

**ALASKA STATE LEGISLATURE  
HOUSE JUDICIARY STANDING COMMITTEE**

March 30, 2022

1:03 p.m.

**MEMBERS PRESENT**

Representative Matt Claman, Chair  
Representative Liz Snyder, Vice Chair  
Representative Harriet Drummond  
Representative Jonathan Kreiss-Tomkins  
Representative David Eastman  
Representative Christopher Kurka  
Representative Sarah Vance

**MEMBERS ABSENT**

All members present

**COMMITTEE CALENDAR**

CONFIRMATION HEARING(S) :

Select Committee on Legislative Ethics

H. Connor Thomas - Nome

- CONFIRMATION(S) ADVANCED

SPONSOR SUBSTITUTE FOR 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."

- HEARD & HELD

**PREVIOUS COMMITTEE ACTION**

BILL: HB 5

SHORT TITLE: SEXUAL ASSAULT; DEF. OF "CONSENT"

SPONSOR(S) : REPRESENTATIVE(S) TARR

02/18/21	(H)	PREFILE RELEASED 1/8/21
02/18/21	(H)	READ THE FIRST TIME - REFERRALS
02/18/21	(H)	STA, JUD
03/26/21	(H)	SPONSOR SUBSTITUTE INTRODUCED

03/26/21 (H) READ THE FIRST TIME - REFERRALS  
 03/26/21 (H) STA, JUD  
 03/27/21 (H) STA AT 1:00 PM GRUENBERG 120  
 03/27/21 (H) Heard & Held  
 03/27/21 (H) MINUTE(STA)  
 04/13/21 (H) STA AT 3:00 PM GRUENBERG 120  
 04/13/21 (H) Heard & Held  
 04/13/21 (H) MINUTE(STA)  
 04/20/21 (H) STA AT 3:00 PM GRUENBERG 120  
 04/20/21 (H) Heard & Held  
 04/20/21 (H) MINUTE(STA)  
 04/27/21 (H) STA AT 3:00 PM GRUENBERG 120  
 04/27/21 (H) Heard & Held  
 04/27/21 (H) MINUTE(STA)  
 04/29/21 (H) STA AT 3:00 PM GRUENBERG 120  
 04/29/21 (H) Scheduled but Not Heard  
 05/04/21 (H) STA AT 3:00 PM GRUENBERG 120  
 05/04/21 (H) Moved CSSSHB 5(STA) Out of Committee  
 05/04/21 (H) MINUTE(STA)  
 05/06/21 (H) STA RPT CS(STA) 1DP 5AM  
 05/06/21 (H) DP: TARR  
 05/06/21 (H) AM: VANCE, STORY, EASTMAN, KAUFMAN,  
 KREISS-TOMKINS  
  
 05/06/21 (H) FIN REFERRAL ADDED AFTER JUD  
 03/04/22 (H) JUD AT 1:00 PM GRUENBERG 120  
 03/04/22 (H) Heard & Held  
 03/04/22 (H) MINUTE(JUD)  
 03/09/22 (H) JUD AT 1:00 PM GRUENBERG 120  
 03/09/22 (H) Heard & Held  
 03/09/22 (H) MINUTE(JUD)  
 03/30/22 (H) JUD AT 1:00 PM GRUENBERG 120

**WITNESS REGISTER**

H CONNOR THOMAS, Appointee  
 Select Committee on Legislative Ethics  
 Nome, Alaska

**POSITION STATEMENT:** Testified as appointee to the Select Committee on Legislative Ethics.

RENEE MCFARLAND, Deputy Public Defender  
 Appellate Division  
 Public Defender Agency  
 Department of Administration  
 Anchorage, Alaska

**POSITION STATEMENT:** Answered questions during the hearing on CSSSHB 5(STA).

JAMES STINSON, Director  
Office of Public Advocacy  
Department of Administration  
Juneau, Alaska

**POSITION STATEMENT:** Answered questions during the hearing on CSSSHB 5(STA).

**ACTION NARRATIVE**

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**CHAIR MATT CLAMAN** called the House Judiciary Standing Committee meeting to order at 1:03 p.m. Representatives Drummond, Snyder (via Teams), Kurka (via Teams), Vance, and Claman were present at the call to order. Representatives Kreiss-Tomkins (via Teams) and Eastman arrived as the meeting was in progress.

**CONFIRMATION HEARING(S):**  
**Select Committee on Legislative Ethics**

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CHAIR CLAMAN announced that the first order of business would be the confirmation hearing on the governor's appointee to the Select Committee on Legislative Ethics.

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CHAIR CLAMAN opened public testimony on the confirmation hearing for the governor's appointee to the Select Committee on Legislative Ethics.

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H CONNOR THOMAS, Appointee, Select Committee on Legislative Ethics, referred the committee to his resumé, a document, entitled "Select Committee on Legislative Ethics Appointment - H. Conner Thomas Resume 3.23.2022.pdf," [included in the committee packet] and offered that he had been a resident of Nome, Alaska, for 44 years. He said that he was an attorney and had practiced law at Alaska Legal Services, the Alaska Public Defender Agency, and he had served as a magistrate for the Alaska Court System. He shared that he has been in private practice since 1986. He stated that he had first been appointed to the Select Committee on Legislative Ethics in 1998 and his interest in the committee was based on his appreciation of the

field of ethics and his desire to contribute to public service in Alaska. He stated his belief that there exists public support for the committee and that the committee serves individuals who are subject to the Alaska Ethics Act via the "Heads Up" Policy.

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CHAIR CLAMAN asked Mr. Thomas what the length of his term of service on the committee would be.

MR. THOMAS answered that it would be for three years.

REPRESENTATIVE DRUMMOND noted that Mr. Thomas had first been appointed in 1998, and she asked whether he had served a three-year term and whether he was a current member of the committee.

MR. THOMAS answered that he had served the initial 3-year term and was currently serving on the committee, and that he had been in continuous service since.

REPRESENTATIVE EASTMAN stated that during his own service on the committee, there had been some difficulty in filling vacancies, and he asked Mr. Thomas if the problem persists.

MR. THOMAS answered that the problem persists for recruiting members. He noted that there exist two alternate seats. He stated that there had been advertisement of vacancies.

REPRESENTATIVE SNYDER asked Mr. Thomas to offer his opinion on why difficulties with recruitment persist. She allowed that she did not have knowledge of all the issues that the committee faces.

MR. THOMAS conceded that he was not certain about the cause of the problem. He stated that the workload of the committee was not burdensome to its members. He allowed that the subject matter at times could be contentious or acrimonious but stated that it was only intermittently so.

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

REPRESENTATIVE EASTMAN alluded to Representative Snyder's earlier line of questioning and suggested that the legislature

attempt to ascertain problems with recruitment of members and offer solutions.

REPRESENTATIVE KREISS-TOMKINS expressed his appreciation to Mr. Thomas for his years of service on the committee, which he characterized as an important one.

REPRESENTATIVE SNYDER offered her appreciation of Mr. Thomas' service.

REPRESENTATIVE DRUMMOND echoed others' appreciation of Mr. Thomas' service of more than 30 years.

CHAIR CLAMAN offered his appreciation to Mr. Thomas' years of service, which he characterized as important. He echoed the concern raised by Representative Eastman that recruitment for the committee should be improved.

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REPRESENTATIVE SNYDER stated that the House Judiciary Standing Committee has reviewed the qualifications of the governor's appointee and recommends the following name be forwarded to a joint session for consideration: H. Connor Thomas for the Select Committee on Legislative Ethics. She stated this does not reflect intent by any of the members to vote for or against this individual during any further sessions for the purposes of confirmation.

CHAIR CLAMAN announced that the name of H. Connor Thomas would be forwarded to the joint session.

**HB 5-SEXUAL ASSAULT; DEF. OF "CONSENT"**

[Contains discussion of SB 187.]

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CHAIR CLAMAN announced that the final order of business would be SPONSOR SUBSTITUTE FOR 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." [Before the committee was CSSSHB 5(STA).]

CHAIR CLAMAN mentioned to the committee that SB 187 was related to CSSSHB 5(STA). He asked a representative from the Public Defender Agency to explain to the committee how the change to the definition of consent in the proposed bills would affect sex crime prosecution and defense as compared to the current definition in statute.

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RENEE MCFARLAND, Deputy Public Defender, Appellate Division, Public Defender Agency, Department of Administration, stated that, under current law, sex assault prosecutions require the state to prove that the conduct at issue was without consent. She added that the statute defines "without consent" to be different from what people generally consider it to be. She explained that "without consent" means that a person, with or without resisting, is coerced by the use of force against a person or property, or by the expressed or implied threat of death, imminent physical injury, or kidnapping. She noted that there exists another provision in which a defendant causes a person to be incapacitated. She stated that "force" has a broad definition in law and means any bodily impact or restraint. She stated that sexual assault is conduct that is coerced using force. She stated that both proposed bills would repeal the definition of "without consent" and would provide a definition that is more aligned with how non-lawyers perceive the meaning of consent. She stated that CSSSHB 5(STA) eliminates the requirement of the use of force and would include affirmative consent. She added that the use of force could be taken as evidence of a lack of consent but that it would not be required for prosecution. She stated that SB 187 would create the distinction that sexual conduct that is done through force would remain a higher-level offense. She added that there would exist a lower-level offense that would involve a lack of affirmative consent. She also noted that the definition of consent is different in each of the two proposed bills, and that CSSSHB 5(STA) contains more detail and direction. She concluded that both bills would result in major differences in prosecution in Alaska when compared to current law.

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JAMES STINSON, Director, Office of Public Advocacy, Department of Administration, echoed the comments offered by Ms. McFarland and added that SB 187 would maintain more of the current statutory framework regarding the use of force. He stated that discussions on SB 187 had revealed concerns regarding treating

conduct without consent compared to that involving a more forceable rape with the use of a weapon and the classification of those felonies.

CHAIR CLAMAN asked, should CSSSHB 5(STA) pass, how caseloads would be affected regarding consent.

MR. STINSON answered that fiscal notes had been drafted that the change to the definition of consent by the passage of either CSSSHB 5(STA) or SB 187 would be presumed to have the same fiscal impact. He described the impact as being a much broader range of conduct potentially captured and the Department of Law would anticipate the prosecution of more cases. He added that the cases would be expected to be more litigious and would result in more motions and more susceptibility to go to trial.

MS. MCFARLAND agreed with Mr. Stinson's appraisal that caseload would increase, should either bill pass. She stated that the passage of either bill would capture conduct that is not currently prosecuted. She added that the Department of Law would anticipate a significant increase in a complex caseload and would require experience and time due to the serious nature of the crimes.

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REPRESENTATIVE EASTMAN asked for a comparison of Alaska sexual assault law compared to that of other states.

CHAIR CLAMAN asked to clarify whether Representative Eastman was asking about current statute or the proposed bill.

REPRESENTATIVE EASTMAN answered his inquiry was for that of current statute.

MS. MCFARLAND answered that her experience in practicing law was solely in Alaska. She offered that current statute tracks with common law that resistance is not required. She added that the change to statute that had been adopted in 1978 removed the requirement that a victim resist. She stated that some states have adopted affirmative consent provisions similar to those in the proposed bills. She offered to follow up with the committee and provide a synopsis of the laws in other states.

REPRESENTATIVE EASTMAN asked for an estimate of the additional resources that would be needed, should CSSSHB 5(STA) pass.

MS. MCFARLAND answered that the Department of Law had drafted a fiscal note, but that it was indeterminate. She added that a draft fiscal note had been submitted for SB 187 that she indicated could be comparable to that which CSSSHB 5(STA) would require. She stated that the primary driver on these fiscal notes would be the affirmative consent language in the bills. She explained that the fiscal note contained a total of 11 new positions, 5 of which would be lawyers and 6 of which would be staff positions, and that those would consist of office assistants, paralegals, and investigators. She noted that the estimate was likely a conservative one and it is not known what the actual increased workload would be. She noted that the sex assault cases are most often assigned to the most experienced and efficient lawyers and are serious cases with serious consequences. She added that the experience and efficiency among those lawyers had been based on the existing statutory scheme and there would likely be some loss of experience and efficiency in prosecuting cases differently. She added that this fact, along with the anticipated increase in cases, could result in the fiscal note being an under-estimate of the needs that may come to exist.

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CHAIR CLAMAN asked Mr. Stinson to refer to Representative Eastman's earlier question regarding laws in other states and asked for his input on that, in addition to the question regarding anticipated additional resources needed.

MR. STINSON stated his belief that two states have affirmative consent laws, and that he did not have more to add to that line of questioning. He recalled that there had been discussion in other committees on the bills that had revealed that the change to affirmative consent in those states had been so recent that not a lot of data was available on the impacts to prosecution and defense resources.

REPRESENTATIVE VANCE asked whether there was a belief that, should either bill pass, more cases would be prosecuted from the perspective of the victims and whether more prosecutions would occur.

CHAIR CLAMAN invited both Mr. Stinson and Ms. McFarland to provide testimony.

MR. STINSON stated that one conclusion would be that there would be more conduct charged and more cases prosecuted. He added

that the fundamental problems with prosecuting these types of cases would endure. He stated that there may exist some false hope about what the bills may accomplish regarding the impact of a prosecution to a victim. He added that investigation and cross-examination in cases would remain the same. He noted that there exists the potential for litigation [should either bill pass] regarding the new law interacting with the "rape shield" law.

MS. MCFARLAND agreed with Mr. Stinson's conclusion that there would be more prosecutions. She suggested that more cases could be brought to trial rather than being dismissed at indictment and especially for those involving assaults in the second degree, which involve sexual contact rather than sexual penetration. She stated that the question of whether more convictions would follow would be subject to a jury's consideration of the totality of the circumstances.

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REPRESENTATIVE DRUMMOND asked who the Public Defender Agency defends.

MS. MCFARLAND answered that the Alaska Public Defender Agency represents indigent Alaskans charged with a crime with a criminal defense, individuals whose children are subject to state custody, individuals who are undergoing civil commitment, those who are engaged in post-conviction litigation in the trial and appellate courts, juveniles, and, most recently, people who are subject to quarantine and isolation proceedings.

MR. STINSON offered that the Office of Public Advocacy (OPA) would provide representation for the same individuals as Ms. McFarland listed. He added that OPA additionally provides guardians-ad-litem for Child in Need of Aid cases and for cases involving elder fraud.

REPRESENTATIVE DRUMMOND asked who defends a victim.

MR. STINSON answered that the Department of Law prosecutes those cases, and the Office of Victims' Rights represents victims in those proceedings.

REPRESENTATIVE DRUMMOND asked for confirmation that there is reluctance to provide safety to victims based on the anticipated need for new staff. She asked where defendants are housed while awaiting trial.

MS. MCFARLAND stated that the agency does not take a position on the proposed legislation, and the purpose of the invitation to testify was to allow the committee to understand how the proposed legislation is likely to affect the work being done. She answered that some defendants are in jail, some are released with conditions while awaiting trial awaiting trial, and each are subject to each judge in each individual case. She added that, when a defendant is unable to meet conditions of release, should they exist, the defendant is held in custody while awaiting trial.

MR. STINSON echoed Ms. McFarland's statement that he was testifying neither in favor of nor in opposition to the proposed legislation; he was present to aid the committee's understanding of potential impacts to the agency and its resources, should the bill pass. He emphasized that the merits of the bill were a matter of a policy determination by the legislature.

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REPRESENTATIVE DRUMMOND stated that she would support an increase in staff for both agencies, should it become necessary. She asked the current status of SB 187, and for an explanation of the reason that there had been much discussion of it during the current meeting.

CHAIR CLAMAN offered that an earlier presentation to the committee regarding the administration's approach to consent had some differences to that which was proposed in CSSSHB 5(STA), and that that approach was included in SB 187. He added that a house companion bill to SB 187 was being heard by the House State Affairs Standing Committee. He stated that the reason for the discussion of SB 187 was to retain information previously heard on the topic and definition of consent. He stated that he did not know the current status of SB 187.

CHAIR CLAMAN noted that the Alaska Rape Shield Law had been referenced and he asked for a description of how the law is practiced in current statute and what changes would occur if an affirmative consent provision was added to the law.

MR. STINSON noted that the Alaska Rape Shield Law was contained in AS 12.45.045 and directs that a victim's prior sexual history may not be admitted in a sexual assault case unless certain circumstances are met. He explained that there exists case law in which, a judge may find, outside of the presence of the jury,

that the information is relevant and is potentially admissible. He offered an example that included the possibility that a victim's sexual history with the defendant could be admissible. He stated that changing to an affirmative consent framework could raise questions such as the use of a victim's sexual activity as part of an alibi. He stated that there may exist an argument regarding the manner of consent that could be outside of the rape shield law. He offered a hypothetical example in which a defendant may claim that consent had been affirmed by the victim in a manner similar to what other individuals may characterize as affirmative consent and the question would be whether the rape shield law would bar such testimony and preclude the defendant from using it in his/her defense.

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CHAIR CLAMAN asked for an example of an actual scenario in which the Alaska Rape Shield Law would bar admission of prior sexual conduct of a victim and in which, should the law pass, the evidence would no longer be barred.

MR. STINSON offered that the current law pertaining to the use of force or coercion, prior sexual history of a victim would not be relevant unless it involved prior contact with the defendant. He noted that the rape shield law had been designed so that a victim may avoid being humiliated or having his/her sexual history brought up. He noted that the affirmative consent framework would address whether a victim's words or actions would indicate consent, and that a defendant may have prior knowledge of how a person gives consent in current or previous relationships. He added that it could be conceivable that there could be a defense investigation that would bring that up to give weight to the claim that the defendant's actions had been affirmatively consented to. He postulated that, should a dispute arise to whether there had been affirmative consent, it would likely be relevant that certain words or actions consistent with past actions could be admissible. He added that it could be considered as part of the totality of the circumstances.

MS. MCFARLAND offered that the rape shield statute codifies evidence rules, and it requires that evidence be relevant to the issue presented under Rule 401. She added that, under Rule 403, the evidence must be more probative than prejudicial. She noted that the Alaska Court of Appeals had considered the admissibility of evidence pursuant to the Alaska Rape Shield Law and that it is identical to those two rules. She added that the

law prescribes that there exist procedures requiring a defendant seeking to admit evidence of a victim's past sexual history to apply to the court and that the judge would make a ruling in advance of evidence being brought to trial.

CHAIR CLAMAN offered a hypothetical scenario in which a person is charged with sexual assault after engaging in sexual conduct on a Friday night and subsequently returned to the victim's apartment and alleged that prior contact was tantamount to consent based on prior sexual history. He asked what the difference in prosecution would be between the existing law and the proposed bill.

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MS. MCFARLAND answered that, under the current law, it would be difficult to determine the relevance of the prior conduct to determine whether it had been forced or coerced. She stated that, should CSSSHB 5(STA) pass, the prior conduct may be more relevant. She stated that a judge would examine whether there had been freely given, reversible agreement to the conduct. She added that Section 5 of the bill addresses a lack of consent based on the circumstances of the contact. In the hypothetical scenario offered by Chair Claman, knowledge of prior conduct may be relevant and probative to the totality of the circumstances, as long as it was not overly prejudicial; it would not confuse the issue, and an invasion of privacy should not occur.

CHAIR CLAMAN asked whether the change proposed in CSSSHB 5(STA) would focus on the conduct of the victim rather than that of the perpetrator.

MS. MCFARLAND offered her opinion that it would. She noted that prosecution under current law seeks to prove that there exists coercion or use of force.

MR. STINSON offered that he agreed with Ms. McFarland's statements. He suggested that judges would use discretion in admitting prior sexual conduct as evidence. He offered that the change to affirmative consent would necessarily pertain to the conduct of the victim. He opined that the hypothetical scenario would still require a judge to consider the victim's prior conduct for relevance, and its susceptibility to be prejudicial and an invasion of privacy when taken with all the other facts, including recklessness to a lack of consent.

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REPRESENTATIVE VANCE asked whether the current law would require the existence of the use of force and whether the proposed bill would direct the requirement of proof of reckless disregard for consent.

MR. STINSON answered that a defendant would necessarily be reckless regarding consent. He suggested that testimony would occur to demonstrate whether affirmative consent had been given.

MS. MCFARLAND referred to Representative Vance's earlier statement regarding current law and drew the distinction that it was not the use of force but coercion that amounted to the use of force. She noted that prosecutions of sexual assault in the second degree were mostly associated with coercion and involve cases where a victim is compelled to submit to the conduct because of the threat of the use of force.

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REPRESENTATIVE DRUMMOND referred to language in Section 5, on page 5, lines 17 and 18, that referenced enforcement of the Alaska rape Shield Law. She noted that the language indicates that a current or previous dating, social, or sexual relationship by itself or the manner of dress of the person involved with the defendant in the conduct at issue may not constitute consent, and she questioned how a judge would rule to allow previous sexual conduct into the prosecution of a case, should CSSSHB 5(STA) pass.

MS. MCFARLAND offered that the phrase "by itself" would be central to a judge's interpretation of whether to allow such evidence. She suggested that, should a defendant seek to admit such behavior as evidence of consent, a judge would likely refer to AS 12.45.045 pertaining to rules of evidence. She suggested that, when considering consent, the fact that there may have been a prior relationship does not imply that consent had been given. She drew attention to the same section, on line 29, in which the surrounding circumstances shall be considered, which may result in the possibility that past conduct may be more admissible than it would be under current law.

MR. STINSON offered that case law exists in Napoka v. State in which testimony related to a prior consensual sexual relationship is admissible when it meets the requirements of AS 12.45.045. He stated that admissibility would also depend on the relevancy to the case, such as if the relationship had been

several years prior to the incident. He concluded that CSSSHB 5(STA) would direct that a judge does not consider any one factor as evidence of consent. He offered that there exist protections such that a dating relationship, a marriage, or the way someone is dressed are not a defense against rape and would only be relevant considering the totality of the circumstances.

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REPRESENTATIVE EASTMAN referred to Section 5 of the bill and asked what an expression of a lack of consent would be under existing law and what it would be should CSSSHB 5(STA) pass.

MR. STINSON answered that an example of the expression of a lack of consent would be someone saying "no," or "stop," via his/her words or conduct under both the current and proposed law.

MS. MCFARLAND expressed her agreement with Mr. Stinson's characterization and suggested that the sponsor may answer to any additional intent of the proposed language. She stated a scenario in which an individual says something that indicates that they do not offer consent would mean that consent was not given and would be relevant and taken as part of the totality of the circumstances. She added that, under current law, it would be required that coercion or threat existed.

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REPRESENTATIVE EASTMAN asked whether the use of the word "expression" would highlight the conduct of the individual making the expression or that of the defendant.

MS. MCFARLAND suggested that one way to consider the application of the language would be to consider it as one element of what the state would be required to prove. She stated that a jury would be asked to decide whether the state proved two elements, the first being whether the victim consented to the actions or conduct. She added that the other element to prove would be the mental state of the defendant and whether he/she recklessly disregarded the lack of consent.

MR. STINSON echoed the comments offered by Ms. McFarland and added that most of the cases involve two individuals who had been alone and there occurs disagreement whether consent was given. He added that a jury determines facts of the case, and the judge determines the law.

REPRESENTATIVE DRUMMOND stated her belief that many potentials were being discussed and suggested that it would be difficult to predict what legislation may change behavior. She stated her belief that nothing seems to be working to reduce the preponderance of sexual assault in Alaska.

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CHAIR CLAMAN referenced the cases of State v. Townsend, State v. Mayfield, and Inga V. State and asked how the passage of CSSSHB 5(STA) would affect the outcomes of those cases, had they been heard following the passage of the bill, or the passage of any affirmative consent law.

MR. STINSON stated that he had a synopsis for the question but deferred to Ms. McFarland to answer since she had worked directly on the cases referenced.

MS. MCFARLAND stated that she had been involved in the State v. Townsend and the Inga V. State cases and stated that those cases addressed the distinction between sexual penetration and sexual contact that is achieved by force and coercion. She stated that sexual contact or penetration that occurs through the use of force is not necessarily coerced through the use of force.

CHAIR CLAMAN asked Ms. McFarland to describe the facts of the cases.

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MS. MCFARLAND explained that in State v. Townsend, an individual was at a bar in Juneau and had briefly reached out and grabbed the shaft of another person's penis. The defendant did not know the person and had no reason to believe that the person wanted the contact, and he was subsequently charged with second degree sexual assault. She stated that this case addressed the lack of consent through the use of force and coercion through the use of force. She stated that the indictment was dismissed because the court found that, although there had been the use of force through the act of touching, the conduct was not coerced through the use of force and did not arise to the level of second-degree sexual assault under statute when looking at the entirety of the circumstances.

MS. MCFARLAND explained that in the case of Inga v. State, the defendant was convicted of second-degree sexual assault and argued that his case, like that of Townsend, did not include the

use of force required to arise to the second-degree assault. She stated that the court of appeals found that the facts of the case were different from those in Townsend. She stated that in the Inga case, the victim was isolated in a location with a man with whom she had reason to fear, and the sexual contact of touching the female breast had occurred after the victim unequivocally refused to have sex with the defendant, and the defendant's immediate response was to physically assault her. She stated that the court had found that there was sufficient coercion through the use of force. She stated that the force required under current law is that the force required for a sexual assault must be more than the force inherent in the act itself.

MS. MCFARLAND explained that the State v. Mayfield case occurred several years later and considered how the other two cases applied to an attempted sexual assault. She stated that the case involved a man in a movie theater who changed seats to sit closer to a 14-year-old girl and who started to put his fingers down her pants. The girl believed that he was attempting to touch her buttocks and she yelled and fled, so no sexual contact occurred. She stated that the court ruled on whether there was sufficient evidence that he intended to touch without consent. She stated that the court ruled that the intent required in such cases is the existence of the intent to use force would be necessary and, when taking the totality of the circumstances of the case, it ruled that there was not sufficient evidence to uphold the indictment. She added that the defendant Mayfield pleaded guilty to harassment. She stated her belief that the passage of CSSSHB 5(STA) would make the analysis of factors more straightforward. She stated that the question would no longer be whether the defendant coerced the contact through the use of force, but it would be whether the defendant recklessly disregarded the lack of consent. She stated that the Townsend and Mayfield cases were both cases in which the defendant did not go to trial, and she postulated that if the proposed legislation had been law at the time, the cases would have survived the motions to dismiss. She stated that there exists uncertainty in how a jury would find in those cases.

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MR. STINSON added that the Mayfield and Townsend cases pertain to the question of what harassment is and what is sexual assault. He stated that the court had ruled in the Townsend case that the conduct may have been tantamount to harassment and not to sexual assault. He stated that the legislature's

decision to categorize certain behaviors as such was one of policy. He stated that the Inga case was evidently more egregious, and that the Mayfield case was less clear because there had been no crime completed. He stated that probable cause would likely be found but the question would remain for a jury to determine whether the defendant would take a crucial step to complete the crime.

CHAIR CLAMAN asked whether the Office of Public Advocacy had submitted a fiscal note related to either SB 187 or CSSSHB 5(STA).

MR. STINSON answered that the fiscal note from his office would be larger than those from the Public Defender Agency and the Department of Law. He stated that there had been a draft fiscal note submitted for SB 187 and he predicted that a similar fiscal note would be submitted for CSSSHB 5(STA). He stated his office recognized that there was uncertainty on the progression of the bills and had postponed submitting an indeterminate fiscal note. He stated that the draft fiscal note would include 6 new positions, of which one would be an attorney. He added that the note included 2 defense investigators and 3 law office assistants. He stated that the preliminary cost estimate was approximately \$2.5 to \$2.6 million and would increase the contract budget by 30 percent or \$1.89 million and would cover costs for leased space. He noted that OPA was competing with the Public Defender Agency for an increasingly small number of available attorneys. He stated that the Department of Law had recently gained 10 new positions, the Public Defender Agency also added positions recently, and that the OPA had not. He noted that the hourly contract rate for independent contractors was outdated, and between \$8 and \$9 million of the fiscal note would be to cover increases in those costs. He added that case caps for contractors had been increased by 30 to 40 percent. He added that the cases are difficult to both defend and to prosecute and the potential exists for burnout when attorneys are overloaded with these types of cases, and that contractors are reluctant to accept such cases. He stated that it had been considered to contract out more cases involving homicides to keep sexual assault cases in-house.

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CHAIR CLAMAN asked whether Mr. Stinson anticipated more cases to be handled by outside counsel or by in-house counsel, should CSSSHB 5(STA) pass.

MR. STINSON answered that the cases would be split. He added that the reason the attorney position had been requested in the fiscal note was that it is sensible to have at least one person in-house that may specialize in these types of cases, although the position is expected to be difficult to recruit. He noted that it was difficult to predict in which jurisdictions such cases would be prosecuted and that areas such as Nome and Kotzebue may have high rates of conflict which would require more outside counsel. He noted that there exists the potential that more cases in the Anchorage area could be kept in-house. He mentioned that there still exists a backlog of cases.

REPRESENTATIVE DRUMMOND asked whether a fiscal note would be drafted for CSSSHB 5(STA) and, should the bill pass, whether OPA would receive the requested resources.

MR. STINSON answered that OPA would submit a fiscal note and expressed his hope that the legislature would provide for the additional resources necessary.

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CHAIR CLAMAN noted that there is a proposed change in the law pertaining to the sexual abuse of a minor, and that conduct that is not currently illegal would become a crime and asked what impacts may occur in each agency and how trials are expected to change.

MS. MCFARLAND explained that CSSSHB 5(STA) would designate a crime for offenses against 16- and 17-year-olds when there does not exist a relationship involving a position of authority and there exists a 10-year age gap, which is not currently a crime. She stated that those who are between the ages of 13 and 15 and who are involved with an individual 10 years older, the penalty for such a crime would be increased. She stated that conduct of sexual penetration that is not currently considered to be criminal would become sexual abuse of a minor in the first degree and conduct of sexual penetration that is currently illegal under sexual abuse of a minor in the second degree would then be a crime in the first degree. She explained that the litigation would not likely substantially change since age is not a matter that is often in dispute. She stated that increasing the penalty for an offense would necessarily result in more work. She explained that a presumptive term for a first felony offender convicted of sexual abuse of a minor in the second degree is 5-15 years and, when raised to the first degree, the presumptive term is increased to 20-30 years. She

stated that first degree cases would be those involving sexual penetration. She stated that cases involving sexual contact are more complex, and CSSSHB 5(STA) would impose a 10-year age gap limit that is different from the 6-year age gap in current law. She stated that no conforming language is included for the sexual contact language as it is for sexual penetration. She stated the range of sentencing for such cases would change from 2-12 years to 5-15 years. She stated that increases in the seriousness of crimes and increases in sentencing for offenses will result in more work.

MR. STINSON noted that, should CSSSHB 5(STA) pass, there would be conduct criminalized that is not currently and he would anticipate some increase in caseload.

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CHAIR CLAMAN asked how long the legal age of consent in Alaska had been established at the age of 16.

MS. MCFARLAND answered that the age of consent predates the 1978 revision to the criminal statutes. She stated that the statutes in effect prior to 1978 were rape statutes and had criminalized sexual penetration with someone who was younger than the age of 16. She postulated that the statute had been enacted at or around the time of statehood.

CHAIR CLAMAN asked what impacts the sexual abuse of a minor provisions proposed under CSSSHB 5(STA) would have on child marriage statutes.

MR. STINSON answered that potential impacts would depend upon the effective date. He stated his belief that marriage is a defense in the circumstances if it is a consensual relationship. He stated that some marriages could become illegal, should CSSSHB 5(STA) pass, and he offered to conduct additional research to fully answer the question.

MS. MCFARLAND referred to AS 11.41.445 which denotes what constitutes an affirmative defense would be, such that the defendant would be a legal spouse, unless the offense was committed without consent with coercion or the use of force. She stated that changes to marriage eligibility ages would result in a change to who may partake in that defense.

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## ADJOURNMENT

CHAIR CLAMAN announced that the House Judiciary Standing Committee would recess to the call of the chair.

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CHAIR CLAMAN called the House Judiciary Standing Committee back to order. Representatives Claman, Drummond, and Kurka (via teleconference) were present at the call back to order.

### HB 5-SEXUAL ASSAULT; DEF. OF "CONSENT"

[Contains discussion of SB 187.]

CHAIR CLAMAN [announced that the final order of business would be continuation of discussion of SPONSOR SUBSTITUTE FOR 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." [Before the committee was CSSSHB 5(STA).]

REPRESENTATIVE KURKA asked whether the definitions of consent and rape by fraud contained in CSSSHB 5(STA) and SB 187 had been compared and asked the witnesses to offer their comments. He asked whether a handout that the Department of Law had distributed to the committee during previous testimony pertained the SB 187 or to CSSSHB 5(STA).

CHAIR CLAMAN offered his understanding that the handout that had been previously distributed to the committee pertained to language either contained in SB 187 or requested by the Department of Law to be adopted into SB 187.

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MS. MCFARLAND allowed that she did not have the handout referenced before her. She offered that the Senate Judiciary Standing Committee had adopted language in SB 187 may have differed from that which had been proposed by the Department of Law. She offered to provide analysis of the differences in language between SB 187 and CSSSHB 5(STA). She explained that the two proposed bills were similar, and one distinction was that the definition of consent in CSSSHB 5(STA), on page 6, line 1, and the version in SB 187 were similar but that CSSSHB 5(STA) does not have the language beginning on line 3 that contains the

definition of the meaning of "freely given." She added that CSSSHB 5(STA), Section 5, on page 5, line 11 contains language similar to that proposed under SB 187 but that it differed such that SB 187 does not have the language regarding the use of force because SB 187 would create a separate offense for conduct involving the use of force. She noted that SB 187 does not include the "manner of dress" language as proposed in CSSSHB 5(STA). She noted that SB 187 does not have the language proposed in CSSSHB 5(STA), subsection 2 pertaining to consenting to force or consenting to being made unconscious. She postulated that SB 187 could allow someone to consent to conduct that is likely to cause injury or to cause someone to become unconscious, which would be illegal should CSSSHB 5(STA) pass. She noted that the "fraudulent professional purpose language" in both bills was similar. She noted that CSSSHB 5(STA) contains subsection 3, which is not included in SB 187. She concluded that the bills take similar but slightly distinctive approaches, and each case would be unique, and the distinctions would necessarily be on a case-by-case basis when considering the potential effects on prosecution, should either bill pass.

MR. STINSON lauded the summation offered by Ms. McFarland and emphasized that SB 187 contains more of the existing statutory framework by preserving sexual assault in the first degree in cases involving the use of force or the implied threat of the use of force, an unclassified felony. He stated that sexual assault without consent is a class A felony. He stated that CSSSHB 5(STA) would provide a presumptive sentence of 20-30 years for a first offense and SB 187 would provide that sexual conduct without consent would be 5-15 years. He offered that SB 187 has a separate section that sexual assault in the first degree would include situations when an offender makes a person become incapacitated prior to sexual penetration. He suggested that there does not appear to be language proposed that would prohibit a person from consenting to becoming incapacitated.

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CHAIR CLAMAN announced that CSSSHB 5(STA) was held over.

[3:05:07 PM](#)

#### **ADJOURNMENT**

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:05 p.m.