add a new provision at AS 11.41.436(a)(8) that is like the proposed addition at AS 11.41.434(a)(4), but covers sexual contact instead of penetration:

being 18 years of age or older, the offender engaged in sexual contact with a person who is 13, 14, 15, 16, or 17 years of age and at least 10 years younger than the offender, or aids, induces, causes of encourages a person who is 13, 14, 15, 16, or 17 years of age and at leads 10 years younger than the offender to engage in sexual contact with another person.

Compared to current law, Section 4 of HB 5 would:

1. Increase the punishment for offenders who are 18 years of age or older, and who are 10 years older than victims who are 13, 14, or 15 from a statutory minimum of 2 years (SAM 3, Class C Felony) to a statutory minimum of 5 years (SAM 2, Class B Felony);
2. Criminalize sexual contact of 16- or 17-year-old victims by offenders who are older than 26 or 27 (respectively).

Figure 1 shows the current law regarding criminal offenses for consensual sexual penetration by age of the victim (on the vertical) and suspect age (on the horizontal). Figure 2 shows the

changes proposed under HB5. Similarly, Figure 3 shows the current law for consensual sexual contact, while Figure 4 shows the changes proposed by HB5.

Figure 1: Sexual penetration victim/suspect age matrix: current law

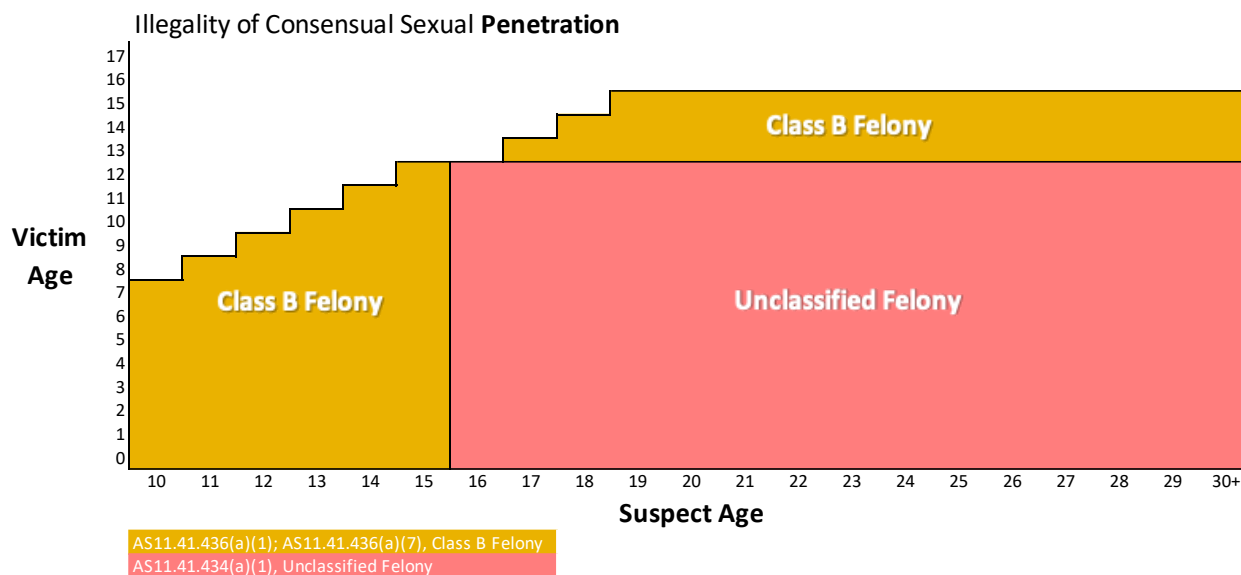


Figure 2: Sexual penetration victim/suspect age matrix: under HB5

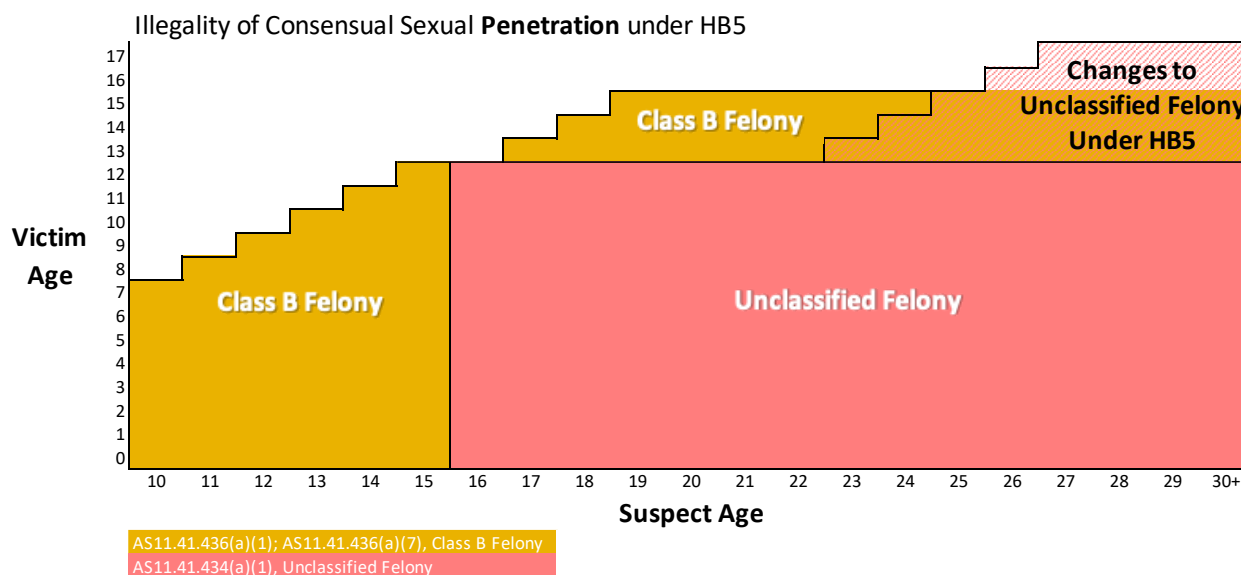


Figure 3: Sexual contact victim/suspect age matrix: current law

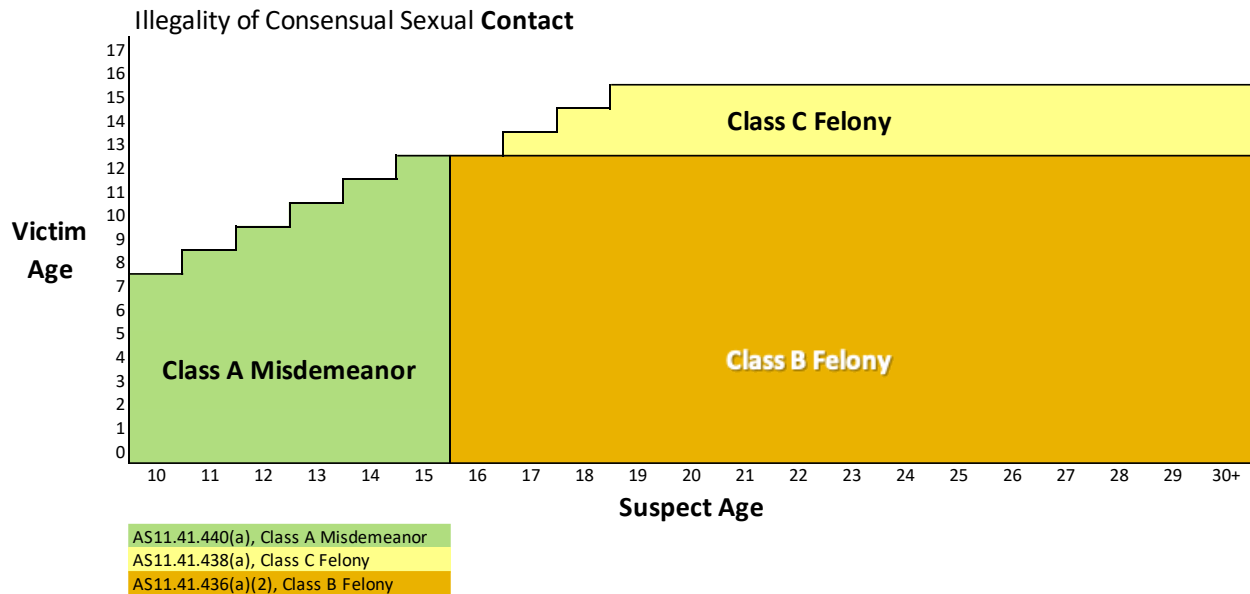
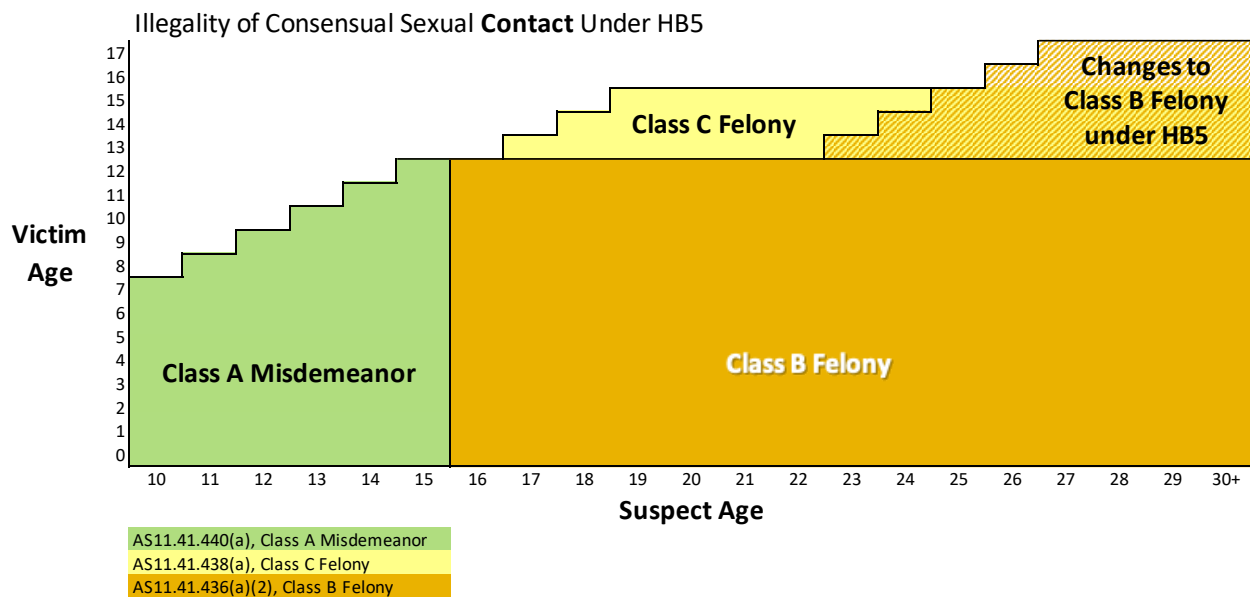


Figure 4: Sexual contact victim/suspect age matrix: under HB5



While other provisions of HB 5 would change aspects of consent, neither the current law for SAM nor the proposed amendment in Sections 3 or 4 of HB 5 include consent as an element of the offense. Consensual sexual penetration of a 16- or 17-year-old by persons more than 10 years older would change from lawful today to an unclassified felony carrying a minimum 20-year sentence under HB 5. Consensual sexual contact with 16- or 17-year-old by persons more

than 10 years older would change from lawful today to a Class B Felony carrying a minimum 5-year sentence under HB 5. We lack sufficient data to estimate the impact of criminalizing currently lawful acts.

We can, however, estimate the impact of changing certain SAM 2 offenses to SAM 1, and the impact of changing SAM 3 offenses to SAM 2. These estimates are necessarily limited, but they provide information that may be of value to policymakers when considering HB 5.

Data and limitations

We used criminal case disposition data provided by the Alaska Department of Public Safety pursuant to AS 44.19.645. These data contain individually identified, charge-level information on offenses and offenders for which suspects were convicted. The data contain no information about victims.

Because sentencing most often includes consideration of all charges in a case, charge-level information was aggregated to cases. Sentences for multiple charges are also sometimes merged in the data and recorded in a single charge. We are therefore unable to determine average sentences for individual charges in cases with multiple charges with certainty. Summing the total sentence within a *case*, however, should yield the total sentence for the charges contained in the case.

Multiple charges add another complicating factor. AS 12.55 allows sentences for violations of AS 11.41.434-438 to be served either consecutively or partially concurrently. Violations of AS 11.41.434 require consecutive terms for one-fourth of the presumptive term under AS 12.55.127(2)(E), where the presumptive term is the middle of the presumptive range. Violations of AS 11.41.436-438 require “some additional term of imprisonment” under AS 12.55.127(2)(F). The available data do not have any indicator for whether sentences were ordered to be served consecutively or partially concurrently. To enable analysis, results are presented as if all defendants served all terms consecutively.

We also ignore the accrual of good time, the term used in Alaska to refer to time deducted for good conduct inside of a correctional facility. The data available for this analysis have both total days sentenced and days suspended. But the data do not have any indicator of actual time served. The impact of good time on actual days served can be up to one-third of an offender’s sentence under AS 33.20.010(a), but good time does not accrue for unclassified felonies under AS 33.20.010(a)3(B). HB 5 would therefore increase the minimum actual time served inside of a correctional facility for sexual penetration of a 13–15-year-old by someone 10 years or more older from 3.3 years (5 years minus one-third of 5 years for good behavior) to 20 years (with no allowance for good behavior). We have no measure of good time and have no reliable way to estimate it. We therefore ignore good time and present only sentenced active time (sentenced minus suspended time).

We provide an estimate based on available retrospective data. Our estimate assumes that the *only* change in the criminal processing would have been the sentence length. Police,

prosecutors, defendants, and judges will likely change decisions at earlier points in the process that would have downstream impacts on prison terms. We have no way to estimate these effects.

Finally, sections 3 and 4 of HB 5 would also make currently lawful behavior unlawful. Sexual contact or sexual penetration of 16- and 17-year-old victims by persons more than 10 years their senior would become unlawful under HB 5. We have no way to estimate the number of additional cases this change could bring.

In short, some of the data limitations such as assuming consecutive terms will tend to overestimate active time (time served in a correctional facility), while other limitations such as ignoring good time will tend to underestimate active time. It is not known how much error these limitations introduce.

Cases impacted by HB 5 over the years 2015-2019

During the period 2015-2019, there were 396 cases with one or more convictions for any SAM 1, SAM 2, or SAM 3 offense (AS 11.41.434-438). There was a total of 165 cases (42% of all SAM 1, SAM 2, or SAM 3 offenses) with one or more convictions for AS 11.41.436(a)(1) or AS 11.41.438. Two offenders had more than one case with convictions for AS 11.41.436(a)(1) or AS 11.41.438; both of those offenders had two cases. Table 1 shows the number of convictions for AS 11.41.436(a)(1) and/or AS 11.41.438 by age of offender and year.

Table 1: Number of cases including one or more convictions for AS 11.41.436(a)(1) or AS 11.41.438 by age of offender and year

| | Year disposed | | | | | Total |
|-----------------|---------------|------|------|------|------|-------|
| | 2015 | 2016 | 2017 | 2018 | 2019 | |
| Age of offender | | | | | | |
| Under 25 | 18 | 23 | 20 | 16 | 11 | 88 |
| 25+ | 16 | 19 | 19 | 15 | 8 | 77 |
| Total | 34 | 42 | 39 | 31 | 19 | 165 |

If HB 5 were the law at the time of the offense, violations of the current SAM 2 offense AS 11.41.436(a)(1), where the offender is older than 25 would have fallen under a new provision of SAM 1, AS 11.41.434(a)(4). There were 39 such cases in the years 2015-2019. If HB 5 were the law at the time of the offense, violations of the current SAM 3 offense AS 11.41.438 would have fallen under a new provision of SAM 2, AS 11.41.436(a)(8). There were 35 such cases in the years 2015-2019. There were an additional three cases where defendants were convicted of both AS 11.41.436(a)(1) and AS 11.41.438, bringing the total number of impacted cases to 77.

Table 2 shows the number of cases and the sentenced active time (prison terms not including suspended sentence terms) for cases including one or more convictions on AS 11.41.436(a)(1)

or AS 11.41.438 or both. Table 2 shows that the total actual active time (prison term) ordered for the 165 cases where offenders were convicted of one or more charges of AS 11.41.436(a)(1) or AS 11.41.438 was 1,476.1 years.

Table 2: Total sentence lengths in cases in calendar years 2015-2019 with one or more convictions for AS 11.41.436(a)(1), AS 11.41.438, or both

| | 436(a)(1) | Current law, AS 11.41. | | Total |
|---------------------------------|-----------|------------------------|-------|---------|
| | | 438 | Both | |
| Age of offender | | | | |
| Under 25 | | | | |
| Years sentenced (actual) | 567.9 | 57.4 | 9.0 | 634.3 |
| Years sentenced (HB 5 minimums) | 686.9 | 83.8 | 9.0 | 779.7 |
| Number of cases | 47 | 39 | 2 | 88 |
| 25+ | | | | |
| Years sentenced (actual) | 501.1 | 80.7 | 260.0 | 841.7 |
| Years sentenced (HB 5 minimums) | 844.1 | 235.5 | 277.0 | 1,356.6 |
| Number of cases | 39 | 35 | 3 | 77 |
| Total | | | | |
| Years sentenced (actual) | 1,069.0 | 138.1 | 269.0 | 1,476.1 |
| Years sentenced (HB 5 minimums) | 1,531.0 | 319.3 | 286.0 | 2,136.3 |
| Number of cases | 86 | 74 | 5 | 165 |

Notes: All sentences are calculated consecutively when offenders are convicted of multiple charges. Active time (prison terms) are displayed; suspended time is not included. Actual time served may vary from sentenced time due to good time and sentence mitigators, among other considerations. HB 5 minimum sentence is set to 20 years for each violation of AS 11.41.436(a)(1) and five years for each violation of AS 11.41.438, with a 50% reduction for attempts. For offenders under 25, sentences were increased to HB 5 minimums when the offender was 23 or 24 years old and were otherwise unchanged.

Table 2 also shows the minimum sentences these offenders would have been subject to if the changes in Sections 3 and 4 of HB 5 were to pass. Cases that received sentences greater than these minimum penalties were not changed; cases that receive sentences less than these minimum penalties were increased to the statutory minimums proposed by HB 5 for offenders 25 years of age or older. Cases where the offender is 23-24 could also be impacted, dependent on the age of the victim. Victim age is not included in our data. We therefore split our

calculation into offenders over 25, who would be subject to HB 5's new provisions, and offenders under 25 who could be. This was calculated using the statutory minimum for Unclassified Felonies (20 years) and for Class B Felonies (5 years), with both reduced by half for attempts as described in AS 12.55.155.

Had Section 3 and Section 4 of HB 5 applied to cases disposed of during calendar years 2015-2019, the total active time would have increased from 1,476.1 years to between 1,990.9 and 2,136.3 years, an increase of between 514.8 and 660.2 years of sentenced prison terms among the 165 offenders during the five-year period 2015-2019. The low estimate assumes all victims of offenders aged 23 or 24 were fewer than 10 years younger than the offender; the high estimate assumes all victims were more than 10 years younger. The additional sentence length is likely between these two extremes.

Summary

Our estimate is based on the limitations and assumptions described above, including that victims, defendants, and criminal justice actors would make similar decisions at each step of the criminal justice process. Changing acts from Class B Felonies to Unclassified Felonies would, however, likely change decisions of the various actors. There is no available data that can be used to estimate these effects. Our estimate also cannot include the number of additional cases that could be brought against offenders more than 10 years older than victims who are 16 or 17 (we have no way to estimate the number of these cases).

Despite the limitations of our analysis, we hope that policymakers find our estimates useful. We found 165 cases during calendar years 2015-2019 with convictions for AS 11.41.436(a)(1) or AS 11.41.438, or both. All else being equal, if Sections 3 and 4 of HB 5 had applied to these convictions instead of current law, the active time to which offenders were sentenced (prison term not including suspended time) would have been collectively increased by between 514.8 and 660.2 years among the 165 cases — approximately 100 additional years of active time sentenced per calendar year, affecting between 20 and 40 offenders per year.