

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

February 7, 2011

1:02 p.m.

MEMBERS PRESENT

Representative Carl Gatto, Chair
Representative Steve Thompson, Vice Chair
Representative Wes Keller
Representative Bob Lynn
Representative Lance Pruitt
Representative Max Gruenberg
Representative Lindsey Holmes

MEMBERS ABSENT

Representative Mike Chenault (alternate)

COMMITTEE CALENDAR

HOUSE BILL NO. 127

"An Act relating to the crimes of stalking, online enticement of a minor, unlawful exploitation of a minor, endangering the welfare of a child, sending an explicit image of a minor, harassment, distribution of indecent material to minors, and misconduct involving confidential information; relating to probation; and providing for an effective date."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 127

SHORT TITLE: CRIMES INVOLVING MINORS/STALKING/INFO

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

01/26/11	(H)	READ THE FIRST TIME - REFERRALS
01/26/11	(H)	JUD, FIN
02/07/11	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

JOHN J. BURNS, Acting Attorney General
Department of Law (DOL)
Juneau, Alaska

POSITION STATEMENT: Introduced HB 127 on behalf of the administration.

ANNE CARPENETI, Assistant Attorney General
Legal Services Section
Criminal Division
Department of Law (DOL)
Juneau, Alaska

POSITION STATEMENT: Explained the provisions of HB 127 and responded to questions.

DEREK DeGRAAF, Sergeant, Supervisor
Technical Crimes Unit (TCU)
Alaska Bureau of Investigation (ABI)
Division of Alaska State Troopers
Department of Public Safety (DPS)
Anchorage, Alaska

POSITION STATEMENT: Responded to questions during discussion of HB 127.

ACTION NARRATIVE

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CHAIR CARL GATTO called the House Judiciary Standing Committee meeting to order at 1:02 p.m. Representatives Gatto, Pruitt, Thompson, Holmes, and Keller were present at the call to order. Representatives Gruenberg and Lynn arrived as the meeting was in progress.

HB 127 - CRIMES INVOLVING MINORS/STALKING/INFO

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CHAIR GATTO announced that the only order of business would be HOUSE BILL NO. 127, "An Act relating to the crimes of stalking, online enticement of a minor, unlawful exploitation of a minor, endangering the welfare of a child, sending an explicit image of a minor, harassment, distribution of indecent material to minors, and misconduct involving confidential information; relating to probation; and providing for an effective date."

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JOHN J. BURNS, Acting Attorney General, Department of Law (DOL) - noting that children in Alaska are sexually abused six times more often than the national average and that women in Alaska

are raped two and one-half times more often than the national average - explained that HB 127 [primarily] addresses [sexual] exploitation of a minor crimes and stalking crimes. House Bill 127 expands the crime of [stalking in the second degree] by amending the definition of the term, "nonconsensual contact" to include the use of a global positioning device to follow or monitor a victim, or the installation or attempted installation of a device that observes, records, or photographs events in the home, workplace, or vehicle of a victim, or on a victim's personal telephone or computer; this proposed change reflects that these types of technology are being used to commit [stalking] crimes. House Bill 127 would also make it a crime to publish or distribute a sexually explicit image of a minor; and make it a crime to, without legal authority or consent, knowingly obtain confidential information about another person. In conclusion, he said that the objective of HB 127 is consistent with efforts to eradicate sexual assault and domestic violence (DV) [in Alaska].

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ANNE CARPENETI, Assistant Attorney General, Legal Services Section, Criminal Division, Department of Law (DOL), referring to the sectional analysis of HB 127 included in members' packets, concurred that Section 1 would expand the definition of the term, "nonconsensual contact" for purposes of Alaska's stalking statute. A person commits the crime of stalking if he/she engages in a course of conduct that recklessly places another person in fear of death or physical injury, and the term, "course of conduct" is defined as repeated acts of nonconsensual contact with the victim. Section 1 is proposing to add to AS 11.41.270(b)(3) [two new subparagraphs]:

(H) following or monitoring that person with a global positioning device or similar technological means;

(I) using, installing, or attempting to use or install a device for observing, recording, or photographing events occurring in the residence, vehicle, or workplace of that person, or on the personal telephone or computer of that person;

MS. CARPENETI then explained that Section 2 is proposing to add to AS 11.41.270(b) a definition of the term, "device" in order to clarify that that term includes software. In response to questions, she indicated that she would research whether proposed AS 11.41.270(b)(3)(I) would also include software that

enables a perpetrator to track a victim's computer keystrokes; assured the committee that [Sections 1 and 2] pertain to the crime of stalking, not to parents monitoring what their minor children are doing on the computer; and explained that for drafting purposes, the phrase "of that person" - as used in proposed AS 11.41.270(b)(3)(1) - is used when prohibiting one person from behaving in a particular way in relation to another person.

REPRESENTATIVE HOLMES questioned whether proposed AS 11.41.270(b)(3)(I) would apply in situations where the computer, residence, or vehicle is owned by someone other than the person being stalked.

MS. CARPENETI said she considers that it would apply but acknowledged that it wouldn't hurt to clarify that issue in the bill.

REPRESENTATIVE GRUENBERG relayed that he would be providing the DOL with a list of questions in writing.

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MS. CARPENETI went on to explain that Section 3 would raise the penalty for the crime of online enticement of a minor, from a class C felony to a class B felony, and that Section 4 would raise the penalty for that same crime when committed by someone [already] required to register as a sex offender or child kidnapper, from a class B felony to a class A felony. She added:

This has significant impact on the potential penalty that a person may be sentenced to who was convicted of these crimes, because the bill, also, in Section 12, adds these crimes to those sex offenses in Title 12 ... that are given elevated sentences, and that's found in AS 12.55.125(i), which is a particular section just for sex offenses.

MS. CARPENETI surmised that [Section 12] is merely correcting an oversight, that the crimes of online enticement of a minor should be included in that sentencing statute. Sections 3 and 4 propose significant changes to the penalties for such crimes, which are seriously harmful to children, constitute classic grooming behavior, are seriously predatory, lead to even more serious offenses against children, and thus warrant the proposed increase in penalties. In response to questions and comments,

she agreed to research how Alaska compares to other states, and what the new [presumptive] sentencing ranges would be; ventured that Alaska is behind the federal government in addressing this issue; and offered her understanding that in any given year, the DOL doesn't prosecute very many people for online enticement of a minor crimes.

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MS. CARPENETI then explained that Section 5 would change the penalty for the crime of unlawful exploitation of a minor - which occurs during the making of child pornography - such that all offenders would be subject to a class A felony. Under current law, only repeat offenders are subject to a class A felony, and first-time offenders are subject to only a class B felony. This conduct is really serious, she opined, and thus it's entirely justified for all such offenses to be class A felonies. She noted, though, that the Division of Juvenile Justice (DJJ) has expressed interest in removing this particular offense from the automatic-waiver-into-adult-court provisions located in Title 47, and so the DOL has prepared an amendment to that effect, agreeing with the DJJ on this issue. In response to comments, she assured the committee that the making of child pornography is not protected by the First Amendment.

MS. CARPENETI explained that Section 6 addresses the crime of endangering the welfare of a child in the first degree; specifically, Section 6 would add those required to register as a child kidnapper to AS 11.51.100(a)(2), the list of those people with whom a person may not leave a child. Existing AS 11.51.100(a)(2) already includes those required to register as a sex offender, and so Section 6 is merely cleaning up that provision. In response to a question, she noted that this provision would not - and does not now - apply to those who are a parent, guardian, or lawful custodian of the child.

REPRESENTATIVE KELLER asked why this provision would only apply in situations where the child is under the age of 16.

MS. CARPENETI surmised that it's because 16 is the age of consent in Alaska. In response to other questions, she relayed that the penalty for the crime of endangering the welfare of a child is dependent upon the facts of the particular case, such as [where and with whom the child was left and] what harm was done to the child; that the DOL has attempted to make the crimes/penalties listed in Title 11 consistent with each other, though there may still be some discrepancies; that depending on

the facts of the particular case, the DOL might be able to prosecute a person for a crime other than that of endangering the welfare of a child in the first degree; that the DOL doesn't feel that any other changes to AS 11.51.100 are warranted - again, Section 6 is intended as a cleanup provision; that the DOL doesn't consider AS 11.51.100 to be too broad, particularly given that the DOL retains prosecutorial discretion; and that whether someone would be prosecuted under AS 11.51.100 for leaving a child in a library would depend on the specific facts of the case.

REPRESENTATIVE GRUENBERG offered his belief that existing AS 11.51.100(a)(2)(B)-(C) warrants revision to address those who were charged a long time ago and those whose charges were later dismissed.

MS. CARPENETI agreed to research that issue further and perhaps provide a clarifying amendment regarding [those whose charges were dismissed].

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MS. CARPENETI then explained that Section 7 - which would add a new crime under proposed AS 11.61.116 - addresses a concern that's come up in recent years regarding the electronic sending of explicit images of minors under the age of 16; specifically, Section 7 would make it a crime to publish or distribute an electronic or printed photograph, picture, or film that depicts the genitals, anus, or female breast of a minor under the age of 16. However, Section 7 would not apply in situations involving the sending of lewd images of children [under the age of 16], since such child pornography is already covered under AS 11.41.455 - unlawful exploitation of a minor. This is a difficult issue to address, she observed, because the goal would be to just have a law that applies in situations where sexual predators are using explicit images in a way that further abuses their victims, but not in situations where children have foolishly sent explicit images of themselves to their boyfriend/girlfriend.

MS. CARPENETI relayed that Section 7's proposed language attempts to reach a balance by prohibiting the sending of an explicit image of a minor without the consent of the minor's parent, but not the sending by a minor of his/her own explicit image. Nothing in this provision would allow a child to consent to the sending of his/her explicit image by someone else, since in Alaska, a minor under the age of 16 cannot give consent; a

child under the age of 16 is not capable of making a mature decision about his/her explicit image that may end up on the Internet for the rest of his/her life. The penalty provided for in Section 7, therefore, is based on the harm that could result from the transmission of such images; it would be a class B misdemeanor [if the explicit image was sent to one or two other people, a class A misdemeanor if it was sent to three or more other people,] and a class C felony if it was [posted] on the Internet.

CHAIR GATTO noted that Section 7 uses the phrase, "electronic or printed photograph, picture, or film", and asked whether these terms were duplicative.

MS. CARPENETI explained that although that might be the case, that language was taken from the unlawful exploitation of a minor statute, and has the added benefit of having already been interpreted by the courts, and of already having been defined in other statutes. In response to comments and further questions, she assured the committee that Section 7 would not apply to the sending of text - regardless of how graphic - adding that it would be very difficult to draft statutory language defining what, exactly, would be prohibited without also raising First Amendment concerns. Again, Section 7 is limited to the sending of explicit images of children under the age of 16; such images are not constitutionally protected.

REPRESENTATIVE HOLMES, referring to the term, "female breast" as used in Section 7, said she would not want this provision to apply in situations where a person sends around pictures of a kids' birthday party, for example, that include a female baby/toddler without a shirt on, or pictures that include a teenage girl in a low-cut top. She asked how that term would be interpreted; for example, at what age would a female child be considered to have breasts, and how much of the female breast must be showing in the image in order for Section 7 to apply.

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MS. CARPENETI indicated that Section 7's exception for the sending of explicit images with the child's parent [or legal guardian's] consent might address situations such as in the kids' birthday party example, and relayed that although the statutes don't further define the term, "female breast", there have been some court decisions on the matter which she would provide to the committee. In response to another question, she said that Section 7 would not apply to an image of a girl in a

wet top because, although it might be revealing, the girl would still be clothed. With regard to what culpable mental state would be required under Section 7, she explained that the DOL would have to prove that a person knowingly distributed the image with reckless disregard that it was of a minor under 16 years of age.

MS. CARPENETI, in response to further questions, said she is not aware of any federal-supremacy, treaty, interstate-commerce, or international-commerce issues raised by Section 7, and posited that as a practical matter, there probably wouldn't be, particularly given that Alaska's courts have already held, and Alaska's statutes already provide, that if a person's acts occurring outside the state cause harm to a victim in the state, then the State of Alaska has jurisdiction over the person and could prosecute him/her. [Section 11 of HB 127] merely clarifies that point [with regard to the crimes outlined in proposed AS 11.41.452 - online enticement of a minor - and proposed AS 11.61.116 - sending an explicit image of a minor], though it won't ensure that the perpetrator can be found or that it would be practical to prosecute him/her, but it does allow for prosecution by the state. Additionally, if there are similar crimes under federal law, then both jurisdictions could prosecute the person for the offense.

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MS. CARPENETI went on to explain that Section 8 would make a conforming change to AS 11.61.120(a)(6) to clarify that behavior constituting a crime under Section 7's proposed AS 11.61.116 is different than behavior constituting a crime under AS 11.61.120 - harassment in the second degree. Section 9 would amend the statute pertaining to the crime of distribution of indecent materials to minors - AS 11.61.128 - to clarify that the person distributing the material must know that it depicts the prohibited conduct, and to clarify that if the minor to whom the material was sent is under 16 years of age, that the person was reckless with regard to that fact. Section 9's proposed changes essentially spell out the culpable mental state required for the crime of distribution of indecent materials to minors, and are intended to address issues raised in federal court in American Booksellers Foundation for Free Expression (ABFFE) v. Sullivan [now known as ABFFE v. Burns], and the DOL is expecting that [the plaintiffs] are going to be suggesting further changes to AS 11.61.128, which the DOL believes is constitutional as is.

MS. CARPENETI indicated that Section 10 would create two new misdemeanor crimes: proposed AS 11.76.113 - misconduct involving confidential information in the first degree, a class A misdemeanor; and proposed AS 11.76.115 - misconduct involving confidential information in the second degree, a class B misdemeanor. A person would commit the second degree offense if he/she knowingly obtains confidential information about another person without either the legal authority to do so or the consent of the other person, and a person would commit the first degree offense if he/she commits the second degree offense with the intent to use that information to commit a crime, [or to obtain a benefit he/she is not entitled to, or to injure another person, or to deprive another person of a benefit]. [Proposed AS 11.76.115(b) defines the term, "confidential information" as including] information that has been classified confidential by law - such as information about minors, tax information, information dealing with trade secrets, and medical information - and information encoded on an access device, [on an identification (ID) card issued under AS 18.65.310,] or on a driver's license. She mentioned that new technology has enabled people to access the information encoded on various access devices, ID cards, and licenses and then use that information to commit property crimes.

REPRESENTATIVE GRUENBERG noted that language on page 5, line 25, contains a typographical error in that the word "if" should instead be the word "of" in proposed AS 11.76.115(a).

MS. CARPENETI concurred. In response to comments, she noted that sometimes businesses will ask for a customer's driver's license for no apparent reason, and then run it through a device and obtain the information encoded on it, and she opined that businesses shouldn't be doing that unless they first obtain the customer's consent. In response to a question, she shared her belief that HB 127 doesn't violate the single subject rule.

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MS. CARPENETI again explained that Section 11 clarifies that the State of Alaska would have jurisdiction to prosecute people who aren't in Alaska but who commit the crime of online enticement of a minor, or the crime of sending an explicit image of a minor, in situations where the minor was in Alaska when the offense took place. In response to questions, she reiterated that when the state and federal government have similar crimes, then both jurisdictions could choose to prosecute the person for the offense, depending on the circumstances, though it may not

be practical to do so or possible to find the perpetrator; and relayed that in terms of jurisdiction over criminal matters, a lot of Alaska's criminal statutes are driven by policy, not necessarily by the constitution.

REPRESENTATIVE GRUENBERG questioned why no other crimes were included in Section 11.

MS. CARPENETI indicated that although the DOL definitely doesn't want to limit any jurisdiction that Alaska may have over any Internet crimes, it felt that it was important to clarify the issue for those two specific crimes. Section 11, though, also states, "This jurisdiction is in addition to any other jurisdictional basis expressed or implied in law".

REPRESENTATIVE GRUENBERG indicated interest in expanding Section 11 such that it would also address distribution crimes and conspiracy crimes committed against minors, and interest in expanding the conspiracy statutes such that they would address some of the crimes against minors outlined in the bill.

REPRESENTATIVE LYNN expressed interest in adding a provision to HB 127 that would address situations in which false caller ID is used in the commission of a crime against a minor.

MS. CARPENETI agreed to research those issues further.

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MS. CARPENETI explained that Section 12 would change the sentencing provisions in Title 12 to reflect the bill's proposed changes [via Sections 3, 4, and 5] to the penalties for the crimes of unlawful exploitation of a minor and online enticement of a minor. Section 13 would clarify for the courts that the commissioner of the Department of Corrections (DOC) may, but is not required to, provide active supervision to persons placed on probation for certain misdemeanor offenses; currently, active supervision is not generally provided for misdemeanor offenders. In response to questions and comments, she indicated that Section 13 would address situations involving the DOC's pilot Probationer Accountability with Certain Enforcement (PACE) program; and clarified that under current law, the DOC cannot provide active supervision for an offender unless he/she has been placed on probation, that the judge is the only one who can place an offender on probation, and that Section 13, regardless that it is repealing and reenacting AS 33.05.020(a), wouldn't change that.

REPRESENTATIVE GRUENBERG, referring to Section 15, asked why July 1, 2011, was chosen as the effective date.

MS. CARPENETI relayed that when crafting criminal laws, the DOL tries to provide a specific effective date in order to give those who must deal with the new laws time to become familiar with them, and so generally chooses July 1 since that's a reasonable amount of time after the legislative session has ended for the DOL to get the word out. Without a specific effective date, it can be confusing for law enforcement to keep track of when particular laws go into effect.

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DEREK DeGRAAF, Sergeant, Supervisor, Technical Crimes Unit (TCU), Alaska Bureau of Investigation (ABI), Division of Alaska State Troopers, Department of Public Safety (DPS), said that just in the past year, he has seen examples of all the crimes outlined in the bill occurring throughout Alaska. Some of the crimes have occurred in rural areas and others have occurred in urban areas. Because of the technical nature of some of these crimes, the TCU has statewide jurisdiction and thus can supplement local law enforcement investigations into such crimes. On the issue of devices that can track a victim's keystrokes, he relayed that [the TCU] believes that the language proposed in the bill is sufficient to address such devices, whether they are software devices or hardware devices. In response to questions, he surmised that in rural communities, it could well be that VPSOs would be the first responders to the crimes outlined in the bill, and then the TCU would be contacted, and that as the VPSO program is expanded, the more success there will be in reporting, identifying, and investigating such crimes.

CHAIR GATTO surmised that more reporting will lead to fewer offenses occurring.

MR. DeGRAAF, in response to a question, indicated that the changes proposed via Section 7 of HB 127 fall in line with laws in other states, and that over the past couple of years, law enforcement offices in Alaska have been receiving many reports of people - often minors - sending explicit images of other minors. He opined that Section 7's proposed language strikes a fair balance between those who engage in such activity with bad intentions and those who do so as part of a joke. In response to comments and another question, he pointed out that in many of

the cases he is familiar with, although the activity may have started out as part of a joke, it quickly progressed beyond that and became very harmful to the minors involved. Currently, [without passage of HB 127] not much can be done in such cases because there is no criminal statute in place addressing this behavior.

CHAIR GATTO expressed an interest in receiving suggestions for statutory changes that could further assist law enforcement in protecting Alaska's children. In conclusion, he announced that HB 127 would be held over.

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ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:31 p.m.