

**ALASKA STATE LEGISLATURE
HOUSE STATE AFFAIRS STANDING COMMITTEE**

March 24, 2007

10:05 a.m.

MEMBERS PRESENT

Representative Bob Lynn, Chair
Representative John Coghill
Representative Kyle Johansen
Representative Craig Johnson
Representative Andrea Doll
Representative Max Gruenberg

MEMBERS ABSENT

Representative Bob Roses, Vice Chair

COMMITTEE CALENDAR

HOUSE BILL NO. 92

"An Act removing the victims' advocate and the staff of the office of victims' rights from the jurisdiction of the office of the ombudsman in the legislative branch."

- MOVED HB 92 OUT OF COMMITTEE

HOUSE BILL NO. 151

"An Act requiring an indemnification and hold harmless provision in professional services contracts of state agencies, quasi-public agencies, municipalities, and political subdivisions."

- MOVED CSHB 151(STA) OUT OF COMMITTEE

HOUSE BILL NO. 171

"An Act relating to the terms of legislators, the date and time for convening regular legislative sessions, adoption of uniform rules of the legislature and to certain of those rules, the date for organizing the Legislative Budget and Audit Committee, and deadlines for certain matters or reports to be delivered to the legislature or filed; prohibiting bonuses for legislative employees; and providing for an effective date."

- HEARD AND HELD

HOUSE BILL NO. 13

"An Act relating to prepayments of accrued actuarial liabilities of government retirement systems; relating to the Alaska Municipal Bond Bank Authority; permitting the Alaska Municipal Bond Bank Authority or a subsidiary of the authority to assist state and municipal governmental employers by issuing bonds, notes, commercial paper, or other obligations to enable the governmental employers to prepay all or a portion of the governmental employers' shares of the unfunded accrued actuarial liabilities of retirement systems; authorizing a governmental employer to issue obligations to prepay all or a portion of the governmental employer's shares of the unfunded accrued actuarial liabilities of retirement systems and to enter into a lease or other contractual agreement with a trustee or the Alaska Municipal Bond Bank Authority or a subsidiary of the authority in connection with the issuance of obligations for that purpose, and relating to those obligations; and providing for an effective date."

- BILL HEARING CANCELED

PREVIOUS COMMITTEE ACTION

BILL: HB 92

SHORT TITLE: JURISDICTION OF OMBUDSMAN: VICTIMS RTS

SPONSOR(s): REPRESENTATIVE(s) SAMUELS, STOLTZE

01/16/07	(H)	PREFILE RELEASED 1/12/07
01/16/07	(H)	READ THE FIRST TIME - REFERRALS
01/16/07	(H)	STA, FIN
03/20/07	(H)	STA AT 8:00 AM CAPITOL 106
03/20/07	(H)	Scheduled But Not Heard
03/24/07	(H)	STA AT 10:00 AM CAPITOL 106

BILL: HB 151

SHORT TITLE: INDEMNITY CLAUSE IN PUBLIC CONTRACTS

SPONSOR(s): REPRESENTATIVE(s) JOHNSON BY REQUEST

02/22/07	(H)	READ THE FIRST TIME - REFERRALS
02/22/07	(H)	STA, JUD
03/20/07	(H)	STA AT 8:00 AM CAPITOL 106
03/20/07	(H)	Heard & Held
03/20/07	(H)	MINUTE(STA)
03/24/07	(H)	STA AT 10:00 AM CAPITOL 106

BILL: HB 171

SHORT TITLE: ACCOMMODATE 90-DAY SESSION/LEG PROCEDURES

SPONSOR(s): RULES

03/01/07	(H)	READ THE FIRST TIME - REFERRALS
03/01/07	(H)	STA
03/06/07	(H)	STA AT 8:00 AM CAPITOL 106
03/06/07	(H)	Scheduled But Not Heard
03/15/07	(H)	STA AT 8:00 AM CAPITOL 106
03/15/07	(H)	Heard & Held
03/15/07	(H)	MINUTE(STA)
03/22/07	(H)	STA AT 8:00 AM CAPITOL 106
03/22/07	(H)	Heard & Held
03/22/07	(H)	MINUTE(STA)
03/24/07	(H)	STA AT 10:00 AM CAPITOL 106

WITNESS REGISTER

REPRESENTATIVE BILL STOLTZE

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Offered an introduction of HB 92 as joint prime sponsor.

REPRESENTATIVE RALPH SAMUELS

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Testified as joint prime sponsor of HB 92.

KATHY HANSEN, Interim Director

Office of Victims' Rights

Anchorage, Alaska

POSITION STATEMENT: Testified in support of HB 92.

LINDA LORD-JENKINS, Ombudsman

Office of the Ombudsman

Anchorage, Alaska

POSITION STATEMENT: Testified in opposition to HB 92.

TREVOR FULTON, Staff

to Representative Craig Johnson

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: On behalf of Representative Johnson, prime sponsor by request, provided details regarding HB 151.

BOYD MORGENTHALER, P.E., Chair

A/E-Owner Contracts Committee

Alaska Professional Design Council (APDC)

Anchorage, Alaska

POSITION STATEMENT: Testified on behalf of APDC in support of HB 151.

LEANNE BOLDENOW, Client Executive
Marsh USA, Inc.
Anchorage, Alaska

POSITION STATEMENT: Testified during the hearing on HB 151.

JOHN BOUCHER, Senior Economist
Office of the Director
Office of Management & Budget (OMB)
Juneau, Alaska

POSITION STATEMENT: Testified during the hearing on HB 171.

ACTION NARRATIVE

CHAIR BOB LYNN called the House State Affairs Standing Committee meeting to order at [10:05:18 AM](#). Representatives Coghill, Johnson, Doll, and Lynn were present at the call to order. Representatives Johansen and Gruenberg arrived as the meeting was in progress.

HB 92-JURISDICTION OF OMBUDSMAN

[10:05:57 AM](#)

CHAIR LYNN announced that the first order of business was HOUSE BILL NO. 92, "An Act removing the victims' advocate and the staff of the office of victims' rights from the jurisdiction of the office of the ombudsman in the legislative branch."

[10:06:20 AM](#)

REPRESENTATIVE BILL STOLTZE, Alaska State Legislature, offered an introduction of HB 92 as joint prime sponsor. He indicated that the bill clarifies the jurisdiction of the state ombudsman related to the Office of Victims' Rights (OVR). He said he was one of the staff members who worked on the creation of OVR as an office designed to be "a side-by-side entity" to the Office of the Ombudsman and enforce the rights of victims as strongly mandated by the legislature and approximately 83 percent of the voting public in 1994. He said, "This was really the implementing statute for that constitutional amendment." He said the question at hand is whether or not the state should have a strong victims' right agency that has the autonomy to be able to enforce the constitutional rights of crime victims.

10:09:17 AM

REPRESENTATIVE RALPH SAMUELS, Alaska State Legislature, as joint prime sponsor, explained that the Office of Victim's Rights has gone through several iterations. He noted that at one time, OVR was going to be housed in the executive branch. Then Governor Tony Knowles vetoed that creation, which Representative Samuels said in hindsight was a good thing. He explained if that had been allowed, OVR would have been investigating entities such as the Department of Law, the Public Defender's Agency, or the Department of Public Safety, and all the roads from those departments lead to the governor. He added, "So, you would have been investigating yourself."

REPRESENTATIVE SAMUELS said eventually the Office of Victims' Rights was put into the legislative branch. Whereas the Office of the Ombudsman can investigate citizens' claims of problems with departments, OVR is an ombudsman solely for the victims of crimes, can hire attorneys, and has its own code of ethics, he explained. He said the purpose of the bill is to ensure that both the agencies answer to the legislature - not to each other. He stated that he and Representative Stoltze were active in the creation of a separate OVR and never meant it to be a subsection of the Office of the Ombudsman.

10:11:41 AM

REPRESENTATIVE SAMUELS, in response to a question from Representative Doll, said a person who has an issue with how he/she is being treated by OVR would appeal directly to the legislature.

10:12:46 AM

REPRESENTATIVE STOLTZE indicated that the legislature has a strong voice regarding OVR.

10:13:46 AM

REPRESENTATIVE GRUENBERG noted that the statute that is being amended [AS 24.55.330(2)] relates to jurisdiction of the Office of the Ombudsman. He said all judicial judges would be exempted from that statute, but hearing officers and administrative law judges in the new Office of Administrative Hearings were not included in the language. He surmised that HB 92 must have been written before that office was created.

10:14:31 AM

REPRESENTATIVE STOLTZE said he does not have an answer to that.

REPRESENTATIVE GRUENBERG said he will not offer an amendment, but it is an issue that should be discussed in the next committee of referral.

10:15:31 AM

KATHY HANSEN, Interim Director, Office of Victims' Rights, said she has been a staff attorney at OVR for three years. She stated support for HB 92. She offered her understanding from having spoken with the director of the Office of the Ombudsman that that office's policy is to refer any crime victims who request assistance or have complaint straight to OVR without investigation. She stated that every one of the attorneys who works at OVR has been a prosecutor and has criminal law experience. She referred to AS 24.65.200, which read as follows:

Sec. 24.65.200. Victims' advocate's privilege not to testify or produce documents or other evidence. Except as may be necessary to enforce the provisions of this chapter, the determinations, conclusions, thought processes, discussions, records, reports, and recommendations of or information collected by the victims' advocate or staff of the victims' advocate are not admissible in a civil or criminal proceeding, and are not subject to questioning or disclosure by subpoena or discovery.

MS. HANSEN cited AS 24.65.180, which read as follows:

Sec. 24.65.180. Judicial review. A proceeding or decision of the victims' advocate may be reviewed in superior court only to determine if it is contrary to the provisions of this chapter.

MS. HANSEN said the purpose of Section 180 was so that "the director's discretion on crime victims' complaints would be final and not subject to another review by another agency." She said if the [Office of] the Ombudsman had authority to investigate OVR, there could be disparate outcomes. For example, the ombudsman could reverse a decision of OVR, but with

less information and expertise in the area of crime victims' rights.

MS. HANSEN said OVR's attorneys also have an advocacy function, in which they can litigate and provide free legal services to crime victims and, when appropriate, file pleadings, appear in court, and conduct behind the scenes advocacy. For example, a lawyer in OVR can enhance criminal punishment when appropriate during plea negotiations, and can ensure that crime victims receive full restitution. Furthermore, OVR can access clemency files from the governor's office and state court judges' confidential documents and files. An OVR lawyer can look at pre-sentence reports and advise victims regarding a judge's sentence and whether or not to object to a plea agreement. Ms. Hansen said that is not something the ombudsman should be allowed to do even indirectly, because he/she might reverse advice given by OVR. She said OVR is also involved with ongoing criminal investigation. She said lawyers at OVR can give the crime victim an independent legal opinion as to whether a matter was timely and thoroughly investigated and whether it is or is not a viable case for prosecution.

[10:20:27 AM](#)

MS. HANSEN said HB 92 is a simple fix that would change the language related to the definition of agency. A more complex fix would be to restructure AS 24.55 to allow the ombudsman to have those additional duties and possibly add attorney staff. She said OVR thinks it is appropriate to be reporting directly to the legislature, and the fact that OVR's attorneys must follow a code of ethics and rules of professional conduct is an added bonus to the clients of that agency. One of those rules, she pointed out, is that OVR provides due diligence to its clients; therefore, in addition to being able to complain to the legislature about any problems that might arise related to OVR, they could also complain to the Alaska Bar Association. Ms. Hansen concluded that in order to stem any confusion or litigation, the bill must clearly show that the legislature intends for OVR to be the special ombudsman for crime victims.

[10:21:40 AM](#)

REPRESENTATIVE GRUENBERG stated concern that [the Office of the Ombudsman], without this bill, would have access to the privileged information held by OVR. He asked if there is any other way that that confidential information could be obtained that should be of concern.

MS. HANSEN answered no. She offered further details.

10:23:02 AM

LINDA LORD-JENKINS, Ombudsman, Office of the Ombudsman, testified in opposition to HB 92. She said passage of the bill would take an action no legislature has seen fit to take in the 32 years since the Office of the Ombudsman was created. She continued:

I believe this issue has arisen because an ombudsman complainant, referred by my office to OVR for assistance, returned to the ombudsman to complain that OVR had not adequately investigated her complaint before declining to take further action.

This complainant has authorized me to discuss some aspects of this complaint, but ... I'm not going to discuss very much. The issue here is an issue of ensuring that a vulnerable young woman who was horribly victimized is afforded the dignity and respect and assistance to which she is entitled.

I'd like to state that the Office of the Ombudsman recognizes the importance of the work done by OVR. My opposition to this bill should not be interpreted in any way as minimizing the value of the victims' advocate or the assistance it provides to victims of crime. My office repeatedly refers complainants to OVR if it appears that OVR is better suited to handle a complainant's issue, and I made such a referral as recently as Monday evening. I plan on continuing to do so. However, I believe that the mandate of the ombudsman enabling a legislation requires that we ... review or investigate complaints against state agencies, and especially so when we receive complaints about the quality of the services received after our referrals.

I must take exception to the characterization that OVR is the special ombudsman for crime victims. An ombudsman is an impartial fact-finder - an impartial neutral - who investigates complaints about those agencies subject to its jurisdiction. The position that OVR is a special ombudsman for crime victims is contrary to every public statement of mission and

purpose heretofore made by OVR. Since its inception, OVR was considered an advocate for crime victims, not an impartial investigator. Stephen Branch Flower, the first victims' advocate, characterized OVR as a uniquely, publicly funded victims' rights law firm. As this victims' rights law firm, OVR is authorized to represent crime victims in criminal or juvenile court proceedings to ensure that the rights provided by Alaska's Constitution ... and laws are afforded. That's why OVR is an agency created by the legislature.

The best characterization of the services OVR provides to victims is as an attorney. The record reflects that OVR distinguished itself from the ombudsman in its argument from Cooper v. District Court, Alaska 2006. OVR specifically argued that the Copper/Court's comparison of OVR to the ombudsman was an error, as OVR - unlike the ombudsman - has the responsibility of advocacy. OVR stressed the provisions of Alaska 24.65.110, authorizing its advocacy for crime victims. OVR also pointed to the fact that while the ombudsman is expressly prohibited from intervening in ongoing court proceedings, OVR is expressly authorized to intervene on behalf of crime victims.

Other advocacy or investigatory agencies are within the ombudsman's jurisdiction: the long-term care ombudsman, Adult Protective Services, the Department of Public Assistance Fraud Unit, the Human Rights Commission, Alaska Judicial Council, and the Alaska State Troopers all perform investigations. None are excluded from the ombudsman's jurisdiction for fear of adding an unnecessary layer of investigation, nor in my 19 years with the ombudsman's office has the ombudsman been accused of unnecessary oversight of these agencies.

OVR is not unique in being either an advocate or an investigator; its functions do not require exceptions from the ombudsman's jurisdiction. Arguments that being subject to ombudsman oversight would add an unnecessary layer of investigation or result in the ombudsman's reversal of a discretionary decision of the victims' advocate reflect a misunderstanding of the work of the ombudsman. It is not the authority or intent of the ombudsman to reinvestigate victim

complaints against district attorneys, law enforcement, et cetera. Instead, investigation of OVR's actions - whether reasonable efforts to investigate victims' complaints are made, whether more weight was given to police officers' perspective than the victims' well-being, whether victims of different backgrounds and abilities are treated equally, whether OVR complies with its own statutes and regulation - is what is contemplated. Thus, it is not an additional layer of investigation of a victim-complainant issue.

10:27:50 AM

Nor does an ombudsman oversight present a huge burden of labor for the OVR. In the year since OVR was created, the ombudsman has received only two complaints against the agency. One was closed because of ombudsman review of OVR statutes in light of the Cooper decision. The other remains open, pending a dispute over access to records. The fact that OVR employs attorneys and litigates does not make it unique. The Public Defender Agency, the Office of Public Advocacy, and the Department of Law all litigate and have specialized expertise. Each is an integral part of state government providing services to thousands and affecting each and every Alaskan. The legislature placed all these agencies within the ombudsman's jurisdiction. The ombudsman is empowered to investigate these agencies without interfering with court proceedings or infringing upon the privilege of the agencies' clients. OVR provides the same sort of services to Alaskans and so should be held to the same standards of oversight. Neither is it within the ombudsman's power to contravene the discretionary action taken by a governmental agency, as long as that action is a reasonable and lawful exercise of the agency's discretion and is taken after thorough review of all the facts. If, in the course of an investigation, a reasonable exercise of discretion based on relevant and proper grounds is found, the ombudsman cannot and would not act to reverse such a decision. If, however, investigation reveals arbitrary and capricious exercises of discretion, based on improper or irrelevant grounds, then the ombudsman is authorized to suggest alternate courses of action.

Additionally, we believe the fact that the OVR has access to records of active criminal investigations while the ombudsman does not is irrelevant. The case at hand centers on the absence of investigation, including the absence of an active criminal investigation. AS 24.55.160 does not preclude access to OVR's records of this victim's complaint, despite the reference to the exclusion of records of active criminal investigations. The point in the situation at hand is that we have a complainant alleging that there was no real investigation of the crime committed - that what review was done was conducted in a highly improper, totally insensitive manner, and there's no active or ongoing investigation of such crime by the police department or any other law enforcement agency. OVR's investigation - if there was or is one - does not constitute an active criminal investigation.

Finally, the ombudsman provides oversight nowhere else available through [the] victims' advocate. Only the ombudsman has statutory authority to review OVR rules and OVR staff. Our review of the OVR statute does not indicate that even the legislature has access to OVR files. If not the ombudsman, who does oversee OVR? "Who oversees the ombudsman?" you may ask. The legislature oversees the ombudsman and when the complainant grants the ombudsman permission to discuss complaints, we discuss them with legislators.

Again, ... I am not in any way minimizing the value of the victim's advocate or the assistance it provides to victims of crime. This is not an issue of one agency being more or less important than the other. This is an issue of insuring that [a] vulnerable young woman who was horribly victimized is afforded the dignity and respect and assistance to which she is entitled. For this reason I respectfully must enter my opposition to HB 92.

[10:31:16 AM](#)

REPRESENTATIVE JOHNSON asked Ms. Lord-Jenkins if the Office of the Ombudsman is also the investigating agency responsible for the aforementioned case.

MS. LORD-JENKINS responded that the Office of the Ombudsman does not have jurisdiction over the law enforcement agency. In

response to a follow-up question from Representative Johnson, she reiterated that in the time since OVR's inception, the Office of the Ombudsman has only received two complaints about that entity. She mentioned one other case related to hours, but said that was not a complaint against the victims' advocate.

10:32:47 AM

MS. LORD-JENKINS, in response to Representative Doll, relayed that the Office of the Ombudsman currently has 8 staff: one ombudsman, one administrative/intake officer, one intake officer, and five investigators. She said the office has requested one additional investigator during the coming fiscal year. The office began in 1975, with 7 staff members, increased to 26 investigators by 1986, decreased to 13 in 1987, increased to 22 investigators in 1992, decreased to 11 in 1995, and further reduced its staff in fiscal year 1997. The office was granted one additional investigator in fiscal year 2006, she said. She continued:

Our jurisdiction is to investigate complaints about the administrative actions of State of Alaska agencies. We do not have jurisdiction over elected officials. We do not have authority to intervene in matters that have been decided in court. We limit the ... issues that we investigate by regulation. If a matter is subject to a collective bargaining agreement, such as many state employees are governed by, we don't investigate an action; that would be subject to that agreement. We don't investigate actions about which the complainant has known for more than a year and not taken an action on. So, someone cannot call us and say, "Well, back in 1996, the state did this, and I want you to look at it now." We have no statutory authority over individual municipalities unless they contract with us. We have no statutory authority over the actions of private companies [or] private individuals.

MS. LORD-JENKINS, in response to Representative Doll, said the present caseload year is less than it was in 1986 and 1995. She explained, "That's more of a function of how we've done outreach, and how we ... handle complaints." She said the office no longer takes live complaints, but takes in filled out complaint forms. She said the office continually makes improvements to its service, and she reported that the complaint load is increasing. In addition to handling specific

complaints, she said, the office has had approximately 1,300 "intake referrals" whereby it sends people to the proper entity to solve the questions they have presented to the ombudsman.

[10:36:59 AM](#)

REPRESENTATIVE DOLL summarized that Ms. Lord-Jenkins is saying that there are less people working in the Office of the Ombudsman, but there are an increasing number of complaints.

MS. LORD-JENKINS confirmed that is correct.

REPRESENTATIVE DOLL emphasized the importance of having "checks" in government. Furthermore, she stated her belief that it is important to strengthen and encourage the jurisdiction of the Office of the Ombudsman. She directed attention to a memorandum in the committee packet from Tamara Cook, [Director, Legislative Legal and Research Services, dated March 23, 2007, regarding the authority of the ombudsman over records of OVR]. She said that in the memorandum Ms. Cook notes that the ombudsman does have rights over OVR related to jurisdiction. She stated her support of the ombudsman and said she would not support HB 92.

[10:38:31 AM](#)

MS. HANSEN, in response to a question from Representative Gruenberg, confirmed that an attorney could file an ethics complaint with the [Alaska Bar Association] against any OVR staff member. She said anyone could issue a complaint to the Bar Association. She said if the complaint was that OVR was not following its own statute, court action could be taken to have the court issue an order that OVR must follow its statutes. The complainant could also go to legislature, she said.

[10:39:40 AM](#)

REPRESENTATIVE GRUENBERG asked, "If that process were followed, what access would they have to your records, et cetera?"

MS. HANSEN answered that the court would only be able to look at whether [OVR] was following its own statutes. She reiterated that AS 24.65.180 is the statute that addresses what review is allowed superior court judges, while AS 24.65.200 gives OVR the statutory privilege not to disclose its records "by subpoena or through discovery in court proceedings."

[10:40:50 AM](#)

REPRESENTATIVE GRUENBERG asked if the following entities would have any jurisdiction to investigate complaints: the Select Committee on Legislative Ethics, Legislative Council, Legislative Budget & Audit, or the [House or Senate] Judiciary Standing Committee[s].

MS. HANSEN indicated that typically, individual legislators inquire through their aides, and OVR provides them with the information requested. She offered her understanding that the Select Committee on Legislative Ethics has the authority to review OVR.

[10:41:49 AM](#)

REPRESENTATIVE STOLTZE said he thinks the aforementioned memorandum from Legislative Legal and Research Services strengthens the need for HB 92. He noted that a large percentage of the caseloads of the Office of the Ombudsman are from convicted felons. He said sensitivity to victims is a concern. He mentioned inherent conflicts and stated:

It wouldn't take very long for one to bump into another when you're ... investigating a claim of a convicted felon who's incarcerated and you're bumping into a victims' rights issue - it doesn't take very long with ... any kind of expanded caseload.

...Originally, we had the Office of Victim's Advocacy, and there was a concern that the names were too close together and people -- that's the level of sensitivity So, we changed the name in our ... drafting process and through the committee process.

REPRESENTATIVE STOLTZE noted that the Office of Victims' Rights does not use general funds; it's funded through the use of dividends from convicted felons. It has also spun off to fund other entities, including the Council on Domestic Violence and Sexual Assault and victims' compensation. Conversely, the Office of the Ombudsman is asking for another \$100,000 this year. He continued:

It doesn't escape me that a big chunk of their constituency that they ... respond to are people that are incarcerated felons. ... That sort of rubs me

REPRESENTATIVE STOLTZE, regarding jurisdiction, said unlike many other entities, OVR is an entity housed within the legislative branch, and its director is confirmed by a super majority of the legislature. He concluded:

... This is deeply rooted in philosophy I've heard a little bit about the referenced case, and it's a very sympathetic case, and I don't know whether ... it was botched up - it was evidentiary issues. You know, these things are complicated. ... Victims' rights cases are ... fraught with a lot of emotion. ... I don't know the facts, and the one case ... is certainly important, but probably not enough to change your determination of whether or not ... this entity should be independent. ... I can express very certainly that was the ... will of the legislature, being in on the birthing.

10:46:06 AM

REPRESENTATIVE SAMUELS said the legislature creates an ombudsman to ensure that each agency is doing its job. He indicated that both [the Office of the Ombudsman and OVR] were "created to be equal." He said he does not agree with Ms. Lord-Jenkins. He stated:

It was created after our ombudsman statute, and ... you can go to the Bar Association, you can go to the [Select Committee on Legislative Ethics], you can go to your legislator - the same as if you had a problem for an ombudsman. If you always have to have somebody looking over your shoulder you'd have yet another ombudsman's office, and yet another one on top of that. Both of them go to the legislature.

... If you're investigating a woman who was raped, and you are investigating a complaint by the man who raped her, at the same time, you have a problem.

REPRESENTATIVE SAMUELS reminded the committee that there have only been two complaints. He said if a person does not like the action of OVR, he/she can take other avenues. The same holds true regarding the Office of the Ombudsman, he said.

REPRESENTATIVE STOLTZE said appeals can be made through either entity.

10:48:35 AM

CHAIR LYNN closed public testimony.

10:49:00 AM

REPRESENTATIVE COGHILL stated:

First of all, the fact that the rights of crime victims rose to the level of a constitutional amendment - Article 1, Section 24 - gives it kind of a special place. And so, I'm going to vote for the bill, because I really do believe that one of the troublesome things in our justice system is that justice sometimes can be lost in the process. And this, I think, gives us the opportunity to focus that process.

REPRESENTATIVE COGHILL said Ms. Lord-Jenkins brought up the issue of accountability, and he said he thinks the legislature should keep watch on that issue. He stated his support of HB 92.

10:50:07 AM

REPRESENTATIVE GRUENBERG said difficult cases can make bad law. He noted that a high level of the ombudsman's cases involve representing defendants. He stated, "That would create a real, chilling effect on the Office of Victims' Rights if they could turn around then and investigate the agency that represents the victims. That would be a significant conflict of interest." He continued:

This case that has been brought to our attention is an unusual case where the allegation was that the agency that's supposed to represent the victim didn't represent the victim. ... If we didn't do something about it, it could potentially create a much larger problem with the fact that the ombudsman's more often representing the other side - the defendant. ... So, it's flipped around, and that has caused ... one of the problems here.

REPRESENTATIVE GRUENBERG said the question is where people would go if they had a problem with OVR. He echoed the comments of Ms. Hansen that alternatives include: the Alaska Bar Association, the Select Committee on Legislative Ethics, and

potentially some committees in the legislature. He said he is sensitive to the concerns expressed by [Representative Doll], but suggested that "that's an issue for another day." He said he will support HB 92, because he said he wants to avoid serious conflicts of interest.

[10:53:42 AM](#)

REPRESENTATIVE GRUENBERG [moved to report HB 92 out of committee] with individual recommendations [and the accompanying fiscal notes].

REPRESENTATIVE DOLL objected.

[10:53:59 AM](#)

A roll call vote was taken. Representatives Gruenberg, Coghill, Johansen, Johnson, and Lynn voted in favor of moving HB 92 out of committee. Representative Doll voted against it. Therefore, HB 92 was reported out of the House State Affairs Standing Committee by a vote of 5-1.

The committee took an at-ease from [10:54:50 AM](#) to [11:00:19 AM](#).

HB 151-INDEMNITY CLAUSE IN PUBLIC CONTRACTS

[11:00:21 AM](#)

CHAIR LYNN announced that the next order of business was HOUSE BILL NO. 151, "An Act requiring an indemnification and hold harmless provision in professional services contracts of state agencies, quasi-public agencies, municipalities, and political subdivisions."

[11:00:34 AM](#)

REPRESENTATIVE COGHILL moved to adopt the committee substitute (CS), Version 25-LS0479\E, Bannister, 3/21/07, as a work draft. There being no objection, Version E was before the committee.

[11:00:58 AM](#)

REPRESENTATIVE JOHNSON, speaking as sponsor by request, said the changes made through Version E narrowed the language, because the original bill version may have had the unintended consequence of costing "the permanent fund dividend" money.

[11:02:29 AM](#)

TREVOR FULTON, Staff to Representative Craig Johnson, Alaska State Legislature, on behalf of Representative Johnson, prime sponsor by request, provided details regarding HB 151. He directed attention to the Legislative Legal and Research Services memorandum, from Theresa Bannister, dated March 23, 2007, which he said outlines the changes made in Version E. One change added the word "defense" to the bill title so that it read:

"An Act requiring an indemnification, defense, and hold harmless provision in construction-related professional services contracts of state agencies, quasi-public agencies, municipalities, and political subdivisions."

MR. FULTON noted that the term "construction-related professional services" was also added to the bill.

[11:04:36 AM](#)

REPRESENTATIVE GRUENBERG remarked that the use of the term "consultant" invites a heightened scrutiny, not only by the legislature but also by the general public. He noted that John Walsh was sitting in the room, and he said he "represents these folks." He suggested using another, less controversial term.

[11:05:35 AM](#)

REPRESENTATIVE JOHNSON noted that he has at one time worked as a consultant and during his political campaign he was reluctant to tell people about that, "because of that black eye." He stated that consultants serve an important purpose. He illustrated how consulting can be an honorable profession, noting, for example, that companies that cannot afford to hire their own people can bring in consultants for very specific purposes. He said that although he appreciates Representative Gruenberg's comments, he does not want to jump on the bandwagon of depicting consultants negatively.

[11:07:25 AM](#)

BOYD MORGENTHALER, P.E., Chair, A/E-Owner Contracts Committee, Alaska Professional Design Council (APDC), told the committee that APDC is a consortium of professional societies that represents the 5,000 architects, engineers, and land surveyors

registered in Alaska. He stated that APDC supports Version E of HB 151 as an important issue for all Alaskan consultants. He said the bill is about liability. When two parties enter a contract, each expects the other to be responsible for their own actions. In particular, he noted, each party is responsible for their sole liabilities. He said "indemnification" and "hold harmless" are two terms that are used frequently in contracts. He continued:

Hold harmless is simply an agreement by one party to not hold the other party responsible for certain acts or under certain circumstances. And indemnification is an extension of that that says that one party will ... financially underwrite the loss of the other party under certain circumstances.

The real issue here is not the sole negligence of the two parties, but who's responsible when there's a joint liability. The [Department of Transportation & Public Facilities (DOT&PF)] takes a very fair approach to this: They say that when there's joint liability, it should be shared on a comparative fault basis. And that's ... exactly what HB 151 requires. It's just common sense

Unfortunately, not all public agencies have the same approach as [DOT&PF]. Some agencies require their consultant to take responsibility for all liability, except for the agency's sole negligence. So, if the agency is 99 percent at fault, the consultant still pays 100 percent of the cost, because there's no apportionment of cost on a comparative fault basis.

In the last six months, as an industry here in Alaska, we have battled the Alaska Railroad, the University of Alaska, ... the [Matanuska-Susitna (Mat-Su)] Borough, and other public agencies on this issue. In all the cases that we've faced, these agencies have demanded that the consultant - and ... perhaps we could that "professional services consultant" - ... assume 100 percent of the joint liability. The Alaska Railroad even went so far as requiring indemnification, and I quote, "from and against all claims and actions asserted by a third party or parties resulting from the services performed." This is just an absolutely unlimited liability.

11:11:05 AM

It's not the public that is demanding these liabilities. Whenever we've discussed it with the Board of Regents or ... officers, assembly people, project managers, they generally are looking for a fair indemnification. But the problem we're facing comes from contracting officers. And as contracting officers change, so do the indemnification languages. For example, in the Mat-Su Borough, they had a one-sided indemnification that we battled through 2001, and in 2002, they changed it to the [DOT&PF] format, which lasted through all of last year. But now, they have a new contracting officer; he scratched what we battled for, and now we're back to the same old one-sided language. So, you can see the problem. ... This costs the [architects, engineers, and] land surveyors in Alaska, and ultimately the public, millions of dollars in wasted time every year as we fight just to have fair contract language.

11:12:33 AM

... There are three major impacts that we experience. Number one is that the contracts become uninsurable. Our professional liability insurance only covers damages to the extent caused by our negligence, but it doesn't extend to the negligence of the other parties. So, when we are required to carry all of the middle ground, we're not insured. ... We had one insurance agency tell us that we can get insurance for anything, but we were looking at \$2 million to pay for the policy and a million dollar deductible. I think that was an exaggeration, but I think you get the point.

The other thing that happens is that good consultants walk away from agency work. Paradoxically, it's the consultants that really understand risk that are in the best position to help the owner with their project, and yet it's these very same consultants who won't sign in onerous languages. So, that leaves the owner with consultants who can either make themselves judgment proof - who are willing to take the risk but then oftentimes will enter into defensive design techniques to limit their risk - which causes project prices to go up. The bottom line is there's no free lunch.

And finally, we're forced to raise our prices. We do this by capturing the millions of dollars of overhead that we spend each year in our hourly rates, and we also do that by increasing the prices in our contracts to compensate for the additional risk.

MR. MORGENTHALER said [HB 151] follows the language successfully used by DOT&PF for decades, will standardized indemnification requirements for all public agencies, will level the playing field, and is the fair, honest, and right thing to do.

[11:14:51 AM](#)

LEANNE BOLDENOW, Client Executive, Marsh USA, Inc., said that company is an insurance brokerage that has represented architects and engineers throughout Alaska for 10 years. She stated:

It is very typical to have a contract presented to us for insurability, and as we review the indemnification clause, the requirements for the design professional consultant to take on all liabilities, claims, and hold harmless, we have to notify the design firm that their professional liability insurance cannot take on liabilities that are not directly connected to [negligent acts, errors], and omissions. So, ... HB 151 specifically identifies that and would alleviate this problem. So, I'm simply here today to support the APDC and the bill, and I am also a member of the APDC contract committee and do frequently witness these contracts from their aspect in supporting that these agency contracts are outside the design professionals' professional liability.

[11:16:33 AM](#)

REPRESENTATIVE GRUENBERG described a situation in which the legislature is asked to repeal or amend a statute because of insurance problems - because insurance does not cover the situation. He said he would hate for the legislature to pass HB 151 and have some insurance company somewhere say the new language doesn't meet the mark. He asked Ms. Boldenow if she is certain the language of the bill is sufficient.

MS. BOLDENOW responded, "The contracts that are causing the issues are outside the insurance provisions. To bring them inside, this bill does meet those requirements."

[11:18:53 AM](#)

REPRESENTATIVE GRUENBERG said when an action such as HB 151 is taken, if an insurance company no longer wants to cover something, than it will change its contract so that it does not. He asked if there is anything else the legislature can do to prevent that happening.

[11:19:12 AM](#)

MS. BOLDENOW replied that unfortunately insurance companies do direct how business is conducted, but that is because of the risk involved, and because those companies need to ensure they make money. She stated that although she has "watched this" for 10 years, she does not have a crystal ball to look into to predict what risk will transpire in the future.

REPRESENTATIVE GRUENBERG clarified that he is not pointing fingers at anyone, and he acknowledged that everyone is doing the best they can.

[11:20:30 AM](#)

CHAIR LYNN, after ascertaining that there was no one else to testify, closed public testimony.

The committee took an at-ease from [11:21:17 AM](#) to [11:21:37 AM](#).

[11:21:42 AM](#)

REPRESENTATIVE DOLL moved to report HB 151, Version 25-LS0479\E, Bannister, 3/21/07, out of committee [with individual recommendations and the accompanying fiscal notes]. There being no objection CSHB 151(STA) was reported out of the House State Affairs Standing Committee.

The committee took an at-ease from [11:22:06 AM](#) to [11:25:35 AM](#).

HB 171-ACCOMMODATE 90-DAY SESSION

[11:25:39 AM](#)

CHAIR LYNN announced that the last order of business was HOUSE BILL NO. 171, "An Act relating to the terms of legislators, the date and time for convening regular legislative sessions, adoption of uniform rules of the legislature and to certain of those rules, the date for organizing the Legislative Budget and Audit Committee, and deadlines for certain matters or reports to be delivered to the legislature or filed; prohibiting bonuses for legislative employees; and providing for an effective date."

[Before the committee was Version 25-LS0653\E, Cook, 3/16/07.]

CHAIR LYNN noted the complex nature of the bill and stated his intent was not to pass it out of committee on this date.

[11:26:52 AM](#)

REPRESENTATIVE JOHNSON moved to adopt Amendment 1, labeled 25-LS0653\E.2, Cook, 3/23/07, which read as follows:

Page 1, line 1:

Delete "the terms of legislators,"

Page 2, lines 16 - 22:

Delete all material.

Renumber the following bill sections accordingly.

Page 2, line 24, through page 3, line 2:

Delete all material and insert:

"Sec. 24.05.090. Duration of legislature; [REGULAR] sessions. Each legislature has a duration of approximately two years, and sessions consist of a "First Regular Session" that meets in the odd-numbered years, a "Second Regular Session" that meets in the even-numbered years, and any special session that the governor or the legislature calls. The legislature shall convene at the capital for the First Regular Session [EACH YEAR] on the second Monday in January at 1:00 p.m. [10:00 A.M.]; however, following a gubernatorial election year, the legislature shall convene on the third Tuesday in January at 1:00 p.m. The legislature shall convene at the capital for the Second Regular Session on the second Monday in February at 1:00 p.m. [10:00 A.M. EXCEPT AS PROVIDED IN THIS SECTION, EACH LEGISLATURE SHALL HAVE A DURATION OF TWO YEARS AND SHALL CONSIST OF A "FIRST REGULAR SESSION," WHICH SHALL MEET IN THE ODD-NUMBERED

YEARS, AND A "SECOND REGULAR SESSION," WHICH SHALL MEET IN THE EVEN-NUMBERED YEARS, AND ANY SPECIAL SESSION OR SESSIONS THAT THE GOVERNOR OR LEGISLATURE MAY FIND NECESSARY TO CALL]."

Page 3, line 25:

Delete "**February** [JANUARY] 1"

Insert "January 1 preceding a First Regular Session or at any time before February 1 preceding a Second Regular Session"

Page 6, lines 2 - 3:

Delete all material.

Insert "governor's budget workbooks at least seven days before the legislature convenes in a regular session [BY THE FIRST MONDAY IN JANUARY OF EACH YEAR, EXCEPT THAT FOLLOWING A GUBERNATORIAL ELECTION YEAR"

Page 7, lines 27 - 30:

Delete all material.

Re-number the following bill section accordingly.

REPRESENTATIVE COGHILL objected [for discussion purposes].

REPRESENTATIVE JOHNSON explained that Amendment 1 would stagger the starting date of the legislature. In the first term, the legislature would start in January, and in the second term, it would start in February. He said Amendment 1 would solve some of the problems he has regarding the long lag time between the election and the time a legislator is sworn in. He indicated that it would also prevent the possibility of the governor calling in lame duck legislators in January. Amendment 1 would also solve problems related to when the budget must be announced. He stated his belief that Amendment 1 lives up to not only the intent of the law, but also the letter of the law, and it would minimize the type of statute changes that would have to be made "to accommodate all of the reportings in that January session from the various administration departments."

[11:29:31 AM](#)

REPRESENTATIVE JOHNSON, in response to Representative Doll, said the 90-day session would end in mid-April.

REPRESENTATIVE COGHILL asked if all the dates contemplated in the bill are covered in Amendment 1.

REPRESENTATIVE JOHNSON said probably not; however, he said that can be fleshed out and fine tuned by the committee.

REPRESENTATIVE COGHILL echoed that Amendment 1 addresses the concern about a lame duck legislature being called into a special session in January. He said he likes the idea of starting the first regular session at "the regular time that we have in January." He asked if Amendment 1 addresses the issue of starting later for gubernatorial election years.

[11:32:06 AM](#)

REPRESENTATIVE JOHNSON said typically when a new governor enters office, he/she needs the extra time to develop budgets, and he said he would have all sessions start based upon the gubernatorial schedule, whether or not it was a gubernatorial election year.

[11:33:03 AM](#)

REPRESENTATIVE COGHILL said he likes that idea. He said he thinks that starting the second session in February is reasonable. Amendment 1 also provides for the consecutive-day session, which he said the people of Alaska voted in favor of. He said he cannot think of any problems regarding Uniform Rules, although there may be some related issues to solve.

REPRESENTATIVE COGHILL removed his objection. He said, "I want this in the bill conceptually."

[11:34:15 AM](#)

REPRESENTATIVE DOLL said she wonders why the legislature would want to start in February every other year. She suggested that doing so may complicate schedules and housing opportunities. She asked what the advantage would be.

[11:34:54 AM](#)

REPRESENTATIVE JOHNSON said on a personal level, starting in February gives him all of January with his family after the holidays. Furthermore, it would move the legislature into better weather later in the season, which would make traveling

back and forth better. He commented, "Juneau in May is pretty nice."

[11:36:26 AM](#)

REPRESENTATIVE COGHILL noted another reason to move the start date to February has to do with the timing of the budget forecast. That second session, he noted, the legislature will have already been organized, can meet outside of Juneau, and will be better prepared when it meets. He concurred with the "weather window" reason.

[11:38:54 AM](#)

REPRESENTATIVE JOHNSON revealed that he is a big supporter of a biannual budget, and he point out that this type of schedule sets the legislature up to be able to shift into that type of budget planning.

[11:39:40 AM](#)

REPRESENTATIVE GRUENBERG said HB 125, which addresses long-range fiscal planning, will be on the House floor soon. He stated his strong support of Amendment 1.

[11:40:47 AM](#)

REPRESENTATIVE COGHILL restated that he removed his objection to Amendment 1. There being no further objection, Amendment 1 was adopted.

[11:41:08 AM](#)

REPRESENTATIVE GRUENBERG directed attention to a letter in the committee packet, [dated March 22, 2007], from John Boucher.

[11:41:56 AM](#)

JOHN BOUCHER, Senior Economist, Office of the Director, Office of Management & Budget (OMB), recalled that during the March 15 hearing on HB 171, Representative Coghill had requested that the administration "talk specifically to the appointments of commissioners and others." He said the administration did not have a problem with an earlier submission of those names; however, he said that was "presupposing that the session would begin in February." With the adoption of Amendment 1, he noted, there are two different schedules. He stated:

And so, in the January schedule we'd prefer to have more time - in the February schedule it would be okay to move it up - so that the governor would have adequate time to look at these.

... We haven't contemplated all the dates, but intuitively, what I'm thinking is we might have two different types of schedules in an even and odd year. ... That may present some challenges; I'm certain that they could be overcome with proper planning.

[11:44:05 AM](#)

REPRESENTATIVE GRUENBERG said he would like to see OMB propose an amendment showing the dates it would prefer. He said he was going to strike Section 17, but he will not do that at this time.

[11:44:44 AM](#)

MR. BOUCHER said he would provide those dates. Regarding [the adopted Amendment 1], he echoed Representative Coghill's testimony about the revenue forecast. He said, "In my perception of the value of having the revenue forecast later, it's often in being able to know the current ... fiscal years' numbers to the greatest extent possible, because at that point in time you probably have 10 to 11 months-worth of actual data for the current fiscal year, which can affect your thinking, in terms of the amount of surplus available, et cetera."

[11:45:34 AM](#)

REPRESENTATIVE COGHILL said he is sensitive to the possibility that requiring a list of new appointees from the administration within 15 days may be tight, but the legislature has been given the restraint of finishing its session in 90 days, and giving the administration 30 days "goes into a big chunk of that legislature." He asked Mr. Boucher to think along those terms. He concluded, "Because if we get to the point where appointments can't be made by the time a third of the legislature has been spent, then ... I think we're going to run into some problems."

[11:47:05 AM](#)

REPRESENTATIVE JOHNSON said he only perceives this [requirement of the administration] being a problem every four years, and

then only if a new governor is elected. He suggested that 15 days could work on most years, and 20 days could be set for election years.

[11:47:57 AM](#)

REPRESENTATIVE GRUENBERG said he would like the right to offer an amendment at a later hearing.

[11:48:25 AM](#)

REPRESENTATIVE COGHILL said one topic to consider as an amendment to the bill would be to insert a sunset date, because he said the issue needs to be revisited. He said the big policy call is whether or not the public was right in passing the 90-day initiative. Another issue for a possible amendment is related to changes to the Uniform Rules proposed by Representative Norman Rokeberg in a prior legislature. He indicated that one rule has to do with [legislators being present during a vote to move a bill out of committee in order for their vote to count]. He said he would ensure committee members received the information pertaining to Representative Rokeberg's resolution. He noted that Alaska has several public corporations, and it has gas and oil issues that demand immediate attention and require policy calls, which tie into the issue of having to be present to vote. He stated that there are problems with the Uniform Rules and statute. He said, "I hope that I can present them a little better when we get to it."

[11:52:22 AM](#)

REPRESENTATIVE DOLL said she thinks the public sees the rush of the last 30 days of session, but it does not understand what it is that the legislature does for the first 15-20 days, which is why she welcomes this type of discussion.

CHAIR LYNN echoed Representative Doll's comment about how obvious the rush at the end of session is. He said a lot of work goes on behind the scenes. He remarked that there is no such thing as a simple bill; every bill is controversial to somebody and requires time to address.

[11:54:48 AM](#)

REPRESENTATIVE GRUENBERG said HB 171 is a very unusual bill that will have a profound effect on the legislature, and he said he has not seen another like it in the time that he has served in

the legislature. He said that it is a blessing to have both the chair of the House State Affairs Standing Committee and the chair of the House Rules Standing Committee involved. He stated that it is seldom that the legislature examines its own process; HB 109 - the ethics bill - is another such example. The way the legislature conducts business in a 90-day session and how it works during the interim will have profound effects on many people around state. He expressed appreciation for the fact that the legislature is addressing this issue.

[11:57:05 AM](#)

REPRESENTATIVE COGHILL said another issue to address will be that of interim per diem. He said it is called a stipend, but it is meant as pay in recognition that a legislator gives up a portion of his/her day in which he/she would otherwise be gainfully employed. He said, "I have a feeling this will push the tension on that to the point that we'll have to address it."

[11:58:15 AM](#)

CHAIR LYNN offered the analogy of the apple cart that has been tipped over. He said, "What we're doing right now is picking up apples one at a time, and trying to put them back in ... the cart."

[11:58:42 AM](#)

CHAIR LYNN announced that HB 171 was heard and held.

ADJOURNMENT

There being no further business before the committee, the House State Affairs Standing Committee meeting was adjourned at [11:58:58 AM](#).