HOUSE FINANCE COMMITTEE
March 19, 2010
1:37 p.m.

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CALL TO ORDER

Co-Chair Stoltze called the House Finance Committee meeting to order at 1:37 p.m.

MEMBERS PRESENT

Representative Mike Hawker, Co-Chair
Representative Bill Stoltze, Co-Chair
Representative Allan Austerman
Representative Mike Doogan
Representative Anna Fairclough
Representative Neal Foster
Representative Les Gara
Representative Reggie Joule
Representative Mike Kelly

MEMBERS ABSENT

Representative Bill Thomas Jr., Vice-Chair
Representative Woodie Salmon

ALSO PRESENT

Hanna McCarty, Staff, Representative Beth Kertulla, Sponsor; Samantha Englishoe, First Alaskans Institute Fellow, Office of Representative Beth Kertulla, Sponsor; Joseph Masters, Commissioner, Department of Public Safety; Anne Carpeneti, Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law; Derek DeGraaf, Sergeant, Supervisor, Technical Crimes Unit, Alaska Bureau of Investigation, Division of Alaska State Troopers.

PRESENT VIA TELECONFERENCE

Gerad Godfrey, Chair, Violent Crimes Compensation Board; Jeffrey Mittman, Executive Director, Alaska Civil Liberties Union (ACLU) of Alaska; David Kazarian, Big Lake, Alaska;

David Horowitz, Executive Director, Media Coalition, New York City.

SUMMARY

HB 298 SEX OFFENSES; OFFENDER REGIS.; SENTENCING

HJR 48 was REPORTED out of Committee with a "do pass" recommendation and with attached new fiscal note by the Legislative Affairs Agency.

HJR 48 CRIME VICTIMS FUND PRESERVATION ACT

HJR 48 was HEARD and HELD in Committee for further consideration.

#hjr48
HOUSE JOINT RESOLUTION NO. 48

Urging the United States Congress to pass the Crime Victims Fund Preservation Act.

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HANNA MCCARTY, STAFF, REPRESENTATIVE BETH KERTULLA, SPONSOR, explained that for more than twenty years, the Victims of Crime Act (VOCA) fund has provided grants to state victim assistance programs to fund services to more than four million victims of all types of crimes. She relayed that no one chooses to be a victim of crime, but when a crime does occur, victims deserve to be treated with dignity and respect. For victims, fairness includes restoring health, safety, and well-being. Without the VOCA funding and the direct services it supports, crime victims go without advocacy, medical and mental health, and legal services.

Ms. McCarty asked for support in efforts to raise the cap on the fund in order to ensure that VOCA assistance grants continue to support vital services.

SAMANTHA ENGLISHOE, FIRST ALASKANS INSTITUTE FELLOW, OFFICE OF REPRESENTATIVE BETH KERTULLA, SPONSOR, informed the committee that the Victims of Crime Act of 1984 created the VOCA fund as a protected and dedicated source of funding for crime victims' programs. The fund is not financed by taxpayer revenue but by a collection of fines, forfeitures,

and other penalties paid by federal criminal offenders. Each year VOCA dollars are distributed to states to support two important types of programs: crime victim compensation programs, which reimburse victims for crime-related expenses; and victim assistant programs, which provide victims with direct support and guidance in the aftermath of crime. The fund is comprised of offender penalties and fines, and the amount of deposits into the fund fluctuates from year to year. In 2000, Congress started capping annual obligations from the fund, saving the amount collected over the cap to ensure the fund's stability.

Ms. Englishoe continued that the VOCA fund has a current accumulated balance of nearly $3 billion. Under the VOCA statutory formula for the annual distribution of funds, state assistant grants are dependant on the size of the cap and the amount available for those grants is whatever remains after other programs have been funded. Unless the cap is high enough, state VOCA assistance grants are cut as other VOCA-dependent costs increase and new under-the-cap programs and earmarks are added. Despite unprecedented deposits into the fund, inadequate caps led to severe cutbacks in VOCA's victim assistance grants from 2006 to 2008, causing a devastating impact on programs providing direct services to crime victims. However, at the same time as the state victim assistant grants were cut by $87 million (22 percent), the fund grew more than $700 million. The balance would have been available for direct services if the cap minimum had been higher.

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Ms. Englishoe maintained that under the Crime Victims Fund Preservation Act, the VOCA statute would establish minimum funding levels for fiscal years 2010 through 2014, steadily drawing down a portion of the accumulated balance. The Office of Management and Budget has projected that the fund will have a balance of at least $1.3 billion at the end of 2014 even with the minimum caps. The fund would be sustainable and would not need other revenue sources.

Ms. Englishoe cited strong state support for the Crime Victims Fund Preservation Act, including by the Department of Health and Social Services, the Department of Public Safety, Alaska Attorney General Dan Sullivan, and U.S. Congressman Don Young. In addition, representatives from

the state Violent Crimes Compensation Board and the Council on Domestic Violence and Sexual Assault were supportive.

Representative Gara voiced support for the measure.

Co-Chair Stoltze noted the absence of testimony from Victims for Justice.

GERAD GODFREY, CHAIR, VIOLENT CRIMES COMPENSATION BOARD (via teleconference), spoke in support of the legislation. He referred to a letter of support for the resolution from the board (copy on file). He underlined the value of providing assistance in the recovery and rehabilitation process to innocent victims of violent crime. He noted the cost benefit to society, as counseling and intervention often serves as prevention in the next generation. Assistance often empowers victims to remain or become productive members of society.

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Co-Chair Stoltze acknowledged the work of the board. He referred to the zero fiscal impact note.

Co-Chair Hawker MOVED to report HJR 48 out of Committee with individual recommendations and the accompanying fiscal note. There being NO OBJECTION, it was so ordered.

HJR 48 was REPORTED out of Committee with a "do pass" recommendation and with attached new fiscal note by the Legislative Affairs Agency.

#hb298
HOUSE BILL NO. 298

> "An Act relating to the crimes of harassment, possession of child pornography, and distribution of indecent material to a minor; relating to suspending imposition of sentence and conditions of probation or parole for certain sex offenses; relating to aggravating factors in sentencing; relating to registration as a sex offender or child kidnapper; amending Rule 16, Alaska Rules of Criminal Procedure; and providing for an effective date."

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JOSEPH MASTERS, COMMISSIONER, DEPARTMENT OF PUBLIC SAFETY, noted that other components of the initiative had been previously presented to the committee, primarily during the operating budget hearings. Other components involve statutory changes that provide law enforcement personnel and prosecutors with more effective tools for dealing with sex-related offenses perpetrated in the state.

Co-Chair Stoltze pointed out that there had been comments made to his office about computer privacy issues.

ANNE CARPENETI, ASSISTANT ATTORNEY GENERAL, LEGAL SERVICES SECTION-JUNEAU, CRIMINAL DIVISION, DEPARTMENT OF LAW, echoed that the theme of the bill was “fine tuning” already existing law, except for sections that expand the law to propose new prohibitions.

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Ms. Carpeneti provided a sectional overview of the bill (copy on file).

- Sections 1 and 2 correct an error made in 2007 when the legislature enacted AS 11.56.759, that adopted a class A misdemeanor if a sex offender violates specific conditions of probation or parole. One of the requirements of the crime is that the person has served the entire period of incarceration imposed for the crime. This is effective for probationers, but not for parolees, because a person is never on parole if he or she has served the entire period of incarceration. A member of the Parole Board brought this issue to our attention, because the statute has caused problems for the board in dealing with parolees. These sections remove parolees from the statute.

Ms. Carpeneti detailed that the first two sections are housekeeping provisions.

- Section 3 rewrites AS 11.56.840, failure to register as a sex offender in the second degree. The proposal is similar to current law, but it sets out the elements more clearly. The section also adopts an affirmative defense that unforeseeable circumstances outside the control of the person prevented him or her from registering, and that the person contacted the

Department of Public Safety immediately upon being able to do so.

Ms. Carpeneti noted that the section clarifies the language to make it easier to read. In addition, it responds to a state court decision (Moffett v. State) in connection with a similar law (failure to appear). The decision was that the state must prove that the defendant made a deliberate and conscious decision not to appear; as pertains to HB 298, the decision would extrapolate to a person making a deliberate and conscious decision not to register as a sex offender. The bill would adopt an affirmative defense for those people who are unable to register because of circumstances beyond their control, which does not happen often; registration could happen by phone.

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Representative Joule queried language barriers, asking how the state would make sure that people with another language besides English as their first language would understand the concept. Ms. Carpeneti replied that the person must register for the first time in person, either when released from jail or in person at the Department of Public Safety (DPS). She presumed that responsibilities are explained at that time. She did not know about adjustments made for language; she agreed the issue was important.

Representative Joule stated concerns because people might nod to acknowledge being spoken to without fully understanding or agreeing with what is being said. Ms. Carpeneti responded that the bill would not change obligations related to registering, unless there has been an emergency.

Ms. Carpeneti agreed to check with DPS about the use of other languages. She moved to the next section:

- Section 4 would raise a form of harassment in the second degree (that is, with intent to harass or annoy another person, the person subjects the other person to offensive physical contact) to harassment in first degree if the offensive physical contact is by the offender touching the other person's genitals, anus, or female breast. Harassment in the first degree is a class A misdemeanor; the second degree offense is a class B misdemeanor. There have been prosecutions

recently involving offensive touching that occurred so quickly that the court concluded that the victim did not have time to convey lack of consent to the offender. The court reduced these charges from sexual assault to harassment in the second degree. This conduct is more serious than a class B misdemeanor; the bill would raise it to a class A misdemeanor.

Ms. Carpeneti detailed that the situation related to harassment had just come up recently; people have been victimizing other people without time for the victim to communicate lack of consent. The bill would increase the contact to a level of offense that is more in tune with the conduct.

Co-Chair Stoltze asked the reasoning behind the language used on line 14. Ms. Carpeneti responded that the language was current law; she did not know, but assumed that the law did not want to miss any of the substances.

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Ms. Carpeneti continued:

- Sections 5, 6, and 7 address a problem with Alaska law prohibiting possession of child pornography that was raised by a recent decision of the Alaska Court of Appeals, Worden v. State, 213 P.3d 144 (Alaska App. 2009). Worden held that our current statute does not prohibit a person from viewing child pornography on a computer; rather, the statute requires that the person must also save it on the computer to be considered to possess it. In response to this decision, the bill adopts the federal approach. It prohibits possession of child pornography, and it also prohibits a person from knowingly accessing child pornography on a computer with the intent to view it.

  The bill adds to the child pornography law the prohibition of the depiction of part of a child under 18 years of age that by manipulation appears to be engaged in conduct prohibited by ASD 11.41.455(a). It also would prohibit material that appears to include a child under 18 years of age (often referred to as anime pornography) if the material is obscene.

Ms. Carpeneti detailed that Section 5 makes changes related to the crime of distributing child pornography, mainly conforming to what the bill does in subsequent sections. The change was made in the House Judiciary Committee; the drafter suggested the language because it was more similar to federal law than existing state statute.

- Section 8 proposes an affirmative defense to possession of child pornography that is similar to federal law. The affirmative defense would address a situation where a person finds child pornography on their computer, and did not obtain it themselves. The defense requires that there are three or less depictions, and the person, without showing the material to another person except law enforcement, destroys the depiction or contacts law enforcement and turns it over to them.

  Section 8 also adopts a definition of the "appears to include a child" for purposes of the prohibition of anime child pornography that references a definition of obscene.

Ms. Carpeneti explained that Sections 6 through 8 amend the crime of possession of child pornography. One is a response to a decision (Wharton v. State) defining possession of child pornography as not including viewing child pornography on a computer; the position of the Department of Law (DOL) is that it just as harmful to the victim if the material is viewed on a computer. The bill (page 4, line 3) would amend the statute to prohibit knowingly accessing prohibited material on a computer with intent to view.

Ms. Carpeneti noted that other additions made in the House Judiciary Committee are found lines 7, 8, and 9 and prohibit persons from possessing material depicting a part of a human child that has been manipulated to look like prohibited acts under state law. There is some element of a real child's body depicted.

Co-Chair Stoltze asked whether the issue addressed was animation. Ms. Carpeneti replied that the section was different; animation is addressed on lines 10 and 11. "Anime porn" or "cartoon pornography" does not use a human child in creating the images. In order for the prohibition to be constitutional, it has to be obscene. The material

(added in House Judiciary) appears on line 30 (page 4) to line 7 (page 5) and is taken from language from the U.S. Supreme Court decision that anime or cartoon porn can be prohibited in certain circumstances.

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Representative Gara commented that a criminal provision can never be drafted perfectly; it can be under-drafted (allowing someone to get away with something) or over-drafted (implicating innocent people). He stated concerns with language that cannot be written clear enough. He pointed to page 4, line 7, which bans depiction of parts of children. The purpose (on both the state and federal levels) of banning the actual photographs was that people were making money and furthering the trade. He asked her interpretation of "depiction." Ms. Carpeneti responded that she read the word as a photograph of some part of a human child.

Representative Gara was glad, as he did not want a debate about what drawings would be banned. He pointed out that a depiction by manipulation, creation, or modification could also be interpreted to be a drawing, a crayon drawing, or a drawing created on a computer that is not a photograph. Ms. Carpeneti responded that the department would be happy to define it as limited to depictions or photographs that seem reasonable. She wanted the language to be clear.

Representative Gara opined that the language had to be fixed. He thought drawings should also be prohibited. He asked which depictions would be made criminal by the bill.

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Ms. Carpeneti replied that the depictions that would be made criminal were those of conduct proscribed in AS 11.41.455(a):

> A child under 18 engaged in the following conduct: sexual penetration; the lewd touching of another person's genitals, anus, or breast; the lewd touching by another person of a child's genitals, anus, or breast; masturbation, bestiality, or the lewd exhibition of a child's genitals; or sexual masochism or sadism.

Representative Gara requested a tighter definition of "depiction" so that it was clear that the subject was a photograph or digital photograph.

Representative Gara directed attention to page 4, line 3. He maintained that the point of the existing law was that letting people download photographs onto computers encourages the original commercial aspect of the person who created the photograph; society has accepted this as a crime. He questioned what would be changed by the bill. A person could briefly acquire the image on the computer and very quickly reject it, not download, keep, sell, or distribute it. In the scenario, a person would knowingly access the image with intent to view it, but then convince themselves that the action is inappropriate. He was concerned that a young person making the wrong choice and then the right choice would be made a criminal.

Ms. Carpeneti replied that the issue was a question of degree. She did not think it would make a difference to a victim whether the image was downloaded or simply viewed. She asserted that each time the material is viewed, the child is re-victimized. She pointed out that the legislation would require that the person knowingly accessed the material with intent to view. The bill also has an affirmative defense included for accessing less than three images and then deleting them or calling law enforcement. The department wanted people who know what they are accessing and look at the material without downloading it to be criminally responsible, as the child is victimized by the viewing.

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Representative Joule wondered whether there was an exemption for state personnel who have to view the material to verify content. Ms. Carpeneti replied that police officers investigating the material are not subject to criminal prosecution.

Representative Doogan asked whether accidentally viewing an image could result in prosecution under the proposed provision. Ms. Carpeneti responded that it was possible but highly unlikely.

Representative Doogan did not want to change the law to allow prosecution for accidental viewing. He queried the

proposed language. Ms. Carpeneti responded that the bill would make it a crime to knowingly access the images described with intent to view them, knowing the images are prohibited under law. She acknowledged that it could be just one viewing.

Representative Doogan described a possible scenario in which a person "stumbles across something." He asked whether the person could be prosecuted. Ms. Carpeneti responded that the bill would not prohibit a person who stumbles across an image. She stated that the bill would only prohibit people who knowingly go to the image. An image that "pops up" does not qualify as knowingly accessed. The bill requires the decision to go to the image to look at it, knowing that it is prohibited.

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Representative Doogan asked how a law enforcement officer would judge whether the image was knowingly or accidently accessed. He wanted a legal opinion. Ms. Carpeneti replied that as a prosecutor in such a case, she would look at all evidence presented by law enforcement; if one image was accessed, she would not prosecute, because she could not prove it. She stressed that there has to be enough evidence to convince a jury of twelve people beyond a reasonable doubt that the person knowingly accessed the material with intent to view prohibited images.

Representative Gara echoed concerns regarding prosecutors who would misuse the provision. He described experience with criminal practice. He stated concerns with the language "knowingly accesses on a computer." He was comfortable with current law about downloading, which he viewed as a very intentional action. He described a scenario in which a person opens an image that they did not know was child pornography. Ms. Carpeneti responded that there would have to be proof that the individual person had the specific intent of accessing the material, which is not an easy thing to prove. She hoped prosecutors would not blur the line. The prosecutor has to show beyond a reasonable doubt that the person intended to access the material that they knew was prohibited by law.

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Representative Gara described a situation in which a 19-year-old person is sent an image that he opens and keeps before realizing what he has done. He asked whether the person would have committed a crime. Ms. Carpeneti did not think the situation qualified as a crime under the legislation. She stated that clicking on an image that has been sent is not knowingly accessing the image with intent to view prohibited material.

Representative Gara argued that a jury could look at the situation and determine that the person should have known. Ms. Carpeneti did not think the measure would allow for that to happen.

Co-Chair Stoltze asked whether people had been prosecuted for possessing a single image. Ms. Carpeneti responded not that she was aware of.

Co-Chair Stoltze thought the issue pertained to situations with thousands of images. Ms. Carpeneti agreed that the cases prosecuted tend to involve hundreds of images.

Representative Fairclough asked the definition of "knowingly." She pointed to the victim's rights. She described "stores" or sites for electronic child pornography. She felt the only thing left for law enforcement was a link to the sites. She wanted a way to clearly and specifically describe situations beyond downloading.

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Ms. Carpeneti provided the definition of "knowingly" found in AS 11.81.900(a)(2), which applies both in terms of conduct and circumstances:

> A person acts knowingly with respect to conduct or to a circumstance as described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists. When knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist. A person who is unaware of conduct or a circumstance of which a person would have been aware of had that person not

been intoxicated acts knowingly with respect to the conduct or circumstance.

Representative Gara described a scenario in which a 19-year-old person opens up an image that he recognizes as against the law; he goes to a second and third image, and then stops. He wondered whether the scenario could be a crime since the action was intentional. Ms. Carpeneti responded that the example was pretty theoretical because the state does not prosecute single instances. She opined that it should be against the law for a person to knowingly access photographs with intent to look at pictures that described children engaged in the described acts.

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Representative Gara queried more detail about anime pornography. Ms. Carpeneti responded that the issue was addressed on page 4, lines 10 to 11. The portion was added in the House Judiciary Committee and would prohibit a person accessing or possessing cartoon material depicting children less than 18 years of age. The definition of "appears to include a child" begins on line 30 (page 4) and brings in a definition of obscenity.

Ms. Carpeneti provided background, detailing that the U.S. Supreme Court (Ashcroft) held that anime or cartoon pornography could not be prohibited because it does not involve the use of real people. A later decision amended that to the extent that cartoon pornography can be prohibited if it is obscene. Page 5, lines 3 through 7 contains the Supreme Court language defining obscenity that would comply to make anime or cartoon pornography illegal. She noted that anime pornography is considered by some to be a gateway act to victimizing real children.

Representative Gara asked whether there was law currently making [pornographic] cartoons illegal. Ms. Carpeneti replied that there was not. She said the provision would be a new policy call.

Co-Chair Hawker asked how many states had outlawed anime pornography in the manner proposed in HB 298. Ms. Carpeneti did not know and offered to get more information.

Co-Chair Stoltze queried the history of debate connected with the issue. Ms. Carpeneti replied that she was not

present when the item was discussed in the House Judiciary Committee. She offered to find out.

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Representative Kelly asked for more information regarding how Alaska compares with similar laws in other states. He wondered whether Alaska was breaking new ground.

Representative Fairclough felt Alaska was on the “bleeding edge” statistically, and she wanted to be on the cutting edge of laws holding people accountable. She reported that she had done some research on anime child pornography and found out that it was defined as violent or sexually explicit animated cartoons.

Ms. Carpeneti directed attention to the next sections:

- Sections 9, 10, 11, and 12 amend the crime that prohibits the electronic distribution of indecent material to minors by expanding the offense to prohibit any form of distribution of indecent materials to minors, in addition to electronic distribution. It also adds a new element of the offense that that the state must prove that requires the material to be harmful to a child. Whether the material is harmful to a child is defined in Section 12, that defines that term.

Ms. Carpeneti added that the amendment was added by the House Judiciary Committee and that the Office of Special Prosecutions and Appeals agreed that it is necessary to comport with both federal and state constitutional provisions. The term “harmful to minors” is later defined on page 6, lines 9 through 18, which list three requirements. The material must: appeal to the prurient interest in sex with persons under 16 years of age; lack serious literary, educational, or artistic values; and be patently offensive to prevailing standards in the adult community as a whole with respect to what is reasonable for children under the age of 16. She noted there had been concern about prohibiting sex education materials; the department believed the additional element would comport with constitutional provisions.

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Representative Doogan pointed to Section 12 (the harmful to minors definition) and asked who would distinguish whether the elements are present. Ms. Carpeneti responded that the question was for the jury or the judge.

Representative Doogan asked how the elements are established when someone is charged with the offense. Ms. Carpeneti replied that the police investigating the materials make a determination; if the police believe the materials will violate the law, they would give the evidence to DOL and the department would determine whether to bring charges.

Representative Doogan asked who would be the "reasonable person" determining whether to charge a person. Ms. Carpeneti responded that like any other crime prosecuted by the state the police would investigate, gather evidence, and bring it to DOL. The department would evaluate whether the case could be proven beyond a reasonable doubt. She asserted that a "reasonable persons" standard is used all the time in the law.

Representative Doogan described a possible scenario: A police officer goes to investigate a shooting, gathers the evidence, takes it to a prosecutor who makes a decision to prosecute, and it goes to a jury. He described the decision as a "fact decision." He did not believe the issue before the committee concerned fact questions.

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Representative Doogan questioned the standards by which decisions are made related to subjects such as literary harm. Ms. Carpeneti responded that most investigations and prosecutions do not only involve one person shooting another and facts that can be described by an outside viewer. She emphasized that most crimes in Alaska involve things like "culpable mental state." Prosecutors and investigators must look at all the facts available and determine what happened, what the person was thinking, and what their intent was. Often the standard of a reasonable person in criminal law is that someone believes they needed to exercise self defense. The belief has to be reasonable, and meet the test whether any reasonable person in the same situation would act the same way. The reasonable person standard is not foreign to the state in prosecuting crimes.

Ms. Carpeneti added that Alaska law does not include concepts like serious literary, educational, or political value. The concepts are new to Alaska, but not to other states and federal prosecution of obscenity cases. She listed U.S. Supreme Court decisions that affected the standards.

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Representative Doogan thought the bill had more than one new legal standard. He wanted to understand which were new. Ms. Carpeneti answered that the one being discussed was new because it requires that the material be harmful to minors, and the concept is defined using terms taken from decisions by the U.S. Supreme Court that are new to Alaska.

Representative Fairclough wanted to frame the issue differently; she thought the particular portion of the code was about distribution to a minor. It also adds a new section (d) related to showing something to a child to arouse them; law enforcement would make a determination whether there was intent to arouse using the photographs. Ms. Carpeneti agreed with her description and underlined that the new element will make it harder to prosecute because proof has to be beyond a reasonable doubt that it is harmful by the definition.

Co-Chair Stoltze stated concerns.

Representative Doogan clarified that he did not want to make prosecution either easier or harder; he wanted to understand how to change the law in such a difficult situation.

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Ms. Carpeneti moved on to the next section:

- Section 13 adds the crimes of human trafficking in the first and second degrees, distribution of child pornography, possession of child pornography, and distribution of indecent materials to minors to the crimes that are not eligible for a suspended imposition of sentence.

  Section 13 also includes an amendment that removes “substantially” when describing a crime in another

jurisdiction that may be a predicate conviction that would disallow the use of a suspended imposition of sentence for other offenses. This conforms with other statutes that require that a predicate offense in another jurisdiction be only similar to an offense in Alaska. Examples include AS 12.55.145(a) (presumptive sentencing), AS 11.41.320(a)(5) (third degree assault), and AS 11.41.110(a)(5) (murder in the second degree).

Ms. Carpeneti told the committee that she had never seen a judge give a suspended imposition of sentence for a person convicted of the crimes listed, but she thought it was best to say it was not appropriate.

- Section 14 adds to the conditions of probation that may be imposed on a person convicted of a sex offense. It gives the court discretion to order the person to submit e-mail addresses and other networking addresses to his or her probation officer, who would be required to give this information to the Troopers and to the local law enforcement agency. If the person was convicted of sexual abuse of a minor or an offense related to child pornography, it gives the court discretion to prohibit the person from using the Internet site, communicating with children under 16 years of age, or possessing or using a computer.

Ms. Carpeneti detailed that discretionary probationary terms or conditions of probation may be imposed by a judge in particular cases (page 7); a person convicted of sex offenses may have limits imposed on their ability to use the Internet or other electronic communications. The conditions are set at the discretion of the court and have to be reasonably related to the offense and the offender. Subsection (2) allows the court reasonable discretion to prohibit people convicted of sexual abuse of a minor or child pornography offenses from using the Internet or even possessing or using a computer.

- Section 15 amends the aggravating factor at sentencing that allows the court to increase a sentence above the sentencing range if the defendant knew that the victim was particularly vulnerable. It does this by adding the consumption of alcohol or drugs as factors that might make a victim particularly vulnerable.

- Section 16 adds two new aggravating factors to the sentencing law. First, it allows the court to increase a sentence above the sentencing range for a crime (AS 11.41) committed against a person that the defendant was dating or with whom the defendant has engaged in a sexual relationship. Second, it allows the court to increase the sentence if the defendant is convicted of sexual abuse of a minor or distribution of indecent material to minors if the defendant is 10 years or more older than the victim.

Ms. Carpeneti detailed that Sections 15 and 16 allow three new aggravating factors for sentencing for people who are convicted of certain crimes. The first is found on page 7 and allows aggravation of a sentence if the victim was vulnerable due to the consumption of alcohol or drugs. The state has to prove the factors beyond a reasonable doubt before a court can aggravate a sentence. Another is found on page 8, and concerns a defendant convicted of an AS 11.41 crime (homicide, sexual offenses, and assaults) who had a dating or sexual relationship with the victim. She noted that current law allows an aggravating factor if there is a family relationship; the bill would expand this. The third aggravating factor proposed in the bill that would be new would involve cases of sexual abuse or distribution of child pornography when the defendant is 10 or more years older than the victim.

- Section 17 and 18 add a new provision to sex offender registration law that requires a person present in Alaska, who is convicted of an offense out of state that requires registration in that jurisdiction, to register in Alaska. This requirement would apply even if Alaska does not have a criminal provision similar to the crime in the other state that requires registration there. A person would have to register for 15 years if convicted of only one offense, and for life if convicted for two or more offenses.

Ms. Carpeneti provided examples to illustrate the new provision. Lewd and lascivious acts against a child in California requires that the perpetrator of the offense acted either to gratify him or herself or gratify the victim; Alaska state law does not require proof of the element. In Alaska, it is enough that touching, contact, or penetration occurred. Alaska courts have held that the crime of lewd and lascivious acts against a child are not

similar to a crime in Alaska; a person convicted of the crime who moves to Alaska would be required to register. She noted that Minnesota does not require everyone convicted of rape to register and evaluates every conviction separately. A person may be required to register in Minnesota for breaking and entering if there was intent to commit a rape, and they would have to register in Alaska if they moved to Alaska.

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Co-Chair Hawker had concerns about curbing freedom for something not against the law in Alaska. Ms. Carpeneti explained that lewd and lascivious acts against a child would be against the law in Alaska because it would be sexual abuse of a minor; there is not the element of sexual gratification.

Co-Chair Hawker reiterated concerns about the property crime example. Ms. Carpeneti replied that burglary with intent to commit a rape is a crime in Alaska, but registration would not be required. House Bill 298 would require registration in Alaska if the prosecution was able to prove in Minnesota or another jurisdiction that a person broke and entered with the intent to rape and was required to register in that jurisdiction. She had not heard of any particular sex offense that would give her pause; the elements of the offense are enough different that they are not similar to a crime in Alaska.

Co-Chair Hawker expressed confusion.

Co-Chair Stoltze referred to other things that people could be convicted of in other states that were normal activities in Alaska, including actions related to guns and defense of property. He did not want import other attitudes. Ms. Carpeneti noted previous testimony (in the House Judiciary Committee) that DPS gets over 100 calls each month asking whether a person would have to register as a sex offender because of prior convictions if they moved to Alaska. She asserted that one of the reasons to have the law was so that Alaska was not a place people could go because they did not have to register.

Co-Chair Stoltze reiterated concerns.

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Representative Doogan asked whether there was a comprehensive list of applicable criminal codes from other states. Ms. Carpeneti responded that registration as a sex offender is an obligation, not a crime. She said she would be glad to compile a list of examples.

Representative Fairclough stated that Alaska has one of the highest rates individuals on sex offender lists. She added that there are people looking for places to live where they do not have to comply with registration by moving out of a state that has convicted them. She did not want Alaska to be a place where individuals who have perpetrated a sexual crime against a child could hide.

Representative Fairclough asserted that there are two options proposed in HB 298; one is a 15-year requirement. She repeated concerns.

Co-Chair Stoltze asked how many contacts DPS received.

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Commissioner Masters replied that Ms. Carpeneti had given the number 100. Ms. Carpeneti added that other testimony had reported over 100 contacts.

- Section 19 authorizes the attorney general, in the investigation of online enticement of a minor, unlawful exploitation of a minor, and child pornography crimes, to issue a subpoena to an Internet service provider if there is reasonable cause to believe that the Internet service account has been used in the exploitation or attempted exploitation of children. The subpoena may require the provider to disclose the name, address, telephone connection records, and other information about the account. Other than use in the criminal case related to the subpoenaed materials, the information obtained must remain confidential.

Ms. Carpeneti noted that the new section had been added in the House Judiciary Committee and provided for an administrative subpoena if there is reasonable cause to believe that a particular computer is pandering child pornography. She detailed that the reason the subpoena could be for more than name and address is to limit the

search to a particular user of a computer that has multiple users.

Co-Chair Stoltze reported concerns that had been relayed to his office. He wanted clarification about the whole process. Ms. Carpeneti responded that Alaska courts have determined that there is not a right to privacy related to name and address. Getting the information from an Internet service provider does not violate a constitutional right to have the information. The police will use the information obtained under the administrative subpoena to apply for a search warrant to investigate the case further.

Ms. Carpeneti continued that the provision would be a time saver in terms of identifying a particular computer that there is reasonable cause to believe has pandered child pornography.

Co-Chair Stoltze relayed that he had received emails describing the search as random. Ms. Carpeneti responded that the search was not random, but required reasonable cause.

2:58:57 PM

Co-Chair Hawker questioned making the provision universal so it could be used in the investigation of any felony offense. Ms. Carpeneti replied that the information being sought would be connected with a particular computer owned by a person. Practically speaking, a police officer would not get information in connection with homicides, rapes, assaults, or thefts; that kind of evidence is not kept on computers. The crimes addressed are related to victimizing children and the distribution of child pornography via computer.

Co-Chair Hawker thought the technology was used by people with “extremist” views; he referred to cases where the police had gotten information from a computer. He suggested making the measure universal and not focused on one particular offense. Ms. Carpeneti responded that the challenge with child pornography cases is that the perpetrator is not known. Police officers are investigating cases where child pornography is being pandered via an Internet service provider; there is no name and they do not know who has the computer. Most conventional crimes are different.

Ms. Carpeneti pointed to the next section, the “discovery provision” starting on page 10:

- Section 20: amends Rule 16(b), Alaska Rules of Criminal Procedure, by adding a prohibition of copying or otherwise reproducing child pornography as part of the discovery process in a criminal prosecution. The material must still be available for inspection for the defendant, defense counsel, and any person the defense may seek to qualify as an expert witness at trial. Federal law has a similar provision. 18 U.S.C.A. § 3509(m).

Ms. Carpeneti detailed that the section provides that child pornography cannot be copied as a part of the criminal discovery process. The federal law has the same provision. The material has to be made available to defense counsel and experts that are used, but the material cannot be copied and sent to another party.

3:03:07 PM

Commissioner Masters informed the committee that Sergeant DeGraaf worked in DPS’s Internet Crimes Against Children Task Force and was familiar with investigations related to the issue.

DEREK DEGRAAF, SERGEANT, SUPERVISOR, TECHNICAL CRIMES UNIT, ALASKA BUREAU OF INVESTIGATION, DIVISION OF ALASKA STATE TROOPERS, testified that the three crimes discussed are now conducted for the most part online through the Internet. Child pornography is no longer transmitted through the mail. There is a group of investigators and detectives in Alaska that specifically target individuals that sell, distribute, or trade child pornography (including images and movies) through the Internet.

Mr. DeGraaf described the technology used to find people who use contraband material; the investigators are able to locate the user in Alaska and identify them based on an email address or IP address. Typically, the IP address is like a telephone number for the computer, but it can change each day. Currently, the process requires serving a search warrant to the Internet service provider. The process is lengthy; it takes a couple hours to write a search warrant, which is technical in nature and typically 30 pages in

length. A judge or magistrate then has to be seen before the search warrant can be served; this is only to find out if the IP address belongs to a specific address. Once the information is secured, a second search warrant has to be applied for in order to enter the premises to conduct an investigation.

Mr. DeGraaf reported that the federal system and a dozen states have enacted legislation allowing for issuance of a subpoena to Internet service providers specifically for the crimes being discussed in order to get subscriber records. The FBI or immigration and customs get information such as the person's name, the address of the house, and account information such as when it was started, who pays for the account, a credit card number, and the log showing the IP addresses over a given time.

Mr. DeGraaf informed the committee that state investigators have been able to use the process to identify thousands of people within Alaska that are proactively using file sharing software such as Limewire, FareShare, and other free software available to anybody. The technology is being used to get and distribute child pornography. He noted that the same technology is used to pirate music and movies.

Mr. DeGraff referred to a printout with generic overviews and some of the IP addresses in Alaska being used to file share child pornography (copy on file). He pointed to an image showing hundreds of people near Anchorage that are using the technology to share the images and movies. He included screen captures of Fairbanks, Juneau, and Barrow to give other examples indicating that the problem is both urban and rural. He noted that having the tool would give the department a better way to quantify or qualify all the IP addresses. Currently, the department does not have the time or resources to be able to write hundreds of search warrants to figure out who the people are and whether to target them if they are registered sex offenders.

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Mr. DeGraaf continued that the new technology has created a new problem for the unit; they cannot keep up with the demand. Studies have shown that between 20 percent and 80 percent of people who possess child pornography have sexually abused a child. He stressed that there are children in the state who are being sexually abused. He

emphasized his commitment to the work and the importance of acquiring the tool.

Co-Chair Stoltze asked whether subpoena powers were needed in order to identify the addresses. Mr. DeGraaf responded that the unit has access to a database that collects the IP addresses that have and share the images; the database is national and very comprehensive. He explained that currently (and at any given time) he has ten cases that he could pursue immediately with hundreds or thousands of images that are being shared. He emphasized the difficulty of getting to all of them. He wanted to be able to break the data down so that it was useful, and to be able to prioritize who to target. For example, it would be expedient to have ten names to compare with records and figure out which are sex offenders are and which are in a position of authority over children. He listed the positions of people who had been arrested recently, including doctors, a psychologist, police officers, and lawyers.

Co-Chair Stoltze asked for more information. Mr. DeGraaf replied that they already know the IP addresses and have verified that the address has the images or movies. The tool would enable the process to go much faster and avoid paperwork because the IP address could be quickly translated into a name and address so that a search warrant could be used to search the location.

3:13:02 PM

Representative Doogan queried the difference between the first and second subpoena. Mr. DeGraaf replied that currently investigators must get a search warrant to identify the name and physical address on the IP account. Next the investigator has to verify that the address is a real house before a second search warrant is obtained to investigate. House Bill 298 would change the first step; the first subpoena would not be needed to identify the location.

Representative Doogan summarized that the legislation would give access to the name and address as well as to telephone and banking or payment records. Mr. DeGraaf explained that the primary Internet providers (GCI, ACS, AT&T) have the information listed; all that information can be obtained

with the first search warrant. The subpoena would take the place of the first search warrant to speed up the process.

Representative Kelly directed attention to page 5, lines 6 and 7 of the bill, related to a reasonable person finding the lack of serious literary, artistic, political, or scientific value. He opined that there had been abuse of the standards recently. He asked why the value had to be measured by the listed terms rather than just saying the fact that a child is involved makes it wrong. Ms. Carpeneti responded that the definition only applied to cartoon pornography (page 4, lines 10 and 11); the definition does not apply to current prohibitions of possession of child pornography, because the U.S. Supreme Court has said that cartoon pornography cannot be prohibited unless it is also obscene. She did not think that could be changed.

3:18:37 PM

Representative Fairclough stated that she was not for or against the issues being discussed, but she wanted people to understand the consequence of doing nothing. She looked forward to dialogue about the protection of privacy. She turned to page 9, line 22 (Section 44.23.080, subpoena powers). She asked whether the first step required a 30-page application to a judge to get the name and address of a potential perpetrator. Mr. DeGraaf replied that the current search warrant that investigators have to write is four pages long; the affidavit is 20 to 25 long because it must define terms like “computer Internet” and acronyms. The details have to be explained in order to withstand the rigors of a trial.

Representative Fairclough queried protocols that would be in place to secure the privacy of citizens. She did not want the search for information about a person to be arbitrary. She did not want law enforcement to be able to come up with an address based on knowing the IP address, for whatever reason; the information could aid a stalker, for example. Ms. Carpeneti responded that the bill provides that any information obtained pursuant to a subpoena is confidential and must be destroyed if not used. The information can only be used to obtain a search warrant in order to investigate further.

Representative Fairclough asked whether there would be oversight of the new tool, such as the peer review of

protocol used by nurses. She wanted to committee to know that the tool would be used as intended and not as an invasion of privacy.

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Mr. DeGraaf assured the committee that there are national standards that must be followed by investigators in the Internet Crimes Against Children Task Force. In addition, investigators are specifically trained and licensed in order to conduct investigations to make sure they are obtaining and translating data correctly and appropriately into a search warrant or subpoena. He reported that investigators use peer review to check each other's work.

Ms. Carpeneti added that there would be review at the attorney general's level, as the subpoena is issued at that level. She suggested that the attorney general come back to the legislature in a year and provide a confidential report and overview of the subpoenas issued to be assured that the tool was used sparingly and appropriately.

Representative Fairclough did not want the process used sparingly if thousands of people are using contraband in Alaska. She described [television] programs with police exposing people with child pornography to make an example of them. She pointed to images representing the number of people in Anchorage and said she was disheartened. She wanted a tool to prioritize addressing the issue, but she urged caution to protect the individual rights of the innocent.

3:29:23 PM

JEFFREY MITTMAN, EXECUTIVE DIRECTOR, ALASKA CIVIL LIBERTIES UNION (ACLU) OF ALASKA (via teleconference), referred to a March 19, 2010 letter to the co-chairs (copy on file). He appreciated the committee's understanding of the constitutional concerns involved. With respect to the subpoena power, he clarified that ACLU of Alaska does not take the position that law enforcement should not have the right to obtain the information. They focus on the procedural process (the constitutional guarantees). The bill with the amendment added in JUD suggests that over 200 years of practice of separation of powers should be done away with. Police enforcement would have the opportunity to request records (private financial information, phone

numbers, and other materials) on its own without independent judicial review. He emphasized that the same powers have been abused when they were granted at the federal level (under the Patriot Act); there is evidence that the FBI was using the process to obtain information such as the phone numbers of ex-girlfriends. The lack of independent, judicial oversight could open the situation to abuse.

Mr. Mittman addressed the issue of registration requirements for sex offenders. He stressed that the intention is to protect Alaskans and make appropriate policy judgments as to the best balance for registration and identification. Provisions in HB 298 could involve the state in lengthy litigation because of elements that are currently unconstitutional. He offered to work with the committee on minor revisions.

Representative Gara referred to a concern about Section 20 described in Mr. Mittman's letter. The section would limit the material a defendant can have accessible to them to prepare for trial. He questioned whether the images could be withheld from the defense. Mr. Mittman pointed to page 11 of the CS, lines 5 through 7, and replied that the section states that material is deemed "reasonably available" at a prosecution or law-enforcement facility to allow "ample opportunity for inspection." He stated that the problem was that defense counsel and defense counsel experts would be put in the position of having to do their preparation at the location of the prosecution and to use the prosecution's computer disk. He pointed out that it was conceivable that after forensic work was done by a defense expert, the prosecution could review the disk and determine what was looked at and how much time was spent on each image; this would put the defense at a disadvantage. He acknowledged the importance of maintaining control over the images. He referred to information provided in the letter of an order fashioned by a Washington state court that ensures protections are in place so that the images are not widely available but kept under lock and key and destroyed afterwards.

3:35:42 PM

Representative Gara asked for clarification about the material. Mr. Mittman replied that the issue is that a copy can be made and provided to defense counsel for their use

in their offices with their experts; the problem is that by saying only the original is available and that all work needs to be done at a time, place, and choosing of the prosecution puts the defense at a disadvantage. Essentially, the prosecution has the material and the defense has to ask in order to prepare, which is not constitutionally acceptable.

Representative Fairclough referred to the letter (page 2) saying that the computer source files would require review at length by an expert witness. She asked about whether the hard drives would be accessible, which could result in tampering with physical evidence. She requested additional information about how the material would be accessed. Mr. Mittman replied that ACLU of Alaska is not proposing that it is constitutionally required for the state or prosecution to turn over the original. The letter explains that the Washington state court upheld that a mirror image of the drive was created, enabling the defense to perform the forensic analysis needed. The defense was required to maintain a log of all viewers, return the mirror image afterwards, ensure that all copies are destroyed, and prove to prosecution that copies were destroyed, giving the defense the same access to material as the prosecution and leveling the playing field.

3:39:58 PM

Representative Fairclough asked whether the information could be provided by redacting only the image. Mr. Mittman replied that the issue (raised by other provisions in HB 298) was whether an image was of an actual child or created. The forensic expert would review what would be a key piece of evidence. He stated that unfortunately, the image would have to be carefully reviewed.

DAVID KAZARIAN, BIG LAKE, ALASKA (via teleconference), read from a prepared letter:

> We all want to protect children from sexual abuse; however, we also need to consider all of the children. The section would have the effect of ruining the lives of countless children who now live here or may live here who are being unconstitutionally banished from society for what their parent did decades ago. This state has recognized the retroactive implementation of the sex offender registry is unconstitutional as ruled

in the Alaska Supreme Court in 2008. I am writing you about the effect of proposed HB 298. The bill states that sex offenders and child kidnappers required to register elsewhere should not be able to move to Alaska and avoid registration. The bill would make it mandatory for a registered sex offender or child kidnapper from another state to register in Alaska when the intention is to live in Alaska. This would apply even when Alaska does not have a law that is similar to the crime that the person has committed. Other states have violated the federal state bans on [unclear] law. If Alaska puts through HB 298 with the above paragraph, it would violate both the federal and state constitutions on a number of points. Number one: the right to equal protection. Treating people who move here differently from those who already reside here is a violation of the right to equal protection. Number two: the Alaska Supreme Court ruling in 2008 on [unclear] law. If a person did something 40 years ago, and they have not committed any more crimes, and now have children, the effect of applying these laws ruins the lives of the children. They can't have friends, their parents can't go to sporting events with them, and they have legally not committed any more crimes for 30 or 40 years. Number four: Sex offenders and child kidnappers required to register elsewhere should not be able to move to Alaska to avoid registration. If Alaska law states it is unconstitutional under Alaska law for them to register, then one cannot hold a person who lives in Alaska to the laws and standards of another state, not under any type of [unclear] parole. If they have served out their sentence, then the courts have no power over them. There are other states that have crazy, archaic laws, like Louisiana has a law that oral sex is against the law. If you get caught having oral sex in Louisiana, you are a sex offender. If they move to Alaska, it would not be right to put them on the sex offender registry for a law that is not a law in Alaska. Punishing a person for a crime which they did many decades ago and have not re-offended ruins the lives of the person's whole family, the wife, the children are all banished from society once a person is placed on the registry. Congressman Bobby Scott, in a sworn hearing on the Sex Offender Notification Registration Act, stated on the record that once a person is placed on the registry, basically their life is over. This new HB 298,

including wording about having registering here is not only unconstitutional in many areas, but inhumane, immoral, and just plain wrong. If you truly want to protect children and society and uphold your oath of office to uphold the constitution, you will work hard to protect the children of the families of those who live here and any who move here with a family member who committed a crime decades ago. If that person has not re-offended and has served their time, why would anyone want to violate the constitutional ban to punish the person and his family for the rest of their lives.

Mr. Kazarian urged teaching adults who have children and children how to prevent abuse from happening. He recommending spending money on prevention and education on how to prevent the crimes.

3:48:58 PM

DAVID HOROWITZ, EXECUTIVE DIRECTOR, MEDIA COALITION, NEW YORK CITY (via teleconference), referred to written testimony, "Memorandum in Opposition to Alaska House Bill 298 as Amended" (copy on file). He explained that Media Coalition is a group of trade associations that defend the first amendment rights of publishers, booksellers, librarians, recording, motion picture, and video game producers, and their retailers and consumers in the United States. He reviewed two concerns about HB 298. First, Section 8 refers to material that appears to include a child definition and is tied to Supreme Court cases. The definition contains only two prongs (prurient interest and serious value) of a three-prong test for obscenity; the patently offensive prong is omitted. Media Coalition's second concern was connected with Section 9 (material harmful to minors being distributed to minors); they feel the law is appropriate applied to bookstores or retail stores, but they have concerns when it is applied to the Internet. He stressed the difficulty of distinguishing between a minor and an adult. Somebody distributing on the Internet would have the choice of either limiting speech to what is appropriate for a minor or to hide the speech, which would reduce sales. He referred to cases listed in the memorandum that take up the point. He felt the problem could be solved if the statute in the Internet context was tailored differently.

3:53:26 PM

Representative Fairclough asked for more information about Media Coalition. Mr. Horowitz replied that the coalition has a board of directors made of representatives of member associations, such as government affairs and general councils. He offered to provide the board of directors.

Representative Fairclough requested the names and contact addresses of the coalition. She asked whether the board made a formal resolution to oppose HB 298. Mr. Horowitz answered that the board did not. He stated that the coalition's mission is to monitor bills that they believe are not constitutionally correct and to oppose them where appropriate.

Representative Fairclough asked whether Mr. Horowitz was given free latitude to choose which legislation to oppose without talking to the board of directors. Mr. Horowitz replied that unusual laws would be discussed.

Representative Fairclough queried other legislation that the coalition had opposed. Mr. Horowitz responded that in the Internet context there has been ten or fifteen states, including Vermont, South Carolina, Virginia, New York, New Mexico, and Arizona over a ten-year period. The Alaska measure was the only one in the current legislative season that addresses the issues.

3:56:16 PM

Representative Fairclough wanted to establish the broad position of the organization on similar issues. She asked if he had authority to speak on behalf of the board. Mr. Horowitz responded that he is not an independent spokesman for any of the individual organizations; the charge is to identify where legislation would inhibit mainstream producers and retailers because of constitutional problems.

Representative Fairclough asked what the response would be if she contacted member organizations. Mr. Horowitz replied that each organization would have to speak for itself.

Co-Chair Stoltze noted that public testimony would re-open if needed in the future.

Commissioner Masters stated that DPS believed HB 298 met constitutional challenges.

HJR 48 was HEARD and HELD in Committee for further consideration.

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ADJOURNMENT

The meeting was adjourned at 3:59 PM.