

**ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE**

March 9, 2022

1:33 p.m.

MEMBERS PRESENT

Senator Roger Holland, Chair
Senator Mike Shower, Vice Chair
Senator Shelley Hughes
Senator Robert Myers
Senator Jesse Kiehl

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 187

"An Act relating to criminal law and procedure; relating to the crime of harassment; relating to the duty to register as a sex offender; amending the definition of 'sex offense'; relating to lifetime revocation of a teaching certificate for certain offenses; relating to the definition of 'domestic violence'; relating to multidisciplinary child protection teams; relating to arrest authority for pretrial services officers and probation officers; and providing for an effective date."

- HEARD & HELD

SENATE BILL NO. 189

"An Act relating to sex trafficking; establishing the crime of patron of a victim of sex trafficking; relating to the crime of human trafficking; relating to sentencing for sex trafficking and patron of a victim of sex trafficking; establishing the process for a vacatur of judgment for a conviction of prostitution; and providing for an effective date."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 187

SHORT TITLE: HARASSMENT; SEX OFFENDERS & OFFENSES

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

02/15/22 (S) READ THE FIRST TIME - REFERRALS
02/15/22 (S) JUD, FIN
02/23/22 (S) JUD AT 1:30 PM BUTROVICH 205
02/23/22 (S) Heard & Held
02/23/22 (S) MINUTE(JUD)
02/25/22 (S) JUD AT 1:30 PM BUTROVICH 205
02/25/22 (S) Heard & Held
02/25/22 (S) MINUTE(JUD)
03/02/22 (S) JUD AT 1:30 PM BUTROVICH 205
03/02/22 (S) Scheduled but Not Heard
03/04/22 (S) JUD AT 1:30 PM BUTROVICH 205
03/04/22 (S) Heard & Held
03/04/22 (S) MINUTE(JUD)
03/07/22 (S) JUD AT 1:30 PM BUTROVICH 205
03/07/22 (S) Heard & Held
03/07/22 (S) MINUTE(JUD)
03/09/22 (S) JUD AT 1:30 PM BUTROVICH 205

BILL: SB 189

SHORT TITLE: CRIME OF SEX/HUMAN TRAFFICKING
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

02/15/22 (S) READ THE FIRST TIME - REFERRALS
02/15/22 (S) JUD, FIN
02/28/22 (S) JUD AT 1:30 PM BUTROVICH 205
02/28/22 (S) Heard & Held
02/28/22 (S) MINUTE(JUD)
03/02/22 (S) JUD AT 1:30 PM BUTROVICH 205
03/02/22 (S) Heard & Held
03/02/22 (S) MINUTE(JUD)
03/04/22 (S) JUD AT 1:30 PM BUTROVICH 205
03/04/22 (S) Heard & Held
03/04/22 (S) MINUTE(JUD)
03/07/22 (S) JUD AT 1:30 PM BUTROVICH 205
03/07/22 (S) Heard & Held
03/07/22 (S) MINUTE(JUD)
03/09/22 (S) JUD AT 1:30 PM BUTROVICH 205

WITNESS REGISTER

ED KING, Staff
Senator Roger Holland
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Explained the changes in the committee substitute (CS) for SB 187, Version A to Version G, on behalf of the committee.

KACI SCHROEDER, Assistant Attorney General
Legal Services Section
Criminal Division
Department of Law
Juneau, Alaska

POSITION STATEMENT: Answered legal questions on SB 187, Version G.

ACTION NARRATIVE

[1:33:47 PM](#)

CHAIR ROGER HOLLAND called the Senate Judiciary Standing Committee meeting to order at 1:33 p.m. Present at the call to order were Senators Myers, Hughes, Shower, Kiehl, and Chair Holland.

SB 187-HARASSMENT; SEX OFFENDERS & OFFENSES

[1:34:20 PM](#)

CHAIR HOLLAND announced the consideration of SENATE BILL NO. 187 "An Act relating to criminal law and procedure; relating to the crime of harassment; relating to the duty to register as a sex offender; amending the definition of 'sex offense'; relating to lifetime revocation of a teaching certificate for certain offenses; relating to the definition of 'domestic violence'; relating to multidisciplinary child protection teams; relating to arrest authority for pretrial services officers and probation officers; and providing for an effective date."

[SB 187 was previously heard on 2/23/22, 2/25/22, 3/4/22, and 3/7/22. Public testimony was opened and closed on 3/4/22.

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SENATOR SHOWER moved to adopt the committee substitute (CS) for SB 187, work order 32-GS2031\G, as the working document.

CHAIR HOLLAND objected for discussion purposes.

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ED KING, Staff, Senator Roger Holland, Alaska State Legislature, Juneau, Alaska, reviewed the changes in the committee substitute (CS) for SB 187, Version A to Version G, on behalf of the committee.

[Original punctuation provided.]

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**SUMMARY OF CHANGES
(VERSION A TO VERSION G)**

I. Version G adds new sections (1-7) altering the language in AS 11.41.410 - 11.41.530 (sexual assault) to change the definition of consent, close the loophole regarding nonconsensual sexual contact without the use of force, and to create a clear gradation of sexual assault classifications.

II. Sections 1 and 2 of version A were deleted to conform to the reclassification of the class C Felony level behavior from AS 11.61.117 (harassment) to AS 11.41.425 (sexual assault).

III. Section 3 of version A is now section 9 of version G. It now removes the areas of the body covered under sexual assault and adds the pelvis and inner thigh to the class A misdemeanor harassment law.

IV. Section 8 of version G is new language to update what it means to publish an image of a minor to the Internet.

V. Conforming changes were made to section 4 of version A (now section 10 of version G).

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VI. No changes were made to section 5 or 6 of version A (now sections 11 and 12 of version G).

VII. Section 7 of version A is now section 13 of version G. The requirement to appear in person when making or changing travel plans was deleted.

VIII. Section 8 of version A is now section 14 of version G. Technical drafting changes were made to this section.

IX. Section 9 of version A is now section 15 of version G. The sex offender registration requirement for AS 11.61.116(c)(2) (publishing certain images of a minor to the Internet) was amended so that it is

registerable on the first offense if the image includes the victim's name and on the second offense otherwise.

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X. Technical drafting changes were made to sections 10 - 14 of version A (now sections 16 - 20 of version G)

XI. Section 15 of version A was deleted due to the deletion of the proposed AS 11.61.117 (class C Felony harassment).

II. No change to section 16 of version A, which is section 21 of version G.

XIII. Section 17 of version A was deleted to preserve the class A misdemeanor harassment law.

XIV. No change to the applicability or effective date sections.

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CHAIR HOLLAND removed his objection; he heard no further objection, and Version G was before the committee.

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KACI SCHROEDER, Assistant Attorney General, Legal Services Section, Criminal Division, Department of Law, Juneau, Alaska, noted the significant changes related to the sexual assault provisions in statute. The department has redefined "without consent" and has rewritten the harassment statutes. As Mr. Skidmore mentioned, in order for something to qualify as sexual assault in Alaska, there must be the threat of force or the use of force. Without that, any type of sexual contact or penetration does not qualify as sexual assault. The current definition ignores how these offenses generally happen, including the freeze response from the victim. The original version of SB 189 attempted to address this issue with the harassment statutes. However, that did not address the heart of the matter. The administration approves this approach, one that has been discussed by some members of the legislature since 2019. This approach has been adopted by several other states. Some of the language in Version G is almost verbatim to Montana statutes.

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SENATOR HUGHES commended the department for the amendments to the bill that elevated sexual assault penalties beyond the harassment level.

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SENATOR SHOWER asked whether the department had statistics from other states using the approach taken in SB 187 that showed any reductions in sexual assaults. He expressed an interest in achieving a balanced approach to avoid capturing behavior such as innocent touching that might happen when students are dancing at a college party. He emphasized that the legislature doesn't want to ruin someone's life by criminalizing behavior because someone had too much to drink at a college party.

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SENATOR KIEHL asked if the department could review how the severity of offenses differ with the use of force or without consent.

MS. SCHROEDER directed attention to Section 5 on page 4, lines 28-30. She read the definition of "without consent."

"without consent" means that, under the totality of the circumstances surrounding the offense, there was not a freely given, reversible agreement specific to the conduct at issue;

MS. SCHROEDER emphasized that those elements are important ones and are used in other states that have adopted this approach to address sexual assault. Consent needs to be freely given, reversible, and analyzed under the totality of the circumstances. She read the definition for "freely given."

"freely given" means a positive expression of agreement, by word or action, given under the person's free will.

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MS. SCHROEDER related that Section 4 identified further descriptors. She read AS 11.41.445(c)(1).

(1) and expression of lack of consent through words or conduct, including in action, means there is no consent; And expression of lack of consent to under the paragraph does not require verbal or physical resistance;

MS. SCHROEDER stated that under the current law, if a victim says no and there is no force, it does not constitute a sexual assault. This provision would remedy that conduct.

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MS. SCHROEDER referred to Section 4, page 4, line 18, noting that paragraph (2) reads:

(2) a current or previous dating, social, or sexual relationship or the manner of dress of the person involved with the defendant in the conduct at issue may not by itself constitute consent;

MS. SCHROEDER highlighted that paragraph (3) speaks to the professional purpose. For example, this would relate to an instance in which a person would say that they needed to touch the other person in this way because it is therapeutic. Thus, the victim is basically coerced by fraud to believe that it is therapeutic when it actually is a sexual assault.

MS. SCHROEDER reiterated that the current definition in statute for "without consent" does not mention force or the threat of force.

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MS. SCHROEDER referred to Section 1, page 1, lines 9-12, to sexual assault in the first degree, which would be when an offender engages in sexual penetration with the use of force or the threat of force, or if the defendant causes the victim to become incapacitated. This bill does not change this unclassified offense in current law.

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MS. SCHROEDER stated that Section 2, AS 11.41.420(a)(1)(A) on page 2 relates to sexual contact with the use of force or the express or implied threat of force or if the offender causes the person to become incapacitated. She further stated that this provision is current law. She directed attention to page 3, line 8, to new language related to an offender engaging in sexual assault in the second degree, a class B felony. This relates to engaging in sexual penetration without the use of force but without consent. She referred to page 4, line 9, which relates to an offender engaging in sexual contact without the use of force, but without consent, which would be a class C felony.

MS. SCHROEDER explained that the department still classified the conduct using force at the highest level, but the penalties are ratcheted down in situations without consent and no force.

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SENATOR SHOWER asked how the marriage defense for rape ties into this bill. He offered his belief that it was House Bill 49.

MS. SCHROEDER agreed that under House Bill 49, the marriage defense was removed. She elaborated that marriage is no longer an excuse for sexual assault. However, the defense for marriage provision relates to whether the person consented to the act for which the offender is charged, while capable of understanding the nature and consequences of the offender's conduct. This means that if there is consent, no offense was committed.

SENATOR SHOWER thanked her for clarifying the provision.

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At ease

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CHAIR HOLLAND reconvened the meeting.

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SENATOR KIEHL turned to Section 4, paragraph (2), which read, "a current or previous dating, social, or sexual relationship or the manner of dress may not by itself constitute consent." He questioned what the language "manner of dress by itself" meant.

MS. SCHROEDER responded that concept had been discussed for many years by the legislature. It also appears in other states' statutes, such as Montana. She related that the Department of Law suggested that there would not be any harm in including it if the legislature agreed. She cautioned that an absolute bar on considering the manner of dress would negate some of the totality of the circumstances analysis. She explained that it might interfere with some defendants who had a prior relationship, such that the person wore clothing that signaled something special to them, so they initiated contact. In those rare circumstances, a defendant could still use that defense. Although it would not negate the recklessness entirely, the person could say that was the signal every other time the couple engaged in sexual relations.

SENATOR KIEHL stated that it would never be okay for someone to say that they met a person for the first time, and the person

was scantily clad, which meant the person was consenting to have sex.

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SENATOR KIEHL offered his view that what Ms. Schroeder described could be elements of a previous dating, social or sexual relationship, but including the manner of dress wouldn't justify initiating sexual contact solely. He expressed concern about having it as an element.

MS. SCHROEDER said she understood his concern. She stated that articulating the fact pattern was uncomfortable. She explained that even if a defendant said this element caused them to believe the act was consensual, the prosecutor would always look at what else happened. Just because someone wore clothing that they previously wore does not mean the person consented. She emphasized that it was up to the legislature to decide; however, she would caution against a total bar due to the totality of circumstances analysis the Department of Law conducts. She cautioned that she does not want to imply that these are arguments the Department of Law receives in court. If a defendant made such an argument, they would do so at their peril. She was unsure this language addressed a problem, although it seemed important to some to include it, and other states adopted similar provisions.

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CHAIR HOLLAND asked if the term "by itself" appears elsewhere in this bill.

MS. SCHROEDER answered no. She reiterated that an offender could not say someone wore "x" and therefore the sexual relations were consensual. She envisioned that it would rarely arise.

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SENATOR HUGHES commented that some men have pointed out that a male can be a sexual assault victim, and a male could also be scantily dressed. She highlighted that those offenses might not always be reported since for cultural reasons.

SENATOR HUGHES asked whether the number of reported sexual assaults would initially go up once the need to prove force or a threat of force was removed. She offered her belief that some offenders have been using this to their advantage to assault multiple victims sexually. She surmised that the rates of incidence would go down over time.

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SENATOR HUGHES referred to Section 9, on page 6, lines 9-10 of Version G. The original bill included the language "genitals, buttocks, or female breast." She had suggested adding the language "pelvis" and "inner thigh," and to remove the word "female." She said she had anticipated the committee substitute would read, "genitals, buttocks, pelvis, inner thigh, or breast." She asked why the language "genitals, and breast" were removed from this provision.

MS. SCHROEDER responded that the Department of Law has no comment on whether the committee would like to address "male breasts" in the bill. She explained that the department removed the language "genitals, female breasts, and semen" to separate the sexual assault statutes from the harassment statutes. Currently, the language includes intent to harass or annoy and the use of force element. She stated that removing the use of force element from the sexual assault statutes creates some overlap. The Department of Law would like to avoid a rule of lenity argument, such that the offender argues that lower offense was what they committed, so it wasn't a sexual assault and they must be charged with harassment. The department included the mental state "intentional," language "under circumstances not prescribed," and a separation of body parts to achieve a clear separation. If the committee had concerns, one option would be to decide what body parts should fall under the harassment statutes. The department would still like to retain the intentional mental state and the "under circumstances not proscribed." She offered her view that those changes would provide enough separation; however, it would be less precise than the current language in Version G.

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SENATOR HUGHES asked her to identify what crime is "touching directly or through clothing another person's genitals or breasts" would become.

MS. SCHROEDER answered that the crime would be a sexual assault if it were without consent.

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SENATOR KIEHL referred to Section 9, which raises the question of how to treat unwanted contact with semen. He recalled discussions the committee held on House Bill 49 in 2019. He offered his view that those statutes had a tiered level of severity. This bill would unintentionally remove part of when any undesired contact becomes a felony sex offense. He expressed

concern that what gets elevated, inconsistent with other criminal behavior, is the nonsexual contact. The various body fluids in the harassment statutes originated, in part, when inmates were having bodily fluids thrown at them. He acknowledged that behavior deserves to be criminalized, but it is not sexual conduct. He suggested the committee might amend this provision, so flinging semen would not be in the same class as sexual felonies. Otherwise, he found the committee substitute's approach to this unwelcome contact has an appropriate structure to the crimes.

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MS. SCHROEDER responded to Senator Shower's earlier concern about college students attending a party and miscommunication occurred. She related that the department must consider mental states not specific in this bill. However, the offender's mental state will guide the Department of Law away from miscommunications. She stated that the mental states for sexual assault require that the person act knowingly, meaning the offender must know they are engaging in a sexual act. The person must also have a reckless disregard for the lack of consent. She paraphrased a portion of the definition [AS 11.81.900(a)(3)].

(3) a person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation;

MS. SCHROEDER stated that the department believes that this definition will prevent prosecutors from charging someone when miscommunications occur. The prosecutors will consider the totality of the circumstances. However, the department doesn't want people to be afraid to date or engage in sexual behavior that is normal and healthy for people. Further, the department must prove these cases before a jury beyond a reasonable doubt, which is the highest standard in the law. She cautioned members that while the department might charge more cases under this language, proving them will not be easier. She stated that sexual assault is the only area in the criminal code that, but for the circumstances surrounding the offense, the conduct would be legal. Consenting people engage in sexual activity all the time, but the circumstances that surround the act differ. Often

sexual assaults occur with few witnesses and without substantial evidence, physical or otherwise, making these cases challenging to prove.

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SENATOR SHOWER highlighted that the committee discussions will show that the committee was cautious in its approach. He expressed concern about capturing and ruining the lives of younger individuals who might do something stupid that they might not have done if they were older or more mature. He offered his belief that legislative intent matters. The committee intends to give the Department of Law the tools it needs, to respect everyone in the process, but not to hurt citizens.

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CHAIR HOLLAND held SB 187 in committee.

SB 189-CRIME OF SEX/HUMAN TRAFFICKING

[2:04:40 PM](#)

CHAIR HOLLAND announced the consideration of SENATE BILL NO. 189 "An Act relating to sex trafficking; establishing the crime of patron of a victim of sex trafficking; relating to the crime of human trafficking; relating to sentencing for sex trafficking and patron of a victim of sex trafficking; establishing the process for a vacatur of judgment for a conviction of prostitution; and providing for an effective date."

CHAIR HOLLAND noted that the committee was preparing a committee substitute, but it was not ready.

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SENATOR MYERS directed attention to a potential discrepancy in the language on page 5, lines 2-6, and the language on page 21, lines 15-18, related to the presumption and burden of proof in vacatur of judgment of conviction for prostitution proceedings. He interpreted this language to mean that the person should not be charged as a prostitute because the person was a victim of sex trafficking. He agreed with the policy but expressed concern that the person must prove that they were a victim to get the conviction vacated. He acknowledged that it was the lowest level of proof, a preponderance of the evidence, but it seemed uneven. He stated that a person could say they were a victim and not need to provide proof, but the person claiming to be a victim must prove it to vacate the conviction.

MS. SCHROEDER responded that those two sections address different things. The language that speaks to "corroboration of certain testimony not required" relates to prosecuting someone for sex trafficking, but this statute applies to all offenses. The department doesn't need to bring in substantial evidence to corroborate. She acknowledged it probably wasn't a good idea to place that language in statute, and she was unsure why the legislature adopted it. However, this is current law, and SB 189 merely relocates the statute.

MS. SCHROEDER stated that this relates to proving something beyond a reasonable doubt. She did not think that the victim providing testimony that they were sex trafficked without providing corroborating evidence was likely to succeed. Nothing would prevent the state from attempting to do so, and nothing says a specific quantum is necessary. However, the state does screen cases by looking for corroborating evidence to meet the high bar. In terms of vacating a judgment, the person can prove it with solely their testimony, but they must meet the preponderance of the evidence standard. If the person presents a compelling and credible case, the judge could make a finding to overturn their conviction. However, nothing requires the person to bring in lots of evidence to get their conviction vacated either.

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SENATOR MYERS commented that it still seems like a mismatch from the victim's perspective. He said, "On the one hand, if I say it earlier, I don't have to prove anything, but if I say it later, then I have to prove it." He suggested that the timing concerns him because if something is true, it doesn't depend on when the person said it.

MS. SCHROEDER replied that it is not the victim in the sex trafficking case who has to prove it. The state must prove the crime, so it will look for corroborating evidence because it must prove it beyond a reasonable doubt. She indicated that it would be challenging to achieve that standard without any corroborating evidence. She stated that vacating a judgment requires a preponderance of the evidence. The victim could tell their story in the prosecution case to vacate the conviction and bring in whatever evidence they choose. She reiterated that the onus is not on the victim, but on the state. She highlighted that one matter is a criminal case, and the other is a civil action.

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SENATOR MYERS said Ms. Schroeder got to the heart of the matter by clarifying that the burden is on the state in one case, and in the other, the burden of proof is on the petitioner to prove their innocence. He offered his belief that from the victim's perspective, the standard of proof should be the same.

MS. SCHROEDER referred to the corroboration section, which speaks to the victim's testimony. Again, the burden of proof is on the state to prove it. The person stating that they had been a victim of sex trafficking does not have to prove anything. The state is prosecuting the sex trafficker, not the victim. This corroboration section of the bill states that the prosecutor can call the victim in as a witness without further corroborating evidence, which the prosecutor would not likely ever do. The other instance would be a civil hearing to vacate a judgment, where the petitioner would need to prove something to the court via their statement or something else. She highlighted that the burden of proof for civil cases is the preponderance of the evidence, whereas it would be beyond a reasonable doubt for the criminal case.

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SENATOR MYERS said he would pursue this with the Department of Law at a later time.

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SENATOR KIEHL stated that there was some confusion at a previous hearing on Section 22, on page 17, on the lookback timeframe. He asked Ms. Schroeder if the 72-hour imprisonment for a person previously convicted of buying a sex act would be once in eternity or once in a set period of years.

MS. SCHROEDER responded that there was not a lookback period for the misdemeanor level so it could be at any point. She added that Title 11 does have some misdemeanors with lookbacks and others without them. She deferred to the committee to decide whether to add a lookback. She noted that the lookback in that section regarding enhanced penalties for patrons is five years for a felony. She said the sentence could increase to a felony if someone accrued convictions at a fairly rapid rate.

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CHAIR HOLLAND held SB 189 in committee.

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There being no further business to come before the committee, Chair Holland adjourned the Senate Judiciary Standing Committee meeting at 2:15 p.m.