ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
January 23, 2002
1:07 p.m.

MEMBERS PRESENT

Representative Norman Rokeberg, Chair
Representative Scott Ogan, Vice Chair
Representative Jeannette James
Representative John Coghill
Representative Kevin Meyer
Representative Ethan Berkowitz
Representative Albert Kookesh

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 243
"An Act relating to sexual assault or abuse of a minor."

- HEARD AND HELD; ASSIGNED TO SUBCOMMITTEE

PREVIOUS ACTION

BILL: HB 243
SHORT TITLE:VERIFY AGE REQD FOR DEFENSE IN SEX CRIMES
SPONSOR(S): REPRESENTATIVE(S)DYSON

Jrn-Date	Jrn-Page		Action
04/10/01	0930	(H)	READ THE FIRST TIME - REFERRALS
04/10/01	0930	(H)	JUD
04/10/01	0930	(H)	REFERRED TO JUDICIARY
04/25/01		(H)	JUD AT 1:00 PM CAPITOL 120
04/25/01		(H)	Heard & Held
04/25/01		(H)	MINUTE(JUD)
01/23/02		(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

REPRESENTATIVE FRED DYSON
Alaska State Legislature
Capitol Building, Room 104

Juneau, Alaska 99801
POSITION STATEMENT: Sponsor of HB 243.

JULIA P. GRIMES, Lieutenant
Division of Alaska State Troopers
Department of Public Safety (DPS)
5700 East Tudor Road
Anchorage, Alaska 99507
POSITION STATEMENT: During discussion of HB 243 simply stated that she was available to answer questions.

ANNE CARPENETI, Assistant Attorney General
Legal Services Section-Juneau
Criminal Division
Department of Law (DOL)
PO Box 110300
Juneau, Alaska 99811-0300
POSITION STATEMENT: Presented the department's position on HB 243 and responded to questions.

ACTION NARRATIVE

TAPE 02-3, SIDE A
Number 0001

CHAIR NORMAN ROKEBERG called the House Judiciary Standing Committee meeting to order at 1:07 p.m. Representatives Rokeberg, Ogan, Coghill, Meyer, Berkowitz, and Kookesh were present at the call to order. Representative James arrived as the meeting was in progress. [For minutes on the Department of Law update regarding State v. Auliye (minor in possession), see the 2:23 p.m. minutes for this date.]

HB 243 - VERIFY AGE REQD FOR DEFENSE IN SEX CRIMES

Number 0052

CHAIR ROKEBERG announced that the first item would be HOUSE BILL NO. 243, "An Act relating to sexual assault or abuse of a minor."

Number 0065

REPRESENTATIVE FRED DYSON, Alaska State Legislature, sponsor, mentioned that Alaska leads the nation in [reported cases] of child sexual abuse. He added that although it might just be "symptomatic of our culture," people having sex with children

has become a very significant problem, both for the victims and for society. He went on to explain that some of the perpetrators of child sexual abuse have used the defense that the victim said that he/she was 16 years old; therefore, the goal of HB 243 is to "tighten that up a bit and make it harder to use that defense, and to state that the perpetrator must have done something more than just take the victim's word ... that [he/she was] above 18 and therefore ... not ... a child under state definition." He pointed out that HB 243 would amend AS 11.41.445(b) to say that the adult having sex with child must do something - or take some reasonable measures - to verify that in fact the victim is not a child.

REPRESENTATIVE DYSON noted that in Steve v. State, the Alaska Court of Appeals has said:

> We do not believe that society's basic notions of justice and fairness are violated when the law imposes criminal liability on a defendant (1) who has sex with an under-age child, (2) who claims that he or she made a mistake concerning the victim's age, but (3) who can not show that the mistake was a reasonable one. The Alaska legislature has declared that people must not have sexual relations with children younger than 16. Human beings generally exhibit visible signs of their age. While it may not be possible to determine a person's exact age from looking at them and talking to them, in most instances it is possible, using these indicators, to identify 13-, 14-, and 15-year-olds as still being in their teens. Accordingly, it is fair to expect people to exercise caution when choosing a youthful sexual partner. And, if the defendant claims that a mistake was made, it is fair to expect the defendant to prove the reasonableness of that mistake - to prove that the mistake was not the result of intoxication, lack of concern, or other unreasonable behavior.

Number 0336

REPRESENTATIVE DYSON also noted that members have in their packets a letter of support from the Alaska Association of Chiefs of Police, and that the Department of Law "supported us eloquently on this last year." He urged members to report HB 243 out of committee in order to send a message that having sex with children is not acceptable in Alaska and that if a person chooses a youthful sex partner, he/she needs to take reasonable

measures to ensure that neither the law nor, more important, a child is being violated.

REPRESENTATIVE OGAN said he is supportive of the concept of HB 243. He asked whether it is fair to say that what is sought via HB 243 is "to add an aggravator to ... a pedophile that would prey on young women under the age of 16." He noted his concern that HB 243 might place an additional burden on someone [who is having sex with someone] in his/her own peer group. As example, he mentioned that because there are 15-year olds going to school with 18-year olds, there might be instances when an older student becomes sexually involved with a younger student.

REPRESENTATIVE DYSON clarified that HB 243 is not an aggravator; instead, it is meant to limit a defense that is currently being used. He went on to describe an incident of "a gang rape that happened out the Diamond area":

> The boys were - as I remember - varied [in] age [from] 15 to 22 or 23, and I think there [were] 30 of them involved [in raping] two young girls. Many of them said, "Well, [we] thought it was consensual," and that "somebody said that the girls said that they were of age." ... One of the girls was so [physically] immature that she wasn't wearing a bra, still had braces, and [yet the perpetrators still used] the defense of "we thought she was of age." Plus, more to [Representative Ogan's] point, they were of her [peer group]; they were kids that shared a schoolroom with her - many of them. Now some of the leaders may have been older, but the gang that lined up and cheered was not. And I want to burn 'em. I want those guys to do hard time for what they did to that little girl, and I want to send the message that just because somebody said, or there's a lineup, or it appears to be consensual, we do not allow having sex with children.

Number 0698

REPRESENTATIVE DYSON said that he appreciates what the state has done to put in the three-year age differential: if the victim is 12 and the perpetrator is 15, "our law says ... you're OK." [For the benefit of the reader, AS 11.41.440 indicates that the above example constitutes sexual abuse of a minor in the fourth degree and would result in a class A misdemeanor.] He also said that although he appreciates Representative Ogan's concern, he

is not convinced that there is any justification for expanding that three-year age differential in statute.

REPRESENTATIVE OGAN, with regard to the gang-rape example, said "I want that [kind of] person who did that kind of act to absolutely pay dearly." He offered that he merely wants to ensure that people in the same peer group that are having true consensual sex do not suddenly wind up on the sex offender list simply because the relationship ends badly, which, he pointed out, could be an unintended consequence of HB 243. He then asked why, on lines 12-13, HB 243 deletes from current statute the phrase ", unless the victim was under 13 years of age at the time of the alleged offense".

CHAIR ROKEBERG noted that the prior minutes on HB 243 indicate that the deletion of the aforementioned language is intended to conform statute to case law developed from the [State v. Fremgen] Alaska Court of Appeals decision.

REPRESENTATIVE BERKOWITZ, on the topic of the gang-rape incident, asked Representative Dyson whether that case was prosecuted and what the outcome was.

Number 0921

REPRESENTATIVE DYSON said that that case was prosecuted; he added that the prosecutors in that case told him that had the law regarding misprision against a child [AS 11.56.765] been enacted 11 days sooner, they would have been able to "hang all the spectators who were cheering, by their thumbs, as well." He noted that the perpetrators have been prosecuted but he is unsure how successfully or how "far down the ranks of the perpetrators they got." He also mentioned that the judge threw out the perpetrators' attempts at a defense that "she said she was 16."

CHAIR ROKEBERG pointed out that at the prior hearing on HB 243, committee members, including himself, had made a number of suggestions regarding certain aspects of the bill. After noting that a committee substitute (CS) has not been offered, Chair Rokeberg asked Representative Dyson whether he has considered making any changes to HB 243.

REPRESENTATIVE DYSON indicated that he is satisfied with HB 243 as currently written but noted that he did make changes to his sponsor statement based on Representative Kookesh's comments from the prior hearing.

Number 1067

JULIA P. GRIMES, Lieutenant, Division of Alaska State Troopers, Department of Public Safety (DPS), testified via teleconference, stating simply that she was available to answer questions.

Number 1077

ANNE CARPENETI, Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), noted that the DOL testified last year in support of HB 243. With regard to lines 12-13, in which HB 243 proposes to delete from current statute the phrase ", unless the victim was under 13 years of age at the time of the alleged offense", she confirmed that this change endeavors to conform statute to case law engendered by the State v. Fremgen Alaska Court of Appeals case. This 1998 decision held that the constitution requires a defendant be allowed to present a defense of reasonable mistake of age even though the victim is under 13; thus the language being deleted is no longer apposite on constitutional grounds. In response to a question, she surmised that HB 243 as currently written is constitutional; "I don't think it's unreasonable at all, under the constitution, to require that a person take reasonable efforts to determine how old a young sexual partner is, and these suggestions - these are really suggestions as to what those measures include."

REPRESENTATIVE BERKOWITZ said he agreed. He went on to say, however, that although the reasonable measures provision doesn't trouble him, he is concerned about language on lines 10-12 that says:

> "reasonable measures" does not include mere statements by the victim or the victim's friends that the victim is that age or older

He elaborated, saying it seems to him that, first of all, if a person is having any kind of sexual contact, he/she is going to have more than a [mere] statement; therefore, he is not sure what the significance of that language is. He asked whether the DOL has examined the aforementioned language in the context of "this crime."

MS. CARPENETI, after acknowledging that she had not done so personally, surmised that the purpose of that language is to make it clear to people that they need to be more cautious than

simply listening to a young, potential victim and his/her friends' claims of appropriate age.

REPRESENTATIVE BERKOWITZ said that he did not think that the aforementioned language really adds anything to current law, and that he is concerned about cluttering the criminal code with unnecessary language. To illustrate, he used the example of a victim who says he/she is of age; according to HB 243, that statement would not be [sufficient for a defense]. And yet, he argued, [there will always] be more than just a statement involved in the commission of this sort of crime; there's going to be a contact. He surmised, therefore, that the defendant will be able to say, "I had this physical contact, I looked at her, I saw her, and I listened to her." Thus, he opined, trying to say that "mere statements" doesn't constitute "reasonable measures" doesn't seem to do anything.

Number 1291

MS. CARPENETI, after acknowledging that perhaps that particular language may simply not express the purpose as well as it could, offered her interpretation that the purpose is to state that ["mere statements"] are not enough to equal "reasonable measures".

REPRESENTATIVE BERKOWITZ countered:

> What I'm saying is, you're never going to have just that; you don't have a commission of a sexual assault just by mere statements. You have commission of the sexual assault with a physical contact, and so you're going to have the physical contact, and the statements. ... So [with regard to] the defense, this doesn't mean anything - which is why I think it strengthens the bill to just leave "undertook reasonable measures to verify that the victim was that age or older".

MS. CARPENETI noted that the discussion is about sexual abuse rather than sexual assault.

REPRESENTATIVE BERKOWITZ offered that his argument still applies; "you're going to need to have contact."

MS. CARPENETI said that she would assume that "mere statements" by the victim are something that the court could take into account, but they're not, on their own, enough. She added that

she believes that there are often cases in which those statements are the only ones that the defendant relies on to conclude that the he/she may go ahead and have consensual sex with the victim.

CHAIR ROKEBERG clarified that HB 243 applies to both the sexual assault and the sexual abuse statutes.

REPRESENTATIVE BERKOWITZ asked Ms. Carpeneti if she could provide him with a hypothetical case in which a defendant would rely solely on statements and not on the physical appearance of the victim.

Number 1380

MS. CARPENETI said that she was sure that there would not be such a case. She elaborated:

> I'm sure that the defendant relies on appearance and tone of voice and, one would hope, that the defendant would rely on other things, too, but it's pretty easy to say, "Oh gee, I talked to her and her friends and they assured me that they were all 16 years old and, shucks, I believed them, and that's what I wanted to do anyway."

REPRESENTATIVE BERKOWITZ said he is unclear on why disqualifying the statements of the victim or the victim's friends adds anything to [paragraph (1)] of HB 243.

MS. CARPENETI acknowledged that perhaps it would be best to maybe say: "alone, statements by the victim and the victim's friends do not [constitute] 'reasonable measures'". She added that she could understand Representative Berkowitz's point that creating a definition and excluding some things might cause some confusion.

CHAIR ROKEBERG said that he tended to agree with Representative Berkowitz, and that he assumed that the first reasonable act a person would take would be to ask the age of the person with whom he/she intended to have sexual relations with. If the defendant failed to do at least that much, he/she could not then attempt to use even "statements" as part of a defense, he opined.

MS. CARPENETI noted that under HB 243 a defendant might still try to use a "statement" as evidence, but it would not be

enough, by itself, to serve as a defense. On a prior point, she clarified HB 243 would apply mostly in sexual abuse cases because in such cases, although the sex may be consensual in the terms that most people are used to using, the law states that it is not truly consensual because a child is not legally recognized as being able consent under these circumstances.

REPRESENTATIVE BERKOWITZ asked whether there is a legal distinction between "statements" and "mere statements".

MS. CARPENETI said not that she is aware of.

Number 1476

REPRESENTATIVE DYSON said:

> We have a longstanding tradition ... in our country of saying that at various ages, we classify people as being able to make decisions on their own behalf, and we have said that under 16, children are not able to weigh all the things that need to be evaluated in making the decision whether ... to have sex.

He acknowledged that the committee is free to change that age limit to three years old if it so chooses. He pointed out, however, that the current discussion is about placing the burden of proof on the perpetrator to ensure that he/she is not taking advantage of a child's immaturity, inexperience, or vulnerability. Representative Dyson reminded members that the goal of HB 243 is to cut out a defense that is being used more frequently, and that his intention is to protect children and ensure that older people do not take advantage of them. On a slightly different topic, he mentioned that for kids on the street - runaways - the currency used is sex, and whether it pays for food, lodging, or drugs, these so-called consensual sex acts are performed as a survival tactic by children in dire straights, and are not truly consensual.

REPRESENTATIVE BERKOWITZ explained that his concerns center on the ability of the criminal justice system to function in a holistic fashion. He mentioned jury rights and the prosecution's ability to have flexibility in presenting a case to a jury as just two possible aspects that might be affected; "when we put words into criminal statutes, we need to look very closely at how those words translate into real action." He referred to the language on lines 9-10: "checking government-issued photo identification", and asked for an explanation of

what, exactly, that term means. He asked what happens if a young person provides a fake identification (ID), what if the ID is not an officially recognized government ID, and what if the ID is from another country. He then posited that there is a whole range of problems that could come into play. "When you start itemizing things in a criminal code, you present opportunities for a defense to say, 'This isn't on the itemized list, and therefore it doesn't really apply,'" he said. Representative Berkowitz added that his preference has always been to give the jury and the prosecution the widest latitude possible and let the system work the way it works best: put the facts out there, make the charge, and argue it. This is why, he opined, that "reasonable measures" sitting by itself offers the best protection to defendants, to victims, and to the integrity of the [criminal justice] system.

CHAIR ROKEBERG said he has some concerns along the same lines. He asked Ms. Carpeneti what would happen if the victim had provided what later turned out to be a fake ID.

MS. CARPENETI acknowledged that if the fake ID was a reasonable copy, it could bolster the defense.

CHAIR ROKEBERG surmised then that having that requirement specifically listed could strengthen a defense, and that that is not what the sponsor intends. He suggested that the intent of the sponsor is to take away a defendant's reliance on the victim's statement regarding his/her age.

Number 1815

REPRESENTATIVE DYSON explained that he did not see the verification-of-age requirement as being much different than what is required for the purchase of alcohol or tobacco. He said, "I would hope ... that if indeed the defense can show that they were given a credible piece of ID - a driver's license, a concealed weapon permit - with photo ID on it, ... and it looked good, ... that that would be a good defense." He posited, however, that even if that fact were presented as part of a defense, a judge would still have the ability, as happened in the gang-rape incident, to "look down over his nose, push his glasses up, and say 'Phooey, this girl doesn't look like she's 16 to anyone'" and reject such a defense. He opined that HB 243 would not limit the court's flexibility, and noted that he has not heard from anyone, either the "prosecution's side" or the "defense community," that the current language could create problems.

REPRESENTATIVE OGAN mentioned that according to his experience, the promises made by various people in the administration that latitude would not be abused have not been kept.

REPRESENTATIVE DYSON asked Ms. Carpeneti whether the language "'reasonable measures' includes" is exclusive, or if it could also include any other measures.

MS. CARPENETI replied that the aforementioned language is not exclusive, and noted that there is a definition in [AS 11.81.900(b)(30)] that says: "'includes' means 'includes but is not limited to'".

Number 1935

REPRESENTATIVE BERKOWITZ, returning the hypothetical example of a victim using a false ID, asked if that would allow the presentation of the defense even if there were no other evidence.

MS. CARPENETI said she believes so.

REPRESENTATIVE BERKOWITZ: "So even if you had a false ID, she looked like she was five [years old], but she gave me a legitimate ID, that's ok?"

MS. CARPENETI replied that that does not mean that the defense would be accepted; it means that the defendant could present the affirmative defense.

REPRESENTATIVE BERKOWITZ argued: "Except for [the fact that] they 'reasonably believed' and they 'undertook reasonable measures' - '"reasonable measures" includes checking government' ID. The government ID was checked, [the] government ID said she was of age, therefore, the defense is permissible."

MS. CARPENETI countered: "Well, you still have to prove that the person reasonably believed the victim." She noted that the "reasonably believed" provision is part of the existing statute and would not be changed by HB 243. The following language regarding "undertook reasonable measures..." would be an additional requirement and create "double prongs," she explained.

REPRESENTATIVE BERKOWITZ, after noting that a "reasonable belief" is necessary for the presentation of a defense, went on

to say that according to his recollection, before an affirmative defense can be made, it has to be presented to the court - to the judge - who then gives permission to "run" the defense. He asked for confirmation of this point.

MS. CARPENETI said there generally has to be some evidence. She posited, however, that since the courts have determined that allowing a person to make this defense is constitutionally required, there would not have to be much evidence to present such a defense. In response to a question, she confirmed that generally, a defendant could not, just on his/her own, present a defense without having the courts permission.

REPRESENTATIVE BERKOWITZ, after noting that the term "reasonable belief" found in paragraph (1) is part of the existing statute, asked what paragraph (2) adds from a legal perspective, rather than from a "sending a message" perspective. "If we want to send messages, we can take out letters and do all that," he added.

Number 2035

MS. CARPENETI offered that paragraph (2) adds a requirement that the defendant undertake some action to justify his/her belief, action that the jury would conclude was a reasonable measure.

REPRESENTATIVE BERKOWITZ asked: "What is necessary to form a reasonable belief? Don't you have to take an act in order to gain the information to form a reasonable belief?"

MS. CARPENETI suggested that a person could take in information in a variety of ways: "maybe ask a question, maybe use your eyes and your other senses to evaluate a person."

REPRESENTATIVE BERKOWITZ asked whether taking that information in would constitute taking measures.

MS. CARPENETI said it would depend on what the jury thinks is reasonable under the circumstances.

REPRESENTATIVE BERKOWITZ surmised then that "it's a jury call." He added that he is very leery about invading the province of the jury.

REPRESENTATIVE DYSON posited that paragraph (2) adds an objective [standard] as opposed to just the "wishful thinking" that a perpetrator might use to justify his/her actions. He

added that the burden is on the perpetrator to prove that he/she was not taking advantage of a child. "That's the message, and that's what I want these guys to go to jail for," he stated. He went on to say that he'd had the opportunity to speak with approximately 50 public health nurses when they gathered in Anchorage two weeks ago and they relayed to him that most of the young girls who come in for services have sexual partners who are five to seven - sometimes more - years older. He added that at least three-fourths of the nurses have "blown the whistle" on these [men] for taking advantage of children. He surmised that the problem of sexual predation of children is a significant one. And while he acknowledged that there could still be the problem of people pretending to be a parent, and parents prostituting their children, and minors creating false IDs (which they do to buy alcohol and tobacco), he posited that HB 243 would add "objective things that folks can do," to ensure that they are not sexually abusing a child. With regard to the term "government-issued photo identification", he noted that he has not seen anyone objecting to that standard being used for the purchase of alcohol and tobacco.

Number 2184

REPRESENTATIVE OGAN, on the issue of parents falsely confirming that a child is old enough to have sex - for example, when parents prostitute their own children or when they give permission to adult friends to sexually abuse their children - asked whether this circumstance could be used as an affirmative defense.

MS. CARPENETI said she believed that that circumstance would be something that the jury would have to evaluate but could be raised as an affirmative defense.

REPRESENTATIVE DYSON noted that such a defense, coincidentally, would be "dropping the parent's fannies in the soup." He recounted that one of his foster daughter's father was "trading her to the landlord for the rent," that this man is still in jail, and that he - Representative Dyson - hoped he stayed there. He pointed out that "Anything you bring up that they can do as a positive measure to verify could be counterfeited or faked, but in doing so, you drop another criminal action on it." He noted that there are laws against supplying false IDs and laws against prostituting children.

REPRESENTATIVE MEYER recounted that while he served on the Anchorage Assembly, the issue of teenage nightclubs arose, and

he recalled that one particular operator off of Tudor road did not care how old his patrons were, which meant someone there could be eight or nine years old or thirty years old. He surmised that if someone in dark, smoky surroundings was shown what later turned out to be a false ID, that could still be considered an endeavor to verify someone else's age, even though the circumstances weren't conducive to an accurate viewing of the ID. He mentioned that he thinks what Representative Dyson is doing via HB 243 is good because it would make it just a little bit harder for older people to prey on children.

Number 2373

REPRESENTATIVE DYSON noted that he anticipates giving more attention to the specifics of HB 243, and he assured the committee that if a better solution comes up, he will make the appropriate changes. On a slightly different topic, he mentioned that the moose hunting regulations are not sympathetic if a hunter has made a mistake with regard to how wide the rack is or whether there is a spike or a fork. He said that most hunters whom he knows are very careful in choosing a target and are inclined to pass up the shot rather than get caught up in prosecution. He also noted that the same is true of the commercial fishing industry; the burden is on the mariner to take all prudent measures to ensure that the law is not being violated. He asked of the committee: "Do you really care more about the moose and the ... salmon than our girls and ... boys that are being exploited?" The burden is on the perpetrator to take all reasonable measures to not break the law or hurt a child, he stated.

REPRESENTATIVE KOOKESH, in response, noted that:

> At the same time we're also chartered with the responsibility of making sure that anything we pass out of here is constitutional, so those limits and those questions that we ask are based on that. So while I appreciate your emotion, you also have to remember we have a responsibility here. The responsibility goes to asking those questions. So I think it is really unfair for anyone to characterize us as not caring.

REPRESENTATIVE DYSON said he misspoke and he apologized for that. He said he was really just asking that "we come anywhere close to the same standard" of protection for children as for moose and salmon.

TAPE 02-3, SIDE B
Number 2480

REPRESENTATIVE BERKOWITZ asked Ms. Carpeneti whether there is another use of the term "measures" in statute.

MS. CARPENETI said she would have to look that up; she was not familiar with the term "measures" in this context.

REPRESENTATIVE BERKOWITZ noted that one of the dangers of incorporating new terms in the criminal code is that they're not subject to interpretation; they haven't had the whole history of case law behind them. He said that in his experience, it is generally preferable to find terms that have a use and have a meaning that express the concept. He added that he is searching for the appropriate wording, and posited that perhaps it is "efforts" as opposed to "measures" but he is not sure that that is the right term.

MS. CARPENETI said that she would be willing to do some research on that issue. She surmised, however, that the term "reasonable measures" was used because it is also defined in paragraph (2).

CHAIR ROKEBERG asked Representative Dyson if it would be fair to say that HB 243 is intended to allow for the defense of reasonable belief but to disallow a mere statement of age as the sole basis for that belief; "You wish to have other measures, or other verifications made, beyond the mere statement of age."

REPRESENTATIVE DYSON confirmed that that is a fair assumption of what he is trying to do.

Number 2388

CHAIR ROKEBERG closed the public testimony on HB 243. He then mentioned that he wanted to [discuss] an amendment to line 9: after "older;" delete "'reasonable measures' includes checking government-issued photo identification or checking with the victim's parents;". [This suggested amendment was discussed but not offered.] He surmised that deleting this language would let the jury and the court determine whether the "measures" taken by the defendant are sufficient according to the circumstances of the case. He added that such an amendment would still keep the burden on the defendant to go beyond the reliance of a "mere statement".

REPRESENTATIVE JAMES opined that such an amendment would not "get us any further than we are today." She posited that a lot of cases arise from an "on the spot judgment" that a young person is legally old enough to have sex with, and that keeping the description of what "reasonable measures" entails will help avoid those types of situations.

REPRESENTATIVE OGAN said he finds it hard to believe that in a spontaneous situation, a person is going to take the time to check an ID or call up someone's parents to verify the age of the person he/she is about to have sex with. He observed that Representative Berkowitz has a point regarding the unintended consequence of "loading up statute" with language that "smart lawyers" are going to find a way around.

REPRESENTATIVE DYSON commented that he appreciates what [the committee] is doing, and that he thinks Representative James' observation contains a lot of wisdom: "we really want people to be careful about these decisions." He also noted that Representative Ogan raises the same point that Representative Kookesh raised at the last hearing on HB 243: people aren't going to take the extra steps entailed in paragraph (2). At least until the first three or four people go to jail because they did not take these extra steps, then people will start being more careful, he posited. The law has a tremendous ability to reinforce the positive and to penalize the negative, he noted.

Number 2197

REPRESENTATIVE DYSON, on the issue of Chair Rokeberg's suggested amendment, countered that if the committee is going to follow that line of reasoning, perhaps they should also consider amending language pertaining to the purchase of alcohol and tobacco in the same fashion and, thus, enable store clerks to base their decisions on whether to sell to someone solely on a "reasonable belief" without the additional requirement of checking someone's "government-issued photo identification". He said he thinks that having sex, particularly with someone just met, "is a bigger deal" than buying cigarettes.

CHAIR ROKEBERG noted that he had not yet offered the amendment being discussed; he was just getting an idea of what the committee wished to do. He surmised that the testimony indicates that if a victim shows a false ID, then that could be considered prima facie [evidence] that the defendant took sufficient "reasonable measures".

REPRESENTATIVE DYSON countered that in situations in which the victim looks younger than stated on the ID or claimed by perpetrator, the judge isn't going to let that defense stand. He expressed opposition to Chair Rokeberg's suggested amendment.

REPRESENTATIVE MEYER said he agreed with Representative Dyson with regard to Chair Rokeberg's suggested amendment; HB 243 should have that "extra hurdle in there."

REPRESENTATIVE COGHILL said that the language to be deleted by Chair Rokeberg's suggested amendment should remain in HB 243. That language is not just a laundry list, he opined, but rather is an indicator that the legislature wants a higher [standard]. He also noted, however, that having HB 243 state that "'reasonable measures' does not include mere statements" could be problematic, although it, too, is just an indicator.

Number 1909

REPRESENTATIVE BERKOWITZ said:

> All the good intention that this bill undertakes are going to be doomed if we don't cure the legal problems that exist with it. ... Just looking at what the intent is and then looking at just the language here - this is confusing, this is ambiguous, and it doesn't get where we need to go. We're using terms like "measures", which ... Black's Law Dictionary ... uses ... as a term for surveying work. We're talking about checking government ID. What does checking mean? Does it mean waving it around? ... We're taking about "mere statements"; we're taking about "victim's friends". Are we going to be defining "friends" in the criminal code now?
>
> Let's think about what we're trying to do. Let's work hard, get the right language to do it, and do it right. It's going to take a little bit of effort. The intent is good, the objective is good; let's get there. Let's not just say "We've got to move this thing through the process." This is a judiciary committee; let's do our job. ... It's not that hard. It's just a question of doing a little bit of work and maybe taking a little bit of time.

REPRESENTATIVE JAMES said she agreed with the concept of taking a few more days to come up with the correct language to discourage people from preying on children, as long it is done in a reasonable amount of time.

REPRESENTATIVE MEYER remarked that because Legislative Legal and Research Services drafted HB 243, he trusts that the current language is sufficient. He also noted that because the sponsor is comfortable with HB 243 as written, it's good enough for him.

REPRESENTATIVE BERKOWITZ remarked that while Representative Meyer and the sponsor may be satisfied with the current language in HB 243, he prefers to exercise his own independent judgment and do his own thinking on issues, and he is not comfortable with the bill the way it is. He continued:

> I don't think it accomplishes the goal - which I share with Representative Dyson - and I don't want to kick a half measure down the committee hall; I think we ought to do what we think is right. And we can trust other people, but what did Ronald Reagan say? "Trust but verify." And that's our job here; let's verify that this is doing the right thing. It's not going to hurt to put this thing through the paces a little bit [to get] a better product.

Number 1760

CHAIR ROKEBERG noted that Representative Ogan has brought forth another suggested amendment for discussion, 22-LS0770\A.1, Luckhaupt, 1/22/02, which reads as follows [handwritten changes included]:

> Page 1, lines 4 - 13:
> Delete all material and insert:
> "(b) In a prosecution under AS 11.41.410 - 11.41.440, whenever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of the alleged offense,
> **(1)** the defendant reasonably believed the victim to be that age or older, unless the victim was under 13 years of age at the time of the alleged offense**; and**
> **(2) if the defendant was, at the time of the alleged offense, 19 years of age or older, the defendant undertook reasonable care to verify that the**

victim was that age or older; "reasonable care" including but not limited to checking government-issued photo identification or checking with the victim's parents; "reasonable care" does not include statements by the victim or the victim's friends that the victim is that age or older."

REPRESENTATIVE OGAN explained that his suggested amendment would make paragraph (2) applicable only if the defendant was 19 or older at the time of the alleged offense; would change "reasonable measures" to "reasonable care", which is defined in Black's Law Dictionary; would add the phrase "including but not limited to" as it pertains to what "reasonable care" entails; removes the term "mere" as it applies to "statements"; [and reinserts language regarding victims under the age of 13, which the Fremgen decision has ruled unconstitutional]. He posited that his suggested amendment, which he is merely discussing and not offering at this time, would lay to rest Representative Berkowitz's concerns regarding giving the jury some latitude, while providing some guidelines as to what "reasonable care" means.

Number 1686

CHAIR ROKEBERG, after noting that he agrees with several of the points that have been raised, assigned HB 243 to a subcommittee for the purpose of working out a solution. He appointed Representative Ogan as chair, and also appointed Representatives Berkowitz and Meyer. He requested that the subcommittee bring HB 243 back before the full committee by mid-February.

ADJOURNMENT

Number 1619

CHAIR ROKEBERG called an at-ease at 2:12 p.m. in order to prepare for the Department of Law update. [For minutes on the Department of Law update regarding State v. Auliye (minor in possession), see the 2:23 p.m. minutes for this date.]