

ALASKA STATE LEGISLATURE
SENATE STATE AFFAIRS STANDING COMMITTEE

March 23, 2004

3:40 p.m.

TAPE (S) 04-20-21

MEMBERS PRESENT

Senator Gary Stevens, Chair
Senator John Cowdery, Vice Chair
Senator Bert Stedman
Senator Lyman Hoffman
Senator Gretchen Guess via teleconference

MEMBERS ABSENT

COMMITTEE CALENDAR

SENATE BILL NO. 224

"An Act relating to lowering the legal level of intoxication for operating a motor vehicle, aircraft, or watercraft to .02 percent or the equivalent for persons under 21 years of age; relating to implied consent for purposes of determining consumption of alcohol; and providing for an effective date."

HEARD AND HELD

SENATE BILL NO. 354

"An Act relating to complaints filed with, and investigations, hearings, and orders of, the State Commission for Human Rights; making conforming amendments; and providing for an effective date."

HEARD AND HELD

SENATE BILL NO. 246

"An Act relating to the commission of an offense or a juvenile delinquency act involving the victim's race, sex, color, creed, physical or mental disability, sexual orientation, ancestry, or national origin; relating to sentencing, informal adjustment, and adjudication for those offenses and acts; relating to a diversity tolerance program for certain juvenile delinquency acts; relating to a civil cause of action for certain acts involving discriminatory harassment; and providing for an effective date."

MOVED SB 246 OUT OF COMMITTEE

SENATE BILL NO. 356

"An Act relating to qualifications of voters, voter registration, voter residence, precinct boundary modification, recognized political parties, voters unaffiliated with political parties, early voting, absentee voting, ballot counting, voting by mail, initiative, referendum, recall, and definitions; and providing for an effective date."

BILL POSTPONED

PREVIOUS COMMITTEE ACTION

BILL: SB 224

SHORT TITLE: MINORS DRIVING AFTER CONSUMING ALCOHOL

SPONSOR(s): SENATOR(s) COWDERY

05/14/03	(S)	READ THE FIRST TIME - REFERRALS
05/14/03	(S)	TRA, STA
05/17/03	(S)	TRA AT 11:00 AM BUTROVICH 205
05/17/03	(S)	Heard & Held
05/17/03	(S)	MINUTE(TRA)
02/24/04	(H)	TRA AT 1:30 PM CAPITOL 17
02/24/04	(S)	Moved Out of Committee
02/24/04	(S)	MINUTE(TRA)
02/25/04	(S)	TRA RPT 2DP 2NR
02/25/04	(S)	DP: COWDERY, WAGONER; NR: THERRIAULT,
02/25/04	(S)	LINCOLN
02/25/04	(S)	FIN REFERRAL ADDED AFTER STA
03/23/04	(S)	STA AT 3:30 PM BELTZ 211

BILL: SB 354

SHORT TITLE: HUMAN RIGHTS COMMISSION PROCEDURES

SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

02/27/04	(S)	READ THE FIRST TIME - REFERRALS
02/27/04	(S)	STA, JUD
03/23/04	(S)	STA AT 3:30 PM BELTZ 211

BILL: SB 246

SHORT TITLE: HATE CRIMES/DISCRIMINATION/TOLERANCE PROG

SPONSOR(s): SENATOR(s) LINCOLN

01/12/04	(S)	PREFILE RELEASED 1/2/04
01/12/04	(S)	READ THE FIRST TIME - REFERRALS
01/12/04	(S)	STA, JUD
03/23/04	(S)	STA AT 3:30 PM BELTZ 211

WITNESS REGISTER

Crystal Lowndes
Staff to Senator John Cowdery, sponsor
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT: Introduced SB 224 for the sponsor

Jeffrey Johnston
No address provided

POSITION STATEMENT: Testified on SB 224

Cindy Cashen
Executive Director, MADD Juneau
211 4th Street, Suite 314
Juneau, AK 99801

POSITION STATEMENT: Testified in support of SB 224

Lieutenant Al Storer
Alaska State Troopers
Department of Public Safety
PO Box 111200
Juneau, AK 99811-1200

POSITION STATEMENT: Testified on SB 224

Patty Ware
Division Director of Juvenile Justice
Department of Health &
Social Services
PO Box 110601
Juneau, AK 99801-0601

POSITION STATEMENT: Testified on SB 224

Barbara Brink
Alaska Public Defender Agency
Department of Administration
PO Box 110200
Juneau, AK 99811-0200

POSITION STATEMENT: Had reservations about parts of SB 224

Jan DeYoung
Assistant Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300

POSITION STATEMENT: Clarified aspects of SB 354

Paula Haley
Executive Director, Human Rights Commission

Office of the Governor
800 A St Ste 204
Anchorage, AK 99501-3669
POSITION STATEMENT: Testified on SB 354

Mike Lieberman
No address provided
POSITION STATEMENT: Testified on SB 246

Nick Kotavich
Tlingit Haida Leadership Council
Juneau, AK 99801
POSITION STATEMENT: Testified in support of SB 246

Natalie Landreth
Staff Attorney
Native American Rights Fund
POSITION STATEMENT: Supports SB 246

Don Bremmer
Tlingit Elder
Juneau, AK 99801
POSITION STATEMENT: Supports SB 246

Denise Morris
Alaska Native Justice Center
121 W. Fireweed Lane, Ste 240
Anchorage, AK 99503
POSITION STATEMENT: Supports SB 246

Celeste Hodge
Municipality of Anchorage
4501 South Bragaw
Anchorage, Alaska 99508
POSITION STATEMENT: Supports SB 246

A. W. Fullenwider
No address provided
POSITION STATEMENT: Supports SB 246

ACTION NARRATIVE

TAPE 04-20, SIDE A

CHAIR GARY STEVENS called the Senate State Affairs Standing Committee meeting to order at 3:30 p.m. Present were Senators Cowdery, Stedman, and Chair Gary Stevens. Senator Guess

participated via teleconference and Senator Hoffman arrived shortly.

SB 224-MINORS DRIVING AFTER CONSUMING ALCOHOL

CHAIR GARY STEVENS announced SB 224 to be up for consideration.

SENATOR JOHN COWDERY motioned to adopt committee substitute (CS) \S version for SB 224. There being no objection, it was so ordered.

CRYSTAL LOWNDES, staff to Senator John Cowdery, bill sponsor, explained that the CS for SB 224 is based on the Texas model for zero tolerance of underage drinking and driving. The sponsor is worried about this becoming a larger problem and believes that if the consequences aren't stiff enough, underage DUIs will continue to escalate.

CHAIR GARY STEVENS asked Ms. Lowndes to explain how the CS changes the most recent version of the bill.

MS. LOWNDES explained that it is currently an infraction for a minor to operate a vehicle after consuming alcohol and the CS makes the offense a class B misdemeanor, which is a criminal offense.

SENATOR COWDERY asked her to explain how teens sometimes view the issue.

MS. LOWNDES told members that it's not uncommon for teens that have been stopped for underage drinking and driving to shift the blame to someone else.

SENATOR GRETCHEN GUESS asked how this change would stand up in court and what the process would be for determining that a minor is operating a vehicle after consuming alcohol.

MS. LOWNDES said that a .02 blood alcohol concentration (BAC) level is on the books now and the legislation doesn't change that.

SENATOR GUESS asked if .02 is currently in statute.

MS. LOWNDES said yes.

SENATOR GUESS asked for the definition of vehicle.

MS. LOWNDES didn't think there was a definition in the statute.

SENATOR GUESS suggested clarifying the issue because there would be a problem if this were to become law.

SENATOR COWDERY noted that Ms. Lowndes had spoken with the Commissioner of Public Safety.

MS. LOWNDES added that Commissioner Tandeske gave her the impression that this wouldn't change how things are done. She stated:

It won't change the process of what they go through when they're pulled over on the side of the road and they're cited -they're released to their parent's custody.... The Commissioner has also led me to believe that there are laws currently in place, specifically AS 04.16.050, it's the minor consuming, possession, and consumption law. Section D of that law states that a third offense is a class B misdemeanor, which is the same as we're trying to pass here. So along with that goes all the same penalties that are in place in this CS. And those are already on the books.

CHAIR GARY STEVENS summarized that the first arrest wouldn't result in jail time, but a future arrest could bring a prison term.

MS. LOWNDES added: "We wanted to keep the penalty for first time offenders as close to what they are now because if they're a first time offender you don't need to worry about them repeat offending. Only 20 percent of the people that are cited with MOVACs (minor operating a vehicle after consuming) are repeat offenders. That's an estimate that I was given from MADD."

CHAIR GARY STEVENS asked if that means that 80 percent of those stopped the first time aren't arrested again.

MS. LOWNDES said that's correct.

SENATOR COWDERY asked what information she got from the Department of Motor Vehicles (DMV).

MS. LOWNDES told him that about 350 minors had their licenses revoked for some reason in the past year.

SENATOR COWDERY asked about repeat offenses.

MS. LOWNDES didn't believe the state tracked the number of licenses that were revoked two or more times.

SENATOR STEDMAN noted that the BAC level for adults is .08 then asked for confirmation that this proposal was asking for a .02 BAC level.

MS. LOWNDES said the current intoxication level for a minor is .08. In the original form, the bill lowered the level to .02 for anyone less than 21 years of age. They have since changed the bill to deal with a completely different statute so the BAC level would remain at .08.

SENATOR COWDERY clarified, "This is not that you're driving under the influence. I'm trying to stop our youths from drinking and driving any amount."

SENATOR STEDMAN said he understood that, but he got a little confused in the testimony. He asked if the bill would reduce the current .08 BAC level to .02 for minors.

MS. LOWNDES nodded.

SENATOR STEDMAN reviewed the fiscal note and said it looks as though 400 to 600 additional cases are anticipated with the more stringent requirements.

MS. LOWNDES said those fiscal notes are based on the original bill, but she would get new fiscal notes now that the CS was adopted.

SENATOR STEDMAN opined they would be similar. because the same .02 percentage is used.

MS. LOWNDES said, "We're not convicting them of a DUI at .02. We're simply taking a law that's already in place and making it a misdemeanor rather than an infraction."

SENATOR STEDMAN asked if there would be two levels.

MS. LOWNDES said that's correct.

SENATOR STEDMAN referred to page 3, line 13 of the CS and said he didn't have any concerns about the concept, but he didn't want to impose undue penalties on youths which would adversely affect them later on. He suggested that license revocation and

other behavior modification was preferable to making them criminals.

MS. LOWNDES pointed out that, under current law, the license is revoked, the youth may be given community service, and a fine may be assessed. She added, "It doesn't seem to be keeping anyone from thinking twice about it so this merely makes it so that repeat offenders, somebody that's coming in on their third may not get a jail sentence, but somebody who's coming in on their fourth, fifth, sixth - it's up to the judge...but we want to have something there."

SENATOR STEDMAN asked how they decided on a .02 level.

MS. LOWNDES said this is an effort to make youths realize that driving with any amount of alcohol in their system is against the law.

SENATOR STEDMAN agreed with the direction, but he wanted to make sure that youthful indiscretions weren't unnecessarily penalized.

SENATOR GUESS noted that the definition of minor isn't in the bill and asked if the intent is to include the ages of 14 to 21.

MS. LOWNDES said that's correct.

SENATOR GUESS thought it was interesting that minors weren't defined as those less than 21 years of age. She then asked if the definition of "consumed any quantity of alcohol" might be in regulation because she couldn't find it in statute. "I'm confused also between a .08 and .02." she said, because it's not in statute.

CHAIR GARY STEVENS said a trooper was on the off net and could respond if Ms. Lowndes didn't recall.

MS. LOWNDES said she would like that.

SENATOR STEDMAN continued to express reservations about the long-term impact the bill might have on young people.

SENATOR COWDERY said they were simply trying to curtail drinking at a young age and added that a lot is left to the judge's discretion.

CHAIR GARY STEVENS commented that Senator Guess's question about age is important and asked for verification that a 13 year old may not operate motor vehicles under any condition.

MS. LOWNDES said she wasn't sure.

CHAIR GARY STEVENS said they could ask the troopers.

SENATOR STEDMAN stated: "For those folks that weren't in the Senate Finance Committee last Monday, the Governor came in and had some opening remarks and one of the remarks he made was the amount of money that the State of Alaska pays concerning alcohol abuse relative to schools. It's a large amount so it's duly noted that it's a problem within the state - substance abuse and alcohol in particular."

JEFFERY JOHNSON testified via teleconference to express support for raising the offense to a class B misdemeanor. He reported that he had nine DWIs and didn't do any jail time until the fifth time. He said that if he'd been sent to jail sooner, he might have faced the music and sought help for his alcoholism sooner.

SENATOR COWDERY asked how much time he spent in jail and when he took responsibility for his actions.

JEFFERY JOHNSON said he spent eight years, nine months and some days in jail and began to take responsibility when he was charged with a felony after his ninth DWI.

CINDY CASHEN, Executive Director of MADD Juneau, stated that she was representing the four MADD Alaska chapters in support of the CS for SB 224. "Driving is a privilege not a right. A person, regardless of age, who continues to drink and drive should have serious consequences, which would serve as a deterrent for future drunk driving." It's repeat offenders who are responsible for one-third of all DUI arrests and this bill deals with habitual offenders, she said.

She reported that Fairbanks averages 40 drunken driving arrests per month for those who are under 21 years of age. Between July 2001 and July 2002 there were 1,028 DUI arrests meaning that about 480 of those were teenagers. Reading from DOT statistics she said that of the 4,918 DUIs in Alaska in 2001, 3,107 were first time offenders. There were over 1,000 second time offenders and more than 450 third time offenders. "We have a significant number of repeat drunk drivers and we have a

significant number of them that are teenagers." This is part of a solution and judges would appreciate that the bill simplifies matters.

SENATOR GUESS asked for clarification regarding no prison time between .02 and .08.

MS. CASHEN said she's foggy on that point and Annie Carpeneti would be the one to ask.

CHAIR GARY STEVENS asked Lieutenant Storer if it's true that a 13 year old can't legally operate a motor vehicle under any circumstance.

LIEUTENANT AL STORER, Alaska State Trooper, stated that they could drive on private property, but not on any other property.

CHAIR GARY STEVENS commented that, in that case, the bill concerns youths 14 to 21 years of age.

LIEUTENANT STORER said that's correct, but that's not to say that an officer wouldn't have contact with someone who is not yet 14 and driving.

SENATOR GUESS asked if .02 is in regulation or statute because she couldn't find it.

LIEUTENANT STORER said he honestly didn't know where the .02 came from.

PATTY WARE, Division Director for Juvenile Justice, Department of Health and Social Services, stated that she was working from \version Q so she was adjusting her testimony based on what she was hearing.

She noted that much of the testimony was mixing apples and oranges. "We have a set of DUI statutes that address drinking and driving when the BAC is .08 or higher - for both juveniles and adults," she said.

SB 224 isn't about DUI statutes, she emphasized. The reference to .02 BAC is confusing, because it's not in existing statute or the \S version committee substitute.

TAPE 04- 20, SIDE B
4:25 pm

CHAIR GARY STEVENS acknowledged the point.

MS. WARE said that current statutes regarding MOVACs don't require any level of impairment. The department is supportive of any proposal promoting a graduated sanction approach to this serious concern, but they have significant concern about raising the classification to a class B misdemeanor and the imposition of jail time for a minor operating a vehicle after consuming alcohol.

She pointed out that there are already provisions in statute to send a DUI offender to jail. Furthermore, she said:

We in our own juvenile facilities have juveniles report to secure juvenile facilities on a DUI charge. That can and does already happen. The concern that we have with respect to jail time with respect to this particular statute is that MOVACs are in fact, a status offense meaning that it's an offense based on virtue of your age. We don't have similar statutes for adults.

There are federal requirements in terms of the federal Juvenile Justice and Delinquency Prevention Act that put us in a bind in terms of any kind of incarceration for status offenses. The administration has imposed two specific bills, HB 487 and SB 340, which are moving through the bodies as we speak, in terms of helping us as a department, essentially beef up our compliance with the JJDP Act and so this would, in essence, make that more difficult.

With respect to other possible options, the other thing I would say is that I'm not real clear that the existing statute is broken. We all agree that we should stiffen the penalties and increase them if in fact offenders are coming back and repeating that same offense. But I'm a little bit confused by this. I don't know if we've got anybody on from DMV, but we got data from the Division of Motor Vehicles and in fiscal year 2003 there were 387 juveniles picked up under the MOVAC statutes. In terms of the re-offense rate it's fairly low - seven percent. Ninety three percent of those kids were first time offenders and did not come back.

Would we like it to be higher than ninety three percent? Yes. Does that mean that we should make the repeat offense a [class] B misdemeanor? Changing the sentencing structure in Alaska statutes is complicated. It has, a lot of times, unintended ramifications and consequences. I would propose to this committee that we think very seriously before we do that.

Again, other options are to keep it a violation, to start with mandatory minimums both for the first time and subsequent offenses.

SENATOR COWDERY asked if she had any information on how often offenders re-offend.

MS. WARE said very few went beyond a second offense, but DMV could articulate that better than she.

SENATOR COWDERY said his question was whether they were second, third, fourth, or fifth time offenders and then reflected on Mr. Johnson's testimony.

MS. WARE warned that, "We need to be very mindful, again, at the difference between adults and juveniles - of the requirements that we have to address juveniles in a different manner than we work with adults. That doesn't mean that that sometimes doesn't include periods of incarceration. As I said, under existing DUI statutes, we are allowed to put juveniles in jails when they commit those offenses. But this particular approach is, in fact, a status offense and that, as I said, poses some additional problems. I would also submit to the committee that in terms of repeat offenders, we need to be focused, not just on holding them accountable, which is a critical piece, but we also need to be focused on what we need to do to make sure they get whatever assistance and/or screening and/or treatment so that they don't come back to us. It's a complex issue and I think that sometimes we might be tempted to try to solve that through means that are too simple."

SENATOR GUESS asked her to explain how the bill might impact compliance with the JYPD Act and therefore federal funds.

MS. WARE said they aren't allowed to put status offenders in either juvenile or adult jails. Status offenses are based on age and are anything that doesn't apply to adults.

SENATOR GUESS repeated there's no ability to impose jail time for offenses that are based on age.

MS. WARE noted that there are some obscure exceptions.

SENATOR GUESS said she just wanted to clarify that point.

SENATOR COWDERY announced that he had to leave and thanked the Chair for hearing his bill.

CHAIR GARY STEVENS stated that there were several more people to speak to the bill.

BARBARA BRINK, Director of the Alaska Public Defender Agency, testified via teleconference to say she wanted to explain how the bill might affect her agency. She noted that she was working from the \I version rather than the \S version. She continued:

As I understand it, the bill is attempting to create a new offense for minors. That is, minors having consumed any alcohol operating a motor vehicle. This currently is in our statute books as an offense, but it is listed at what is called the infraction level.

A person who is convicted or found guilty of that offense cannot currently be sentenced to jail time. As I understand the current CS, that is to change and this crime is to become a class B misdemeanor offense. And that frankly Mr. Chairman has a huge impact on my agency.

If a person is charged with an infraction, they are not entitled to the free assistance of counsel if they are indigent. However, if a person is charged with a class B misdemeanor, they are entitled to the full assistance of counsel and, frankly, to the right to have a jury trial. So I think these are some of the unintended consequences that are going to flow from this bill.

I prepared a fiscal note for the original bill based on the figures that the DMV gave all of us. And based on the figures they gave us, we were approximating that we would need the services of one additional attorney in the Anchorage area since most of our minor consuming and DWI cases involving minors have been in Anchorage and Palmer.

I was asked whether my fiscal analysis would change now that this crime went down to a class B misdemeanor from the original bill, which had it as a class A misdemeanor, and my answer, frankly, is no. There isn't a definable quantity of less work involved in representing somebody whether it's a class A misdemeanor or a class B misdemeanor. The full panoply of work experiences that we need to do in order to provide the effective assistance of counsel would still be required if it was a class B misdemeanor. And frankly, it would still be required even if a person was not authorized to receive jail time until it was their second, third, or fourth offense.

As you might recall, the Legislature recently tried to create a similar type of scheme involving minor consuming cases. In the minor consuming cases the child would initially get treatment and community work service. It wasn't until their third offense that it would be called a class B misdemeanor and they were actually eligible for jail time. But this was litigated before the Alaska Court of Appeals and the court agreed that that makes it a class B misdemeanor. If you can go to jail based on a conviction for an earlier offense, even for those earlier offenses - even if you can't get jail on those offenses you are entitled to have representation and to have a jury trial.

Frankly, the impact to the Public Defender Agency on that change in the minor consuming statute was enormous. Back in FY01, our agency represented a total of 58 children charged with minor consuming. Last year we represented 892 children on minor consuming charges. So this has the potential of being a very large change in the way we process these cases, and a very large change in the way we defend these cases, and a very large change in the punishment we impose. I guess what we have to decide, as a matter of policy, is if the change in punishment is worth all those other costs that it is going to take.

I must agree we should remember that we are not talking about a drunk driving bill. What we are talking about is a very low presumption that alcohol has been consumed. And as Patty Ware testified,

certainly the minors we represent now who have above a .08 in their blood, they go to jail. They go to a secure youth facility. They serve the same kind of jail time that adults do.

Though we certainly already are tough on those kids who are driving under the influence, the question is how tough do we want to be on kids who have just consumed any minor amount of alcohol, no matter how small. I would have to say that my sense is that unless we are prepared to pay for the huge increases in prosecution defense and incarceration of these children, that perhaps we should keep it at the level that it currently is.

KERRY HENNINGS with the Department of Motor Vehicles stated that she was available for questions.

CHAIR GARY STEVENS said he was sorry that Senator Cowdery had to leave, but several questions were raised and it appeared that the bill needed further work. He asked Ms. Lowndes to work with the Department of Juvenile Justice and Senator Guess to satisfy some of the issues that were raised.

MS. LOWNDES said she would be happy to do so.

CHAIR GARY STEVENS announced that it wasn't his intention to slow the bill, rather to develop a reasonable bill that they could all support. SB 224 was held in committee.

SB 354-HUMAN RIGHTS COMMISSION PROCEDURES

CHAIR GARY STEVENS announced SB 354 to be up for consideration and called on Ms. DeYoung.

4:40 pm

JAN DEYOUNG, Assistant Attorney General, Department of Law, said she would provide a walk through on SB 354, which affects the procedures of the Alaska State Commission for Human Rights. It would affect the way cases are brought to hearing, how procedures are applied at the commission hearings, and it would expand the discretionary authority of the executive director in determining which cases to bring to hearing as well as clarify the commission's remedial authority if a human rights law violation is found. She continued:

A key part of this bill is the expanded discretion of the executive director to choose among the complaints to take to hearings. Several years ago the Alaska Supreme Court issued a decision in a case called Department of Fish and Game versus Andre Meyer. And the impact of that case was to require commission staff to pursue to a hearing every complaint that the commission, in investigation, found was supported by substantial evidence. The effect of this ruling was to prohibit the commission from exercising discretion in allocating its resources to the most strong or deserving cases.

The bill would give the executive director the power to choose the cases to take to hearing and to dismiss inappropriate other cases in a procedure we call an administrative dismissal.

Section 1 would provide the complainant the authority or the ability to withdraw complaints at any time before the conclusion of the investigation and settlement or conciliation procedures at the commission. This authority is limited after an accusation would be issued and the accusation would be the initiation of the formal procedures going forward to hearing.

Section 2 would add a statute of limitations to the commission's laws. They currently have in regulation a 180 day time period after the commission of an unlawful practice for the subject of the practice to bring a complaint to the commission. The bill would move that into the statute.

Section 3 addresses the investigation and conciliation parts of the commission law and it makes some housekeeping amendments to law to require certain kinds of paperwork if the case is resolved at the conciliation stage. It also makes it clear that the commission staff have the power in that conciliation or settlement phase of the case to compromise a claim for damages. It's not necessary that it conciliate at full damages or full relief for the complainant.

Section 4 of the bill is the section that sets out in detail the expanded powers of the executive director

to choose the complaints that the staff will take to hearing before the commission.

By expanding the discretion, the director will be able to take such factors into account as the strength of the evidence, the strength of an employers affirmative defenses, the significance of the alleged violation, the history of the complaints against the employer, the level of cooperation of the complainant, and to account which cases to go forward on.

The executive director would be able to administratively dismiss the cases that don't meet this test.

To ensure that the administrative dismissal doesn't affect the complainant's rights to pursue other remedies that are often available in these cases, it's a dismissal without prejudice. Basically, the ability to obtain the free assistance of an attorney at the commission's office to go forward is somewhat limited, but if that process is not available, it's not going to limit the complainant's ability to go and get outside counsel to pursue the same complaint in court or in other administrative agencies, which have remedies available.

Section 5 provides that this discretion rests exclusively with the executive director. It's not an issue that can be appealed to the commissioners.

Section 5 also makes a number of changes to procedures if the case is referred for hearing. Most importantly, it applies the Administrative Procedures Act procedures to the commission, which provides for a whole host of procedures that are used in many other administrative hearing agencies in the state. It requires the executive director to issue an accusation after decision is made to go to hearing and it restricts changes to that accusation upon a showing of good cause.

Any change that adds a new charge of unlawful discrimination must be supported by an investigator's finding of substantial evidence. Such an amendment would have to go back to the conciliation phase to allow the opportunity for the employer to consider an

address to charge before it goes to a formal hearing. This conciliation opportunity is very beneficial for the large institutional employers because they may not have - the individuals making decisions about the case may not have first hand information of what actually happened in the work place and it's a good opportunity to review with the commission staff or whatever the evidence and charges are and provides an opportunity for settlement.

It also establishes the burden of proof and the burden of proof is the standard preponderance of evidence. It would apply both to the prima facie case and to defenses.

Another change that it would be making would be to allow a process similar to the motion for summary judgment that is used in the courts so that a petition for summary decision could be made to the commission for those cases where there are no disputes of facts and it's not necessary to go forward to a formal hearing. The goal of this change would be to increase efficiency.

Section 6 of the bill addresses the remedial powers of the commission. It provides the commission with authority to issue a remedy after the summary procedure that I just described. Currently this remedial authority follows a hearing so this would be expanding that.

It clarifies the authority of the commission that punitive damages and non-economic damages are not among the remedies that may be awarded.

It also provides some specific changes to the awards that can be ordered in employment cases and lays out, specifically, the remedies that are available. In addition to the common remedies that are already named in the statute such as hiring, reinstatement, or grading an employee with or without back pay. The bill adds the remedy of payment of front pay, but it limits the payment to a period of two years. It also limits front pay awards to special circumstances. In other words, if returning the employee to work would be inappropriate for a number of reasons, either the discrimination has harmed the employee so the employee

cannot work or the relationship has deteriorated so return to the work is just not feasible.

The remedial provisions also would add a section requiring mitigation, which means that for any damages awarded for earnings, there must be an offset for either actual earnings or earnings that could have been earned if the employee made a reasonable and diligent effort to obtain comparable employment.

Other changes to the bill are to require that if the commission awards interest on an award, the legal rates should be the rate that's applied - the same rate that applies to the courts.

There are various other conforming amendments that appear in the bill [Section 7-15].

CHAIR GARY STEVENS summarized saying that at the present time the commission must investigate every complaint that is lodged, regardless of merit. This bill would let the director's staff make the decision on which cases to follow through on and which were without foundation.

MS. DEYOUNG clarified that each complaint filed would have a staff investigator investigate to see whether it was supported by substantial evidence. If the investigator finds substantial evidence, the next step would be the conciliation phase. At the end of that phase the question would come up for the complaints that haven't fallen out through no finding of substantial evidence or the conclusion of conciliation for the executive director to exercise discretion to go forward to the formal hearing. The investigation would precede the decision.

CHAIR GARY STEVENS asked how many cases are dealt with and the number that aren't carried beyond the conciliation phase.

MS. DEYOUNG did not have the information.

CHAIR GARY STEVENS pressed her for an estimate.

MS. DEYOUNG repeated that she didn't know.

CHAIR GARY STEVENS said, "Well, I understand what you're saying, but why would we do this if there's likely to be no impact?"

MS. DEYOUNG said the court says there isn't any prosecutorial or charging discretion. As resources become more limited this discretionary use of the state's prosecutorial resources will become more important.

PAULA HALEY, Executive Director of the Alaska State Commission for Human Rights, stated that she didn't have data to answer the exact question, but it would be a fairly small percentage of cases that have a substantial evidence finding. There are a lot of ways to close cases early on through mediation, withdrawal to go to court, administrative dismissals, or predetermination settlements.

It's likely that substantial evidence findings vary from 11 percent to the high teens depending on the year. During the conciliation phase she estimates that about 50 percent of the cases do conciliate. She continued to explain:

So we are talking about a fairly small percentage of cases wherein under the court decision that was referred to, we may be compelled to pursue the case to public hearing.... The commissioners who met in Juneau in March unanimously supported that particular provision of the bill because they felt it important as a matter of public policy, for the commission to be able to take the most important cases, which clearly have merit and important public policy concerns forward. And maybe not the other cases which, as was described by Ms. DeYoung, may be just on the boarder.

CHAIR GARY STEVENS wasn't sure he understood correctly and asked what percent of cases are fully investigated.

MS. HALEY said she didn't have the data, but could provide it later. Last year 81 percent of the voluntary mediation cases were settled. "That can have a huge impact. Those cases are not investigated. Subsequent to that, individuals may seek private attorneys. One year maybe five percent would choose to go to court because there are different remedies available. It varies considerably from year to year," she said.

CHAIR GARY STEVENS said he appreciates that she couldn't answer the question right then, but it's a fair question if they are asking for the changes to how they do business. He wanted data to back up the assertion that this would, "help contain costs and ensure that the procedures are equitable to local

complainants and persons..." He asked her to follow up and get the information to the committee.

MS. HALEY said, "I guess I would just say that we have to look at those cases individually so it's very difficult for me to say go back to the past year and say looking at this many cases, how many under this new standard would we not have pursued because under the current standard, we must pursue all of them. So I think it's a bit of a difficult statistic if you actually want to know the number of cases failing conciliation in any given year that we would not pursue." She asked if that is really the information he was requesting from the agency.

CHAIR GARY STEVENS said he didn't need an exact number, but asking for an estimate is a fair request. "If you can't provide it you can't provide it, but if you are asking us to make this change, I think it's quite right that we ask what the impact is going to be."

MS. HALEY said she was happy to provide that, but she wanted him to understand that the commission didn't ask for the legislation; it was introduced by the Governor's Office. There are certainly positive aspects to the bill and they were working closely with the Department of Law, but they weren't seeking the legislation.

CHAIR GARY STEVENS said he understood. He then noted that Senator Hoffman had joined the committee.

He asked Ms. DeYoung whether she was prepared to speak to the fiscal note.

MS. DEYOUNG said she didn't know the status of the fiscal note. She introduced David Jones from the Department of Law who was also present and available for questions.

CHAIR GARY STEVENS told her the fiscal note says there wouldn't be a fiscal impact on the Alaska Human Rights Commission and he questioned that when the Governor's letter says the bill would help contain costs.

He recognized Mr. Jones and asked Ms. Haley whether she had any further testimony.

MS. HALEY responded to the fiscal note saying they worked with the Office of the Governor to prepare the note and don't see that there would be a negative fiscal impact. "There are aspects

of this bill that the commissioners unanimously support and some concerns they have, but we are trying to continue our dialog with the Department of Law to remedy some of the concerns," she said.

SENATOR GUESS asked which sections they currently support.

MS. HALEY replied they support much of the bill. In particular they support section 4, which would no longer require a hearing in every case where substantial evidence is found. Cases with clear merit or important public policy concerns would go forward.

They are particularly concerned about the limits on the type of relief that the commission can award. The front pay period limitation, the standard that would require a complainant to make both reasonable and diligent effort, the restriction for amending complaints for good cause shown are the key points of difference. They are talking with the Department of Law about the limitations regarding remedial measures.

SENATOR GUESS asked if she and the commission were comfortable with the executive director being able to dismiss a complaint they judge isn't a benefit to the complainant, that wouldn't represent the best use of commission resources, or would not serve the best public interest. She thought the scope was rather large.

MS. HALEY replied they are comfortable with that. It's in keeping with what a number of the federal civil rights agencies have been able to do for years. "Recognize that we are here for the important opportunity to remedy an individual's experience with unlawful discrimination," she said. Unlike the private court system proceedings, they are here to support the public policy against discrimination. They think it's important to have the discretion and she didn't think there would be a significant number of cases they wouldn't move on.

CHAIR GARY STEVENS asked if she was referring to page 4 line 18 relating to back and front pay when she said she was not comfortable with the relief section.

MS. HALEY said it is primarily the limitation on front pay to two years. The front pay remedy is used infrequently, but it can be important.

CHAIR GARY STEVENS asked for a definition of front pay.

MS. DEYOUNG explained that back pay is the actual damage the individual suffered when they didn't earn their pay up to the time that the decision is made. Front pay looks to or predicts the future. Usually the individual will be restored to employment, receive the promotion or go to work at another position in which case front pay would not be appropriate. Front pay is a rare remedy, she said.

CHAIR GARY STEVENS announced that there were still questions that needed to be addressed and he would hold SB 354 in committee.

SB 246-HATE CRIMES/DISCRIMINATION/TOLERANCE PROG

CHAIR GARY STEVENS announced SB 246 to be up for consideration. He recognized Senator Lincoln.

SENATOR GEORGIANNA LINCOLN, sponsor, said she would give an overview rather than reading the sponsor statement. She stated:

Over the years this committee and others certainly have read and heard news stories about the hate crimes that have been committed throughout our state. The most recent one was November 2003 regarding a paintball attack on a young woman in Anchorage. There are many more hate bias motivated crimes that take place that go unreported.

Anchorage reported 67 bias hate motivated incidents with only 17 arrests between 1998 and 2002 when they began keeping records of hate motivated incidents. Aggravated assaults against Alaska Natives were the highest reported crime during that time. Juneau Douglas High School is currently reviewing recent racial incidents that have occurred within the school.

A hate crime is any criminal offense committed against a person or property, which is motivated in whole or in part by the offenders' biases against race, religion, ethnic, national origin group, or sexual orientation.

SB 264 was drafted according to model legislation by the Anti Defamation League that will be speaking from Washington D.C. Currently 46 states and the District

of Columbia have enacted laws similar to the Anti Defamation League model.

TAPE 04-21, SIDE B

5:15 pm

The current penalty enhancement statute does not apply to anyone found guilty of a misdemeanor or most first time felony offenders. Those crimes are presently excluded from enhancement and that's really a critical part of the bill. Those crimes are now included in this bill. As an example, a person committing a class B misdemeanor would be elevated to face a class A misdemeanor charge if their actions are determined to be motivated by prejudice bias or hate. If the crime committed is a class A misdemeanor, it would be elevated to a class c felony and so on.

In the case of the paintball attack in 2001, which was videotaped, one young man was charged with seven counts of a class A misdemeanor assault. Had this bill been enacted, that individual would have been charged with a class C felony. It's important to note that the majority of hate crimes reported in Alaska are assault, intimidation, and harassment and would therefore be misdemeanors. Thus the majority of hate crimes are totally outside the scope of aggravating factors already in law.

Why is there a whole new crime of motivation? It serves merely as a sentence enhancement and enhancements are the safest, most constitutional hate crime laws that we've got.

This bill also adds gender to its hate crime legislation. The inclusion of gender is important because it sends a message that gender based crimes also will not be tolerated. Legislators throughout the country have realized that it is difficult to distinguish the race based and religion based hate crimes from gender-based crimes.

What sets the hate crimes apart from other acts of violence is the psychological damage that they leave behind. The American Psychological Association determined that victims of hate crimes suffer the symptoms of posttraumatic stress disorder and that

there are social and economic ramifications to this type of crime as well.

Of all racial groups in Alaska, Alaska Natives suffer the highest rate of victimization. We really have to educate those around us, those that we work with, our young people, that we must condemn those crimes against humanity.

If there's a way that we can prevent hatred, prevent bias because of different races and because of different religions then we ought to do that.

CHAIR GARY STEVENS apologized for the lateness of the hour and noted that he and Senator Stedman had a meeting to attend in just ten minutes. There were a number of people who wanted to testify, but there wasn't time to hear from everyone. The bill would be heard in the Judiciary Committee next and everyone that wasn't able to testify would have an opportunity to speak at that time.

SENATOR BERT STEDMAN remarked that this is a society wide problem. He noted that the analysis on hate crimes between 1998 to 2002 shows there were 15 incidents with Blacks, 15 incidents with Alaska Natives 3 concerning Whites, two Islamic, and three Jewish.

MIKE LEBERMAN, Washington Counsel for the Anti Defamation League, testified via teleconference in support of SB 246. Hate crime statutes are very important and they compliment bias education work. It's best to prevent these crimes before they're committed but once they do occur, the law shapes attitudes and to have a broad inclusive statute in Alaska would be important. This would add sexual orientation, which is important and for the first time the important qualifier, "actual or perceived" would be put into Alaska law.

These statutes are unquestionably constitutional and were ratified by the United States Supreme Court in 1993. He couldn't speak to the sentencing scheme because different states have different penalty structures. However, they do support the concept and approach wholeheartedly.

NICK KOTAVICH, Tlingit Haida Youth Leadership Team representative, spoke in support of SB 246. He is the leader of Undoing Racism, which is comprised of the JDHS Student Council and Tlingit Haida Youth Leadership Team. He said:

This bill, if pushed, will send a message to those who have harassed Natives to the point of physical violence that it will no longer be tolerated.

A boy at my school continually harassed me to the point of physical violence because I was Native. After beating me up, he did it to at least three other Natives. If this bill is passed, you as Senators will be imposing consequences that will prevent these racial behaviors from continuing and make our state a safer place for all youths.

NATALIE LANDRITH, staff attorney with the Native American Rights Fund in Anchorage, spoke via teleconference in strong support of SB 246. She said she would focus on three specific legal aspects of the bill.

- WHY A SPECIAL LAW FOR HATE CRIMES: Each hate crime has many victims and the aim is to terrorize a victim simply because they are a member of a group. The result is that each member of the group is a victim. The U.S. Department of Justice's policy guide to hate crimes characterizes them as a virus that quickly spreads feelings of terror and loathing across an entire community. The psychological impact on that group is far, wide, and lasting. They send a powerful message to the group that they aren't wanted or welcome.
- HOW BIG IS THIS PROBLEM: They don't know. Eighty-five percent of the jurisdictions across the country don't report any hate crime activity so Alaska is a small minority that has a measurable hate crime problem. They do know that Natives are the most likely to be affected by hate crimes.
- DON'T HATE CRIME LAWS CONFLICT WITH FREE SPEECH: That has been covered in previous testimony, but she wanted to add that SB 246 does not conflict. It fits squarely within the floor and ceiling set by the U.S. Supreme Court.

SB 246 would send a message that Alaska isn't willing to tolerate the victimization of Natives and others. "It sends a message to the targets of hate crimes that they are welcome and the law will protect them. It expresses a collective belief that Alaska is stronger when we protect all of our citizens."

DON BREMMER thanked the committee for putting him on the roster considering the lateness of the hour but he said, it's really

the lateness of getting this kind of legislation passed that the committee should be discussing. At some point, Natives will get tired of waiting patiently for such legislation. He made the point that this bill addresses the end result of what minorities are now facing at Juneau Douglas High School and have been facing for generations.

MR BREMMER gave members copies of his written testimony and a copy may be found in the bill file.

BARBARA BRINK stated that she would reserve her comments until the Judiciary Committee heard the bill.

JOSH FINK said he too would reserve his comments.

CHAIR GARY STEVENS apologized for the time constraints.

DENISE MORRIS, President of the Alaska Native Justice Center (ANJC), stated that ANJC, through the board of directors supports passage of SB 246. She drew attention to the fact that as a member of the bipartisan State of Alaska Commission on Tolerance, which was created in part as a result of the Anchorage paint ball incident, one of the recommendations was the passage of hate crime legislation.

Although people don't like to think about or don't know that hate crimes occur, they do and the psychological impact on the victims is substantial. A number of the victims of the paint ball attack were severely traumatized when they had to give their victim impact statements. In both the Poindexter and the Hunter hate crime serial rapist cases in Anchorage, all the identified victims were Alaska Native women. In fact, Alaska Native women are 4.5 times more likely to be a homicide victim than any other rape across the United States.

"The bill reflects our values and signals that hate crimes motivated are especially tragic. SB 264 alone cannot eliminate bias and hate. We cannot legislate the hearts of people, but we should hold them accountable for their actions, especially when those actions are motivated by prejudice, bias and hatred." It is time for this legislation, she said.

CHAIR GARY STEVENS asked her to send her written testimony.

Celeste Hodge, Deputy Director and Community Outreach Liaison, testified via teleconference on behalf of the Municipality of Anchorage in support of SB 246.

She said she was president of the NAACP for over a decade and in that capacity, she worked endlessly to combat racism. Even so, hate crimes continue to plague the nation and are on the increase.

She described SB 246 as important legislation and a necessary tool to help fight the continuing problem of hate crimes against people because of their race, religion, national origin, gender, disability or sexual orientation. It signals that crimes motivated by hate are especially reprehensible because they are not merely crimes against an individual, but rather crimes against the entire community.

I would urge passage of SB 246 as written, she said.

CHAIR GARY STEVENS asked her to send her written testimony to the committee.

A. W. FULLENWIDER, standing committee member of the Anchorage Equal Rights Commission, spoke as a private citizen in support of SB 246. Hate crimes strike fear in people who have done nothing wrong, but are members of an identifiable group. It is the government's responsibility to ensure equal protection for all, she asserted.

CHAIR GARY STEVENS thanked Senator Lincoln for presenting the bill and asked if she had concluding remarks.

SENATOR LINCOLN said she was comfortable with the testimony that was given.

CHAIR GARY STEVENS asked for a motion.

SENATOR BERT STEDMAN motioned to pass SB 246 from committee with individual recommendations and the attached fiscal note.

There being no objection, it was so ordered.

CHAIR GARY STEVENS adjourned the meeting at 5:45 pm.