

HOUSE FINANCE COMMITTEE  
May 12, 2022  
9:38 a.m.

9:38:05 AM

CALL TO ORDER

Co-Chair Merrick called the House Finance Committee meeting to order at 9:38 a.m.

MEMBERS PRESENT

Representative Neal Foster, Co-Chair  
Representative Kelly Merrick, Co-Chair  
Representative Dan Ortiz, Vice-Chair  
Representative Ben Carpenter  
Representative DeLena Johnson  
Representative Andy Josephson  
Representative Bart LeBon  
Representative Sara Rasmussen  
Representative Steve Thompson  
Representative Adam Wool

MEMBERS ABSENT

Representative Bryce Edgmon

ALSO PRESENT

Representative Geran Tarr, Sponsor; John Skidmore, Deputy Attorney General, Department of Law; Brenda Stanfill, Executive Director, Alaska Network on Domestic Violence and Sexual Assault; Representative Matt Claman; Representative Kevin McCabe; Representative Mike Cronk; Representative Laddie Shaw; Representative David Nelson.

SUMMARY

HB 5           SEXUAL ASSAULT; DEF. OF "CONSENT"

HB 5 was HEARD and HELD in committee for further consideration.

Co-Chair Merrick reviewed the agenda for the meeting. She recognized that Representative Matt Claman and Representative Geran Tarr were in attendance.

#hb5

HOUSE BILL NO. 5

"An Act relating to sexual abuse of a minor; relating to sexual assault; relating to the code of military justice; relating to consent; relating to the testing of sexual assault examination kits; and providing for an effective date."

[9:38:40 AM](#)

Co-Chair Merrick reported that the committee heard a brief overview of HB 5 on May 10, 2022. She MOVED to RECIND action on the adoption of the work draft for CSHB 5 (FIN) 32-LS0065\U (Radford, 5/10/22).

Representative Carpenter OBJECTED and asked why the work draft was being rescinded.

Co-Chair Merrick explained the reason for the motion. She voiced that the Committee Substitute (CS) work draft was not the referred version.

Representative Carpenter WITHDREW the OBJECTION.

There being NO OBJECTION, it was so ordered.

Co-Chair Merrick indicated the House Judiciary Committee (HJUD) Committee Substitute, version F, was before the committee.

[9:39:42 AM](#)

REPRESENTATIVE GERAN TARR, SPONSOR, pointed to the handout titled "HB 5 Versions" (copy on file). She noted that the original bill contained provisions regarding rape kits, the definition of consent, sexual abuse of a minor, and rape by fraud. She indicated that there were modifications made to the bill when it reported out of the House State Affairs Committee (HSTA), but the four provisions remained in the bill. She furthered that during the time HB 5 was in the Judiciary Committee, the bill was altered and contained only two of the original provisions, rape kits and the definition of consent. The Chairman of the Judiciary Committee wanted to remove the sexual abuse of a minor provisions due to the late date of the legislative session and the long length of time the bill had remained in HJUD;

therefore, she had agreed. She had wanted to reinsert the rape by fraud provisions that were included in the CS work draft version that was rescinded. She related that she had worked on the bill and there had been 17 previous hearings with much deliberation. She had worked with Legislative Legal Services and the Department of Law (DOL) and studied what had been done and how things were defined in 12 other states. They attempted to define the scope of the rape by fraud definition very narrowly. The definition had been affirmed by a law professor's prior testimony in HSTA, who was involved in drafting the model penal code. She delineated that the two elements that were necessary in the definition of rape by fraud were: impersonating another person and the rapist was known to the victim to obtain consent. She relayed that the Chair of the Judiciary Committee wanted to draft HB 5 aligned with the model penal code. She noted that the model penal code had been under revision for a number of years, and she had been following changes during the four years she had been working on the bill in conjunction with DOL. She wondered if members had any questions regarding what was in the HJUD version and the CS that had been rescinded.

[9:43:22 AM](#)

Co-Chair Merrick clarified that the finance version was a request by the bill sponsor and not by the House Finance Committee.

Representative Wool was trying to understand the process. He was confused and asked for clarification. He did not understand why the committee was exclusively talking about the Judiciary version versus the CS work draft version when it was not before the committee. He wondered if it was the sponsor's desire to reintroduce the CS work draft version. Representative Tarr responded that she spoke of the rape by fraud element when she introduced the bill and wanted to clarify that it was not included in the HJUD version.

[9:45:03 AM](#)

Representative Wool thought that the version of the bill that had been rescinded was a moot point.

Co-Chair Merrick restated that the version under discussion was the HJUD version. She stated that she wanted Representative Tarr to present the Judiciary Committee

version and the House Finance Committee could modify it as it desired.

Representative Carpenter wanted to know what bill the sponsor wanted. He wondered what version the sponsor preferred.

[9:46:33 AM](#)

Representative Tarr apologized about the confusion around the different versions. She felt urgency because the session was 6 days away from ending. She noted that there was a companion bill in the Senate, SB 187 that included an updated consent definition. She was attempting to match the language with the Senate version due to the short time left in the session.

[9:48:11 AM](#)

AT EASE

[9:48:20 AM](#)

RECONVENED

Representative Tarr pointed to the current statutory definition of consent. She explained that the current definition was insufficient and problematic and included elements of the use of force, and did not capture the trauma response of fight, flight, or freeze and was over 40 years old. She declared that the nonfunctional "broken" statute routinely denied justice to victims. She offered that the group Standing Together Against Rape requested the updated definition. She began working on the bill in 2019 and the specific goal was to remove the element of threat or use of force or coercion from the consent definition. She pointed to Section 1, of the bill and remarked that once the use of force was removed from the definition it was placed as a factor in the crime. The new language in Section 1 read, "by the use of force or the express or implied threat of force against any person." It placed the element of behavior into the crime of sexual assault in the first degree. She discussed Section 2 referring to the use of force language that was added and referred to the crime of sexual assault in the second degree, regarding sexual contact. She read the following language in Section 2, "under circumstances not proscribed under AS 11.41.410, the offender engages in sexual penetration with another person without consent of that person." She detailed that the

sexual penetration crimes not captured under sexual assault 1 were covered under Section 2 describing the crime of sexual assault 2.

[9:50:46 AM](#)

AT EASE

[9:53:49 AM](#)

RECONVENED

Co-Chair Merrick indicated the committee would stand at recess until 10:15 a.m.

[9:53:58 AM](#)

AT EASE

[10:19:27 AM](#)

RECONVENED

Co-Chair Merrick recognized Co-Chair Foster, Representative McCabe, and Representative Cronk had joined the meeting.

[10:19:54 AM](#)

Representative Tarr appreciated the flexibility of giving her time to gather documents. She reviewed the sectional analysis for version F:

Section 1:

AS 11.41.410. Sexual assault in the first degree.

Establishes sexual assault in the first degree. Amends subsection (a)(1) to make sexual assault in the first degree encompass sexual penetration without consent by the use of force/implied use of force against a person.

Section 2:

AS 11.41.420. Sexual assault in the second degree.

Establishes sexual assault in the second degree. Amends subsection (a)(1) to make sexual assault in the second degree encompass sexual contact without consent by the use of force/implied use of force against a person. Amends subsection

(a)(S) to make sexual assault in the second degree encompass sexual penetration without consent under circumstances not proscribed in sec. 1.

Section 3:

AS 11.41.425. Sexual assault in the third degree.

Establishes sexual assault in the third degree. Amends subsection (a)(7) to make sexual assault in the third degree encompass sexual contact without consent, excluding an offender knowingly causing a person to come into contact with semen. This change was recommended in Senate Judiciary to reflect changes as a result of HB 14 in the 31st Legislature.

Representative Tarr reviewed Section 3. She pointed to the language "excluding an offender knowingly causing a person to come into contact with semen." She referred to the Schneider case that discovered deficiencies in statute, which was why the language was included. She recalled that in the case, the perpetrator masturbated on the victim, and it was unable to be classified as a crime. However, there were other circumstance where the same thing might happen and did not include the element of force. She exemplified, the situation in a correctional facility where an inmate threw bodily fluids including semen at a guard. She expounded that the language was included because of the Schneider case and the distinction between knowingly causing someone to come into contact with semen with the use of force and defining that in a sexual assault context versus knowingly causing the contact with semen in a non-force circumstance.

[10:23:29 AM](#)

Representative Wool clarified that the correctional facility incident would not be considered a sexual assault but would be considered harassment. Representative Tarr answered in the affirmative.

Co-Chair Merrick recognized Representative Thompson and Representative Ken McCarty in the room.

Representative Tarr continued with the sectional analysis. She reviewed Section 4:

Section 4:

AS 11.41.445. General provisions.

Adds a new subsection (c) that establishes: an expression of lack of consent means there is no consent; absence of verbal or physical resistance does not establish consent; consent may be express or inferred; consent may be revoked or withdrawn at any time; a clear verbal refusal establishes a revocation

of prior consent; lack of consent may be overridden by subsequent consent prior to the conduct at issue; a person who is incapacitated as a result of an act of the defendant cannot consent.

Representative Tarr noted that Section 4 provided more clarity around the elements of consent. She pointed to the reversible concept in the third element of Section 4 and concluded that via discussions with DOL it was redundant. She continued to Section 5:

Section 5:

AS 11.41.470. Definitions.

Adds a definition of "consent" to mean "a freely given, reversible agreement specific to the conduct at issue." This section also defines "freely given" to mean "agreement to cooperate in the act was positively expressed by word or action.

Representative Tarr expounded that the modernized version takes the definition of consent from a "no means no" paradigm to a "yes means yes" paradigm and represented affirmative consent. The goal of updating the current definition was to replace it with an affirmative consent definition. She emphasized that she had no intention of criminalizing normal consensual sexual behavior. She delineated that the intention was to include verbal and physical affirmative behaviors and not exclusively verbal consent. It was important that freely given be defined as positively expressed through words or actions. She pointed to the words "reversible agreement" and noted that people had the right to do one thing but not another.

[10:28:28 AM](#)

Representative Tarr moved to Sections 6 through 8:

Section 6:

AS 11.56. 765. Failure to report a violent crime committed against a child.

Adds the definition of consent found in sec. 5.

Section 7:

AS 11.56. 767. Failure to report a violent crime committed against an adult.

Adds the definition of consent found in sec. 5.

Section 8:

AS 26.05.900. Other sexual misconduct; indecent viewing, visual recording, or broadcasting.

Adds the definition of consent found in sec. 5.

Representative Tarr indicated that Sections 6 and 7 were conforming sections. She furthered that Section 8 referred to the military code of justice. She cited AS 26.05.900 and reminded the committee that the state updated the Military Code of Justice which occurred in 2014, which updated the definition of consent at the time and was very similar to the one in the bill. She relayed that AS 26.05.890 (h) very closely matched the bill's definition. It was passed by the Alaska Legislature in 2016.

[10:30:37 AM](#)

Representative Tarr moved to Section 9 regarding rape kits:

Section 9:

AS 44.41.065. Sexual assault examination kits.

Amends subsection (a)(2)(1) to decrease the time allowed for law enforcement agencies to ensure that laboratories conduct serological or DNA test on sexual examination kit from one year to six months from the laboratory receiving the sexual assault examination kit.

Representative Tarr recounted that since 2014, the legislature had adopted 4 pieces of legislation and two budget provisions that addressed the problems of untested rape kits. She considered it a bipartisan success. She elucidated that there were 2 crimes that had been prosecuted because of the rape kit legislation. She favored the victim centered policy and noted that by reducing the rape kit testing timeframe to 6 months, it facilitated the healing process.

Co-Chair Merrick recognized Representative Laddie Shaw in the attendance.

Representative Rasmussen asked whether Section 9 included rape kit testing for children as well as adults.

[10:32:40 AM](#)

Representative Tarr was uncertain. She deferred the answer to the Department of Law.

Representative Tarr continued with the remainder of the sectional analysis:

Section 10:

Repeals AS 11.41.470(10), AS 1 1.56.765(c)(4), AS 1 1.56.767(c)(4), and AS 26.05.900(e)(8). These statutes contain the previous definition of consent.

Section 11:

Uncodified law - applicability

Amends uncodified law to state that modifications and repeals apply to offenses committed on or after the effective date of the bill.

Section 12:

Effective Date

Makes sec. 9 effective on July 1, 2023.

Representative Tarr noted that Section 10 contained the repealers for the prior definition of consent. She indicated Section 12 dealt with the processing of rape kits at the crime lab and it was always necessary to provide a full year's time delay for the effective date to allow the lab time to hire the new positions and put into place the measures necessary to comply with the bill.

[10:35:06 AM](#)

Representative Tarr reverted to a prior topic and read the code of military justice definition of consent:

"Consent means a freely given agreement to the conduct at issue by a competent person."

[10:35:51 AM](#)

JOHN SKIDMORE, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF LAW, explained that Alaska's statutes concerning sexual assault were a tiered structure. There were different levels of conduct and different penalties associated with the conduct. He delineated that it was important to keep in mind the tiered approach when altering sexual assault statutes because there were cascading affects from the changes. He also highlighted that it was important to consider the mental state or the intention or knowledge of wrongdoing that constitutes part of a crime otherwise known as the "mens rea." He clarified that the mental state was

addressed in a statute separate from sexual assault statutes. He instructed the committee that when referring to sexual assault the statute states that lacking a mental state the conduct was done knowingly and the conduct was reckless as to the circumstance. Therefore, when addressing sexual assault in statute it always meant that the conduct was engaged in knowingly, but the circumstance had to be proven to be reckless. He emphasized that they were the fundamental principles to keep in mind when discussing sexual assault statutes. He voiced that the department was supportive of redefining the definition of consent. He elaborated that under current law, the use of force or the threat of force was required, which was problematic. For instance, if a victim stated, "no" as a means of communicating she did not want to engage in sexual conduct it was not enough to be considered sexual assault and it was not illegal for the perpetrator to engage in sexual misconduct. Alaska led the nation in sexual assault cases, and it was very concerning that the state's sexual assault law was so outdated. He believed the issue was a priority that needed correcting.

[10:39:13 AM](#)

Mr. Skidmore continued that in version F the bill attempted to change the definition of consent. He pointed to Section 1, page 1, line 8 of the bill and pointed to the language, "by the use of force or the express or implied threat of force against any person." He informed the committee that the definition of "without consent" previously described the use of force. Therefore, in order to broaden the definition of without consent and redefine consent and the lack of consent, the elements in the definition would need to be moved somewhere else. The bill moved the language, "by the use of force or the express or implied threat of force against any person" into the elements of the crime itself. However, what version F failed to do was to incorporate two other aspects of current law and thereby weakened the effect of current law on sexual assault. First, the concept of incapacitation was necessary. He delineated that under current law, the definition of without consent implied that if an individual causes the incapacitation of another person i.e., slipping a drug into a drink at a bar to sexually assault them. He noted that under current law the crime would be charged as sexual assault in the first degree but under the current version

of the bill it would no longer be the case and was reduced to sexual assault in the second degree.

[10:41:22 AM](#)

Representative Wool asked for an explanation of the difference between first degree and second degree. Mr. Skidmore responded that a first degree sexual assault carried a penalty of 25 to 35 years, and second degree sexual assault carried a penalty of 5 to 15 years.

Co-Chair Merrick indicated Representative David Nelson had joined the meeting.

Mr. Skidmore continued to explain that the concept of incapacitation was found in almost every other state's laws and in the model penal code. He recounted his discussion of tiers. He elaborated that besides causing incapacitation it was also a crime to engage in sexual contact with an incapacitated person that was not caused by the defendant. Currently, and in version F of HB 5, it was the crime of sexual assault in the second degree. He exemplified a victim who consumed too much alcohol or was under the influence of drugs. His point was that causing the incapacitation was now grouped with coming across someone who was already incapacitated and taking advantage of the situation. The bill would eliminate the distinction, which was why it was important to factor in tiers. He added that the model penal code had the distinction as well as most other states.

[10:43:53 AM](#)

Mr. Skidmore continued with the second lacking element of without consent; property. He detailed that current law also included threats against property such as pets, a home, etc. If someone threatened to damage someone's property in order to persuade someone to have sex with them it was a first degree sexual assault. Under version F, it was eliminated in the bill and weakened current sexual assault statutes. He offered the information so the committee could consider whether to weaken or strengthen sexual assault statutes.

[10:45:14 AM](#)

Mr. Skidmore addressed the definition of consent. He reported that the definition was in Section 5 of the bill, but he drew attention to Section 4, on page 4, of version F. He considered the issues he would discuss were "nuanced and complex." He explained that under current law consent was defined by what was not consent or without consent versus what was consent. He noted that it was considered by some to be the same thing. He emphasized that from a prosecutor's perspective there was an important distinction because they had the burden of proof and had to prove the elements of a crime beyond a reasonable doubt. Proving the lack of something was proving in the negative, which was a more complicated process. He further explained that if consent was defined as a person consenting through inaction it suggested that someone frozen with fear during a sexual assault might be considered as having consented. Whereas, in the opposite direction by defining that without consent could include inaction it suggested that freezing was not consenting. He stressed that it was an important distinction for a prosecutor and was an issue brought up by state prosecutors, the Department of Justice, and the National Women's Judges Conference. He believed that it was troubling that a statute suggested that freezing or inaction was consent. He maintained that there was a better way to define consent than how it was defined in Section 4 of the bill. He offered to present suggestions to improve the consent definitions. He also commented on Subsection 3, Section 4, page 4 line 11. He outlined that the words "withdrawn" or "revoked" could be eliminated because it was included in Section 5. He also pointed out that in Section 4, page 4, lines 15 through 16, Subsection 4, the language, "a person who is incapacitated as a result of an act of the defendant cannot consent" where it was located was problematic and resulted in the downgrade to a sexual assault in the second degree rather than in the first degree. His focus was on the current bill, but noted that provisions regarding fraud was lacking in version F.

[10:50:06 AM](#)

BRENDA STANFILL, EXECUTIVE DIRECTOR, ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT, informed the committee that she would not read from her prepared remarks because it had all been stated by the prior testifiers. She offered that some of what members never heard in committees was testimony from the victims. As an advocate for 25 years, she could determine when an assault would not be

prosecuted because the victim froze. She described the repeated trauma victims experienced during a forensic exam and often times they could not go home in their own clothes. She wanted the committee members to understand the experience of sexual assault for a victim and what words on a paper cannot express. She shared that sexual assault was often described as murder without murdering someone. She stated that "there was something about being violated in this way that goes to the core of who you are" and it often took survivors years to "regain what was taken." She wanted legislators to think of the real experiences of the types of things Mr. Skidmore described and how it affected the decisions a victim made during the assault. She wanted to make sure that the voices of those who experienced sexual violence were with the members when making decisions regarding HB 5.

Co-Chair Merrick invited Mr. Skidmore and Representative Tarr back to the table.

[10:53:27 AM](#)

Representative Josephson asked Mr. Skidmore about Section 1. He deemed that it reflected the worst sexual conduct committed against an individual excluding sexual crimes against children and was highlighted by the use of force language. Mr. Skidmore responded, "Yes." Representative Josephson recalled that an unclassified felony was so bad it defied classification. He asked whether there was a sexual assault that was an "A" felony. Mr. Skidmore answered in the negative. Representative Josephson inquired whether a sexual assault in the first degree would be an A felony. Mr. Skidmore responded in the affirmative. Representative Josephson guessed that an A felony might be useful under Section 1 of the bill. Mr. Skidmore responded that an attempt reduced the level of the crime by 1 degree. There were no other sex crimes classified as an A. There were proposals in other bills that provided for A level sexual crimes, but nothing in current law or version F classified an A level crime.

[10:55:52 AM](#)

Representative Josephson pointed to the bottom of page 2 of the bill [provisions regarding sexual assault in the second degree]. He described sexual assault as contact without penetration. He suggested that sexual assault was bad

conduct but was not the worst of the worst. However, for offenders that committed sexual penetration without the use of force it would only be treated as a B felony. He wondered if it was due to a proof problem at trial or whether it was considered not as egregious as rape with the use of force. Mr. Skidmore responded that criminal law approached offenses in degrees of conduct through evaluation of three concepts: mens rea, the actual act and the egregiousness of the act, as well as the surrounding circumstances of the act. He indicated that sexual assault statutes dealt with sexual penetration and sexual contact. Sexual contact was considered a lower severity crime than penetration. In the legislation, redefining without consent - broadening the law beyond the use of force, the bill followed the paradigm established in the model penal code and by many other states that the circumstances of the penetration carried different levels of severity. Therefore, the bill classified penetration without force as sexual assault in the second degree. The tiered approach was established in current statute, the model penal code, and most other states. Representative Josephson deduced that most people would think penetration would warrant the use of the currently unused A Felony because penetration was the worse sexual conduct, even lacking force. He asked why penetration was not an A felony. Mr. Skidmore cautioned against mixing multiple concepts. He responded that the difference between penetration and contact should be differentiated and remained the same under current law and the F version. He believed that use of force was the same whether there was penetration or contact. The force used could be the same but the sexual act of either penetration or contact differentiated the tier of crime. He believed that whether penetration with the lack of force coupled with a lack of consent should be an A felony was a policy call to be made by the legislature. The current bill placed it in the same category that it already existed. He warned against categorizing it as an unclassified felony because use of force and no force were two different levels of crime and were recognized as such in all American jurisprudence. However, regarding penetration, he believed that it was a policy call to be made by the legislature.

[11:02:24 AM](#)

Representative Josephson referred to page 4, lines 15 through 16, regarding incapacitation. He provided a hypothetical situation where 2 individuals on a date drank

2 glasses of wine and became incapacitated. He asked if the incapacitation provisions applied in the scenario. Mr. Skidmore deduced that a couple of drinks generally did not result in incapacitation. However, if one of the individuals purchased 2 or 3 liters of wine on the date and had sex with the other person it was prosecutable.

[11:03:36 AM](#)

Representative Josephson wondered what was missing in subsection (C) 4 that did not accomplish what Mr. Skidmore wanted regarding incapacitation. Mr. Skidmore replied that it began with language regarding sexual assault in the first degree on page 1, lines 8 through 9. He read the following language:

"by the use of force or the express or implied threat of force against any person..."

Mr. Skidmore maintained that the language should include a threat to property. He suggested that a subsection 2 should be inserted with the language, "where incapacitation was also included caused by the offender was also included in sexual assault in the first degree." Regarding sexual assault to someone already incapacitated, he drew attention to Section 2, page 2, lines 21 through 24, which in current law described an offender encountering an incapacitated individual and engaging in sexual penetration, but the incapacitation was not caused by the offender. In response to Representative Josephson's question, he cited Page 4, lines 15 through 16 that read, "a person who is incapacitated as a result of an act of the defendant cannot consent," which defined lack of consent. The provision would be folded into page 2, lines 30 to 31, that read, "under circumstances not proscribed under AS 11.41.410, the offender engages in sexual penetration with another person without consent of that person," resulting in the same level of offense. He stressed that the situation just described ignored the tier structure resulting in a weakening of current law. He contended that not amending the bill was a policy call, but it was not what DOL had recommended.

[11:06:22 AM](#)

Representative Wool restated that Alaska had the highest rate of sexual crime and he had heard that the state had the

harshest penalties in the country. Mr. Skidmore replied in the negative. He concluded that the state still had the highest rate of sex crimes despite having the strictest penalties.

Representative Tarr interjected that there were statutes that defined the crimes and distinguishing between the statutes that defined the crimes and the statutes containing the associated penalties was necessary. She emphasized that it was necessary for the statute defining the crime to be effective. The consent statute was ineffective so the punitive statutes could not be effective.

Representative Wool had a question about causing incapacitation versus coming across a person already incapacitated. He provided an example of a college campus where excessive alcohol consumption happens and both parties were drinking heavily but one person was purchasing the drinks and the other blacked out without a memory of consenting to engaging in sexual activity that took place. He asked whether that was a worse crime than someone having sexual contact with an already incapacitated person.

Mr. Skidmore responded in the affirmative and indicated that existed in current law and in the model penal code. He maintained that there were two different tiers in current law. Representative Wool understood dropping a pill in someone's drink versus two people drinking and sexual activity resulted, he worried about the consequences of the scenario described above with including too fine a definition of incapacitation. He referred to page 4, Section 4, subsection 1 and 2, lines 7 through 10 and read the following:

"an expression of lack of consent through words or conduct means there is no consent..."

"both a person's action and inaction, in the context of the circumstances, may be considered..."

Representative Wool provided an example of someone freezing where the state of mind was different, and the inaction was due to shyness or some other reason but was not intended as a lack of consent. He wondered how it was differentiated and deemed that the two measures were contradictory.

[11:12:14 AM](#)

Representative Tarr clarified that she had no interest in weakening current law as it related to causing a person's incapacitation or happening on an incapacitated person. She was not supportive of the change and agreed with the tiered law because there was an element of premeditation when someone decided to cause a person to become incapacitated, which made it a more serious crime. She also commented on the second part of Representative Wool's question and agreed with his analysis. She hoped for an opportunity to address the slightly contradictory language.

[11:13:38 AM](#)

Mr. Skidmore appreciated Representative Wool's example. He explained that the bill did not criminalize engaging in sex under the influence of alcohol. He voiced that incapacitation was defined in statute as a very specific level of conduct. He defined incapacitation according to AS 11.41.470 (2), which meant that a person was temporarily incapable of appraising the nature of one's own conduct." He determined that it was not a couple of drinks or shots; an individual had to be so drunk they were incapable of expressing themselves or talking. He contended that current law nor the bill was merely describing having a few drinks. He was simply saying that he did not want to see the law weakened regarding incapacitation. He spoke of the scenario in college where a person knowingly planned to provide too much alcohol to another person and he felt that the behavior was unacceptable.

[11:15:46 AM](#)

Representative Carpenter referred to line 11, on page 3, in Section 4, subsection (C) (3), and read the language, "consent may be revoked or withdrawn at any time..." He wondered if the section could be construed as removing consent one week after the event. Mr. Skidmore responded in the negative. He furthered that it inferred a withdrawal of consent prior to the act occurring for it to be a crime. Representative Carpenter pointed to the words "at any time" and read line 12, "any clear verbal refusal establishes the revocation or withdrawal of prior consent." He asked the question whether the bill unintentionally allowed "regret to become a weapon" if the definition of at any time was up to interpretation. Mr. Skidmore agreed that it was possible for the department to draft the legislation more clearly

but did not think the law would be interpreted the way Representative Carpenter suggested it.

Representative Tarr had recommended removing the section altogether because the actual consent definition in lines 18 through 20 contained the reversible agreement language and was much clearer. She read the language, "reversible agreement specific to the conduct at issue." She clarified that the language contextualized it to mean it was happening at the time. The idea of the bill was to provide clarity rather than add to any confusion. She wanted to avoid criminalizing healthy behavior.

[11:19:29 AM](#)

Representative Josephson mentioned aggravator AS 12.55.155 c (5) regarding consumption of alcohol for a particularly vulnerable person. He wondered if the statute would be ignored or never be available for prosecution in the context of the statutory definition of incapacitation. Mr. Skidmore provided background information. He responded that once an offender was convicted of the elements of a crime, they were subject to sentencing via a presumptive range. The conviction could last longer than the presumptive range using an aggravator or using a mitigator, which would produce a sentence below the range. He answered that when an aggravator established the same elements of the crime then the aggravator was meaningless. He summarized that if the elements of the crime were proven and part of the convicting statute then an aggravator could not be used. He specified that the aggravator cited by Representative Josephson that concerned vulnerable victims could not be used when one of the elements of the sexual assault crime was incapacitation because the incapacity already made the victim vulnerable.

[11:21:44 AM](#)

Representative Josephson returned to the Schneider case. He referred to the bill on page 4, lines 2 through 3, and read, "sexual contact" does not include an offender knowingly causing a person to come into contact with semen." He was trying to grasp the concept. Mr. Skidmore replied that the scenario that was resolved in the Schneider case was that contact with semen was not part of the definition of sexual contact. The matter was resolved by adding "contact with semen" to the definition of sexual

contact. He used the example of an inmate throwing semen or bodily fluids at guards cited earlier. He furthered that under current law, sexual contact included contact with semen, which was addressed as harassment. When the definition of "without consent" was changed in the bill, so that force was no longer required, the inmate/guard scenario would be turned into a sexual assault. The language referenced by Representative Josephson preserved current law from the "Schneider fix" and the offense remained a felony but was not turned into a sexual assault. Representative Josephson had previously discussed his concern about pairing sexual penetration without consent but lacking use of force with a "B" felony. He pointed to page 3, containing the same policy call for a "C" felony for sexual contact. Mr. Skidmore summarized Representative Josephson's question regarding the policy call for sexual penetration with and without the use of force and lacking consent resulting in two tiers of crimes and was repeated for sexual contact. Mr. Skidmore answered in the affirmative that the bill followed the same tiered approach for sexual contact.

[11:25:04 AM](#)

Representative LeBon cited Page 4, Line 11, regarding revocation of consent. He had a question following the same lines of questioning as Representative Carpenter. He wondered how he would advise a college age son who engaged in casual sex. He wondered whether the son should use a consent form and enter into a contract before the sexual act with additional consent afterwards. Mr. Skidmore answered in the negative and voiced that was not what anyone described nor what the bill required. He suggested that most sexual activity was more spontaneous. He advocated for a discussion about the issue and advising his son to ensure that both parties "were on the same page." He furthered that the discussion should happen for college bound women as well. He noted that there were sexual interaction discussions with students in some sexual education programs in the state that taught his advice.

[11:27:58 AM](#)

Representative Tarr interjected that the college student would likely learn the FRIES acronym, freely given, reversible, informed, enthusiastic, and specific, that was considered the accurate way to describe consent to young

adults. She indicated that she attempted to have the language in the law match what was being taught and was understood as consent. She mentioned prior testimony from the Alaska School Activities Association that coached a boys into men program that spoke about consent. The association favored a synchronized definition of consent in law. She hoped the bill would provide more clarity that was more consistent with human behavior and what was expected. She thought that the most exciting part of the legislation was to be able to have the conversation with young people and prevent harm through education. The criminal part of it meant that someone was already harmed.

[11:29:57 AM](#)

Representative LeBon was concerned about unjust accusations. He suggested that encouraging a dating history and a friendship that evolved into consensual sex was the safest approach.

Representative Wool concurred that Representative LeBon and deemed that a written contract might be necessary in the future. He asked if someone could give consent if they were intoxicated and then revoked the consent afterwards claiming they were drunk. He wondered whether it was a valid defense.

Mr. Skidmore responded that intoxication did not necessarily disallow consent and repeated that the timing of the revocation had to take place before the sexual act.

Representative Tarr added that mens rea was a factor to evaluate the behavior and believed that there were protective layers that prevented any accusations found in criminal behavior.

[11:33:21 AM](#)

Mr. Skidmore furthered that the law was designed to protect against miscommunications. The law required proof that an offender acted recklessly in terms of lack of consent. He offered that if the individual agreed at the time there was consent and admitted to revocation after the act proved there was prior consent. Representative Wool relayed that there were many cases where a person had been drinking and seemed totally coherent and later they blacked out and did not remember anything. He used an example of an extreme

case related to a person not remembering murdering another person. He asked whether that was incapacitation. Mr. Skidmore replied that it did not meet the definition of incapacitation. He was familiar with the concept of alcohol blackouts and even though the victim would say she did not recall consenting but there were other witnesses stating that the two people were equally engaging made those types of cases very difficult or impossible to prosecute. He reminded the committee that mens rea was considered and the law required proof beyond a reasonable doubt.

[11:36:23 AM](#)

Representative Rasmussen asked for an explanation of the current process where the Department of Public Safety (DPS) brought a case forward and asked DOL to prosecute. She heard a lot of concern from certain committee members about the need to get a contract to engage in sexual activity and she was not fully understanding why the concern was being raised. Mr. Skidmore responded that in an incident involving a sexual act, the victim in the scenario would first have to report to law enforcement and then law enforcement would investigate and gather evidence. He explained that law enforcement would then consider whether the situation violated current laws and if so, the case was referred to the prosecutor's office. The state would consider whether the elements of the case was enough to prove something beyond a reasonable doubt. He said the process would not change under the proposed law. However, what would change was the law and actions that should be criminalized or not. Representative Rasmussen used a future scenario where her daughter was at a party, and someone tried to engage in sexual activity, and she stated "no." Currently, it was completely legal for the other person to engage in sexual activity with the daughter. She asked for verification that it was currently completely legal for someone to engage in sexual activity with her under the scenario. Mr. Skidmore answered in the affirmative.

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Representative Carpenter provided a scenario that took place in a rural setting. He asked where a victim could go if law enforcement was the problem. Mr. Skidmore answered that the individual would go to the state troopers. He indicated that if an officer was involved in perpetrating any crime against an individual it warranted investigation.

He detailed that each law enforcement agency had an internal affairs department to investigate internal crimes however, if it happened in a rural village, the person would turn to the state troopers. He added that the state prosecutors had a special unit called the "Special Prosecutions Unit" that handled crimes by law enforcement. Representative Carpenter commented that someone in the situation would be reluctant to trust reporting to law enforcement. He wondered if there were other places where they could report a crime outside of law enforcement. Mr. Skidmore suggested the scenario would be difficult because it required an investigation, which had to be done by law enforcement.

[11:43:17 AM](#)

Representative Josephson thought the reason the bill was important had to do with its effect in a courtroom where the jury instructions would look different. He guessed that the bill would cause potential new cases. He deduced that there would still be a need to decline many cases. Mr. Skidmore replied that changing the law would allow for more cases to move forward. However, the bill would not make the cases any easier to prosecute and he expected that the cases would remain difficult to prosecute. The question was not how to make the process easier but what behavior should be illegal. He thought that the cases would be very difficult but it was not a reason not to modify the law.

[11:45:33 AM](#)

Representative Wool exemplified someone who froze and was too scared to say no or fight back but there was no force. He wondered if the delineation was no consent and no force, but the act proceeded because there was no resistance and no fight. He asked if that was the no crime scenario. Mr. Skidmore answered in the affirmative. However, it was always difficult to provide a definitive answer in prosecution because each case was different. He noted that he had never seen the same fact pattern twice. There were similarities in cases, but there were always nuances. There were likely many more facts than what was provided in hypothetical situations. He suggested that the legislature set policy around conduct it deemed should be criminalized. He was cautious with hypothetical scenarios. Representative Wool indicated he asked the question because Mr. Skidmore unequivocally stated "no" to Representative Rasmussen's

question. Mr. Skidmore stated in the affirmative because he believed it was the category the bill covered. However, the nuances of the case had to be understood as well.

Co-Chair Merrick commented that the committee liked hypothetical scenarios.

Representative Tarr thanked the co-chair for hearing the bill.

Co-Chair Merrick reviewed the agenda for the afternoon.

HB 5 was HEARD and HELD in committee for further consideration.

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ADJOURNMENT

[11:49:51 AM](#)

The meeting was adjourned at 11:49 a.m.