

HOUSE FINANCE COMMITTEE

April 12, 2010

1:45 p.m.

(Continued April 13, 2010, 8:18 AM)

(NOTE: The minutes for the first part of this meeting are found in HFIN 041210 0145 PM. The meeting was recessed overnight and reconvened on April 13, 2010 at 8:18 AM. It is put into two different documents to enable the timestamps to work correctly.)

MEMBERS PRESENT

Representative Mike Hawker, Co-Chair
Representative Bill Stoltze, Co-Chair
Representative Bill Thomas Jr., Vice-Chair
Representative Allan Austerman
Representative Mike Doogan
Representative Anna Fairclough
Representative Neal Foster
Representative Les Gara
Representative Reggie Joule
Representative Mike Kelly
Representative Woodie Salmon

ALSO PRESENT

Sue MacLean, Director, Criminal Division, Department of Law; Kathryn Monfreda, Chief, Criminal Records and Identification, Department of Public Safety; Quinlan Steiner, Public Defender Agency, Department of Administration; Jeffrey Mittman, Executive Director, American Civil Liberties Union of Alaska.

SUMMARY

CSSB 222 (JUD)

SEX OFFENSES; OFFENDER REGIS.; SENTENCING

CSSB 222(JUD) was REPORTED out of Committee with a "do pass" recommendation and with two new indeterminate fiscal notes by Department of Administration and previously published fiscal notes: FN2 (COR), FN4 (LAW), FN5 (CRT), and FN7 (DPS).

[8:18:57 AM](#)

RECONVENED

#sb222

SENATE BILL NO. 222

"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."

[8:19:22 AM](#)

SUE MACLEAN, DIRECTOR, CRIMINAL DIVISION, DEPARTMENT OF LAW explained the changes to the proposed legislation since the last hearing. Section 4, Page 3 creates a Class A misdemeanor crime of harassment. Section 17, Page 8 now adds to the definition of sex offender "a person who has been convicted two or more times of the Class A misdemeanor crime of harassment which involves touching a person's genitals, buttocks, or female breast." Section 17 has been modified to state that out of state sex offenders must register if the crime that they were convicted of is similar to a sex offense in Alaska.

Ms. Maclean continued with Section 6, Page 4 where the definition "child pornography including anime characters" has been removed. She continued with Section 8, Page 5 where the companion definition "appears to depict a child" has been removed.

[8:23:13 AM](#)

Representative Gara asked about Section 6 and the crime of creating a depiction of an actual child. Ms. MacLean provided an example of the use of Photoshop to place the face of a child onto a depiction of the prohibited conduct. The United States Supreme Court heard a similar case and held that the harm was to the child whose photograph was used.

Ms. Maclean continued with Section 18, Page 9, Line 1 which is a new section added in response to previous hearings in

which the other body concluded that the state receives inadequate statistics. This section requires all law enforcement agencies to report sex offenses to the Department of Public Safety (DPS). This new section adds a requirement stating that if law enforcement fails to report data regarding sex offenses, grants will be withheld. She concluded with Section 19, Page 9, Lines 24-26 which gives subpoena power to the Attorney General in cases involving exploitation of children where the internet is concerned. The section has been narrowed stating that subpoenas can be issued for the account holder's name, address, and physical location associated with the account.

[8:26:39 AM](#)

Representative Gara discussed crime involving contact through clothing. He noted that the action is already defined as a crime in a separate part of the statute. Ms. MacLean explained that the section refers to a fleeting contact without consent; the crime is classified as harassment. This section raises the crime to a Class A misdemeanor level. Representative Gara expressed a lingering concern that the mentioned crime would never be prosecuted as a "fleeting" touch.

Ms. MacLean ascertained that she may have minimized the crime in her explanation. She explained a case where a person approached a male in a bar and grabbed his genitals without permission. The litigation was that the act does not comprise sexual assault in the second degree, but is instead classified as harassment.

Representative Gara surmised that touch through clothing is a crime, but as classified would be punished with a four year minimum sentence. Ms. MacLean repeated that the law reads "directly or through clothing." The common thread is the lack of consent. Representative Gara opined that the punishment is greater than the crime.

[8:29:46 AM](#)

Representative Foster inquired about Page 9, Lines 5-8 regarding the reporting requirement and withholding of grant funds. He asked if a sex crime is committed in a village would the Village Public Safety Officer (VPSO) or state trooper take responsibility for the reporting requirement. Ms. MacLean replied that nearly all sex crimes

are felonies ultimately handled by the troopers. She assumed that the trooper would create the report for DPS.

Representative Fairclough asked if "extreme youth" as stated on Page 7, Section 15 is defined outside of statute. Ms. MacLean believed that extreme youth referred to children under the age of 5.

Representative Fairclough referred to Page 2, and shared a story about a case where a sex offender was exempt from reporting requirements while travelling. She understood that the mandate to report does not exist if a sex offender is traveling. Ms. MacLean deflected the question to DPS. She thought that a lengthy change of physical location must require that a sex offender register.

Representative Fairclough stated that the requirement or limitations on days are not included in the bill. She noted that the sex offender makes the decision to report a move or lengthy vacation.

[8:34:36 AM](#)

KATHRYN MONFREDA, CHIEF, CRIMINAL RECORDS AND IDENTIFICATION, DEPARTMENT OF PUBLIC SAFETY (via teleconference) commented that registration requirements state that the sex offender must register if residency was changed for 30 consecutive days or when it is determined that the sex offender intends to remain in the new location.

Representative Fairclough asked about DPS prosecuting a regulation that is not state statute. Ms. Monfreda recalled that the case mentioned a vacationing sex offender. She stated that the law does not specify exactly when notification should occur during vacation.

Representative Fairclough stated that she was seeking feedback from the committee. Vice-Chair Thomas suggested that Representative Fairclough work with DPS on the issue.

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Vice-Chair Thomas opened public testimony.

QUINLAN STEINER, PUBLIC DEFENDER AGENCY, DEPARTMENT OF ADMINISTRATION referred to Page 10, Line 18. The section

amended the court rules prohibiting courts from ordering copies of evidence in child pornography cases. The change results in the requirement that the law enforcement agency reviews the material. The anticipated problem comes when the material requires review by a forensic expert. The state would fly the expert to Alaska creating a cost issue of approximately \$20,000-\$30,000 per case. The fiscal note has been changed to indeterminate from zero.

Representative Kelly asked for the recommendation from Mr. Steiner regarding a solution to the great expense. Mr. Steiner remarked that without change to the statute as written, there could be no solution.

[8:41:19 AM](#)

Representative Gara asked if the issue included having copies sent to DPS. Mr. Steiner informed that the statute prohibits the court from ordering a copy that is normally sent out of state. A court order and agreement are typically formed regarding the copying of this type of material. Representative Gara understood that one concern regarded selling of the material. Mr. Steiner stated that he was unaware of any instances where a defense attorney lost control of the discovery. Representative Gara speculated that that the victim was further victimized by the copying of the material.

[8:42:37 AM](#)

Representative Kelly expressed concern about both justice and dollars.

Representative Fairclough commented that children can experience re-victimization knowing that the material is viewed by others.

Mr. Steiner expressed concern about Page 10, Line 31 and the legislative statement concerning the culpable mental state of failing to register as a sex offender. There is a requirement to register but the mens rea that relates to that moment is eliminated.

[8:45:21 AM](#)

Representative Gara asked about Section 19 and the Attorney General's permission to obtain a subpoena without a court order. He asked about other circumstances that endow the

Attorney General with similar power. Mr. Steiner replied that he was unaware of other circumstances endowing the Attorney General with such power. Representative Gara asked about any policy concerns regarding the fairness of the decision. Mr. Steiner responded that he had no position on policy but expressed concern that the subpoena is issued correctly. He stated that there is a reasonable cause requirement for issuing the subpoena, which ultimately leads to a warrant.

Representative Gara clarified that the warrant would be accepted after the evidence was obtained.

[8:47:31 AM](#)

Mr. Steiner commented on Page 7, Line 27-29, which creates an aggravator for crimes concerning dating or sexual relationships. Dating relationship might lead to litigation, as it is undefined. Dating might mean different things in different communities, which he expected would engender a fair amount of litigation.

[8:49:02 AM](#)

Ms. MacLean remarked that one concern about the first version of bill applied to exploitation of children and has since been changed to include the phrase "or defined as child pornography under federal law." She explained that the state does not prosecute cases under federal law. She supposed that difficulty might occur if federal law varied from state law in the definition of child pornography. The state can only prosecute child pornography as defined by our law. She did not expect a great increase in the number of cases posed by the change in statute. She pointed out a rule change at the end of bill. This rule change tracks federal law, which notes that the copying of child pornography can lead to re-victimization, but the main issue is redistribution of the material. The concern regards the offering of materials to the defense attorney. The DOL would provide that the material is viewed at a law enforcement agency and the DOL must be present.

[8:52:42 AM](#)

JEFFREY MITTMAN, EXECUTIVE DIRECTOR, AMERICAN CIVIL LIBERTIES UNION OF ALASKA (via teleconference) addressed concerns on Page 4, Line 2-17, Section 6 and 7 regarding the crime of possession of child pornography. If the

section is compared to Page 5, Section 12 which defines "harmful to minor" takes away first amendment concerns in the section. The Supreme Court found that obscene material lies outside the ambit of the first amendment. The standard is that the material has no artistic value and offends committee interests. He provided an example. He recommended that additional language be added clarifying that the section applies to obscene material.

Mr. Mittman continued with Page 9, Line 14, Section 19 and subpoena power, which is generally used for administrative matters to obtain records. He pointed out that the power is generally not used for criminal investigations. He provided written examples to the committee with the United State's Department of Justice reviewing these powers at the federal level and finding that they were abused. The American Civil Liberties Union (ACLU) has not heard testimony regarding reasons the judge is unable to review the subpoenas. He provided an example of an affidavit. He recommended that the bill be amended to include an annual review to determine how the power is used.

Mr. Mittman continued with Page 10, Section 20. He explained that the court in Washington made it clear that the defense council is responsible for any copies made. He advised that the bill state the court shall order that defense council is responsible for the copies. He concluded with concerns on Section 21 and the elimination of "any mental state whatsoever." He opined that use of "the criminally negligent mental state" is a more constitutionally appropriate standard than simple knowing.

[8:58:48 AM](#)

Ms. Maclean discussed the court ordering the defense to have copies of the actual images of child pornography. She provided an example in which defense attorneys accidentally left behind huge posters of the victim's naked body, without any intention to offend. The section is not designed to gain an advantage, but instead to deal with the fact that giving child pornography to another person constitutes redistribution.

[9:00:37 AM](#)

Representative Doogan asked if the provision prevails will the department support the funding to accomplish the task

of allowing experts to analyze the material. He asked if the department supports legislative request to cover the costs.

Ms. MacLean informed that the law reference was included, which adds more cases to the agencies caseload regarding child pornography. She realized that the public defender agency is funded to supply experts when needed.

Representative Doogan stressed that he simply wanted to know whether the department supports the cost of either analyzing the material or sending it away for analysis. Ms. MacLean responded that if public defenders require an expert DOL will not argue the point. The DOL will not pay for the public defender's experts.

Representative Doogan asked the department's position with future finance committees when added costs for expert reviews come before the legislature. Ms. MacLean responded that DOL will review the fiscal notes presented and note whether the proposed spending comports with statistics. If the request comports, DOL will be supportive.

[9:04:54 AM](#)

Vice-Chair Thomas clarified that the public defender's budget is not under DOL, but instead under the Department of Administration (DOA) for a supplemental budget in the event of cost increases.

Representative Salmon expressed concerns regarding Sections 6, 7, and 8 regarding possession of material. He asked to know the definition of possession. Ms. Maclean responded that the law adds accessing a computer with intent to view child pornography. The state must therefore prove that the viewing was more than accidental.

Representative Salmon asked if the material was sent to a person via the computer would it be defined as possession. Ms. Maclean responded that possession is the knowing that the material is on the computer.

Representative Salmon clarified that a person must open the email message and view the material.

[9:07:22 AM](#)

Representative Joule recalled certain computer systems that require a message to be viewed prior to deletion. Ms. Maclean explained the difference with possession involves downloading and keeping the material or simply downloading it.

Representative Salmon described potential scenarios in which a person may open a message on a handheld mobile phone to quiet the phone in public without carefully viewing the message. Ms. MacLean recalled a court case in which a person viewed a site without downloading information. She elucidated that repeated access to a site proves the intent to view.

[9:09:33 AM](#)

Representative Fairclough pointed out Section 3, Page 2, regarding the language barrier issue for failure to register as a sexual offender.

Ms. Maclean stated that several state agencies have subpoena power. The Attorney General would not issue a subpoena for any cause other than the items listed. The purpose is to deduce the computer's owner. She explained that the Commissioners of Labor, Health and Social Services, and Revenue have subpoena power. The Attorney General has subpoena power for unfair trade practices or consumer protection and the Alaska Police Standards Council also has subpoena power. Failure to register as a sex offender has a knowing mental state that involves realizing that registration is mandatory. The state must disprove the reasons that the person did not register, which is an impossible burden.

[9:13:17 AM](#)

Representative Foster revisited Page 10, Section 20 regarding the duplication of material. He noticed the restriction on the availability of certain material. He asked if the section restricts the defendant's attorney.

Ms. Maclean informed that the section applies to court procedures where a defense attorney and defendant are in place when the rules come into play.

Representative Foster asked if the section applies to all involved in the trial. Ms. Maclean expounded that DOL's

preference is to view the evidence at the police station, but otherwise no person can duplicate the material.

Representative Foster understood that the danger of duplication includes the possibility of multiple copies seen by others leading to re-victimization. He asked if the material was sent away for expert analysis, would others view the material. Ms. MacLean believed that the section tracks federal law, which decrees that the distribution of the child pornography must stop.

[9:16:29 AM](#)

Representative Fairclough discussed the addition of a clause describing art. Ms. MacLean explained that the section "harmful to minors" was added with respect to the crime of distribution of pornography to children. The section initially stated "electronic distribution of pornography to children," but is changed in the bill to "any distribution of pornography to children." Because the section encompasses pornography not limited to child pornography, the state must define the type of pornography specified. The definition is found in the section "harmful to minors." Section 6 refers to the definition of child pornography. This describes the conduct regarded as child pornography. She read the statute.

Representative Fairclough directed attention to Section 19, which insists on an annual review to allow the legislature information about the use of the subpoena power. Doubt about the process comes to the court in the form of a motion to suppress evidence. If there is a problem with the use of the subpoena power, that will be revealed.

[9:20:00 AM](#)

Vice-Chair Thomas closed public testimony.

Co-Chair Hawker spoke to the fiscal notes. He mentioned one indeterminate note from the public defender agency, one indeterminate note from the public advocacy agency, and one position identified by DPS for a total of \$123,500 in additional expenses related to record keeping. He mentioned the Department of Corrections (DOC) and the fiscal note for \$200 thousand per year to incarcerate those found guilty. He mentioned zero fiscal notes from DOL and zero fiscal notes from the Court System.

Representative Fairclough informed about a national reporting system that she opined would be helpful.

Representative Fairclough MOVED to report CSSB 222(JUD) out of Committee with individual recommendations and the accompanying fiscal notes.

CSSB 222(JUD) was REPORTED out of Committee with a "do pass" recommendation and with two new indeterminate fiscal notes by Department of Administration and previously published fiscal notes: FN2 (COR), FN4 (LAW), FN5 (CRT), and FN7 (DPS).

ADJOURNMENT

The meeting was adjourned at 9:23 AM.