

H B

545



ADVOCACY SERVICES OF ALASKA

325 East 3rd, 4th Floor
Anchorage, AK. 99501-2606
(907) 274-3658 TTD

127 S. Franklin
Juneau, AK. 99801
(907) 586-1627 TTD

250 Cushman, Suite 3H
Fairbanks, AK. 99701
(907) 456-1070 TTD

March 29, 1988

Representative John Sund
Chairperson
House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

Dear Representative Sund:

I understand that your Committee is considering House Bill 545 which would change the criminal statutes relating to sexual assaults committed against mentally incapable adults. This letter is to support this bill and to commend you for taking the initiative on this important issue.

A recent incident at the Harborview Developmental Center conclusively demonstrates the need for this type of legislative action. In that case, a staff member was discovered while having sexual contact with a severely impaired resident who clearly could not consent to such activity. We were all shocked to discover that sexual contact without penetration in such circumstances is not a crime under current statutes. This loophole must be closed as soon as possible.

I also understand that your Committee's bill would increase the penalties for sexual assaults committed against mentally incapable adults by care givers. We fully support these efforts. We must send a clear message that such violations of a position of trust will not be tolerated.

Again, I appreciate and support your efforts to protect these vulnerable members of our community. Please contact me if I can be of any assistance.

Sincerely,

Jeffrey L. Jessee
Supervising Attorney

JLJ:dw

STATE OF ALASKA

PUBLIC DEFENDER AGENCY

STEVE COWPER, GOVERNOR

900 W. 5TH AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501-2090
PHONE: (907) 279-7541

March 29, 1988

Rep. John Sund, Chairman
House Judiciary Committee
P. O. Box V
Juneau, Alaska 99811

Re: HB 545.

Dear Representative Sund:

Thank you for requesting my comments on HB 545.

This bill fills a significant gap in the existing criminal code by penalizing sexual contact with mentally incapable people, those who are incapable of understanding the nature and consequences of their conduct. It also increases the penalties for sexual penetration offenses committed against a mentally incapable person by someone with a legal duty to care for the person. Adults who are developmentally incapable of giving a meaningful consent to sexual conduct should be protected from being sexually victimized. The harshest penalties should be imposed on those who exploit the mentally incapable by abusing their positions of legal authority over them.

Because this bill denies a category of adults the ability to consent to the full range of voluntary sexual behavior, the elements of the offenses and the definitions which they use must be narrowly drawn to protect those who require protection but not to deny a fundamental right to those who do indeed have the capacity to consent to sexual behavior. Given the need for sensitivity in drawing lines in this area, the bill's focus on "legal authority" as a requisite for the more serious crimes is substantially preferable to using broader concepts of having any position of authority or being temporarily entrusted to care for someone, such as are used in the child sexual abuse laws. Someone entrusted by law to care for a mentally incapable adult will always be in a position to know the extent of that person's incapacity, and the professional caregiver status makes any sexual overture inherently coercive. By contrast, a neighbor or friend occasionally entrusted to care for a mentally disabled adult may develop a genuine friendship which leads to a noncoercive sexual relationship, which is fully consensual but for the one adult's being so mentally impaired that the law

defines him or her as legally incapable of consent. Though knowingly engaging in a sexual relationship with a mentally incapable person may be criminalized, the severe presumptive sentences for unclassified felonies should not apply to the neighbor or friend situation.

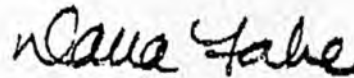
Section 2 leaves the current statute on sexual penetration with a person who is temporarily incapacitated -- e.g., a person who is extremely intoxicated -- unchanged, except that the term "incapacitated" has been eliminated. That is, former AS 11.41.420(a)(2)(B) would be .420(a)(3)(B) under this bill. The term "incapacitated" has a very different meaning in Title 13, and it is helpful to eliminate the confusion which arises from giving a term two different meanings. Section 3 creates a new offense for sexual contact with a temporarily incapable person.

Section 4 provides that a person who is himself or herself mentally incapable cannot be charged with a crime of sexual abuse of another mentally incapable person. Practically speaking, the defense of mental incapability provides a means of decriminalizing sexual conduct between mentally incapable people. Between incapable people, sexual conduct has none of the exploitive character that exists when a non-incapable person preys upon an incapable person. Such conduct is ordinarily voluntary (even if the parties lack the legal capacity to "consent"), and it occurs almost exclusively within institutions for the mentally incapable. It is better dealt with through institutional rules than through the criminal justice system.

Section 5 provides the critical definition of who is "mentally incapable." The proposed definition is far preferable to the definition in current AS 11.41.420(a)(2)(A). The present definition depends on a common morality, presuming that an incapable person's consent is invalid when the consent covers sexual activity that a "normal" (non-incapable) person would not consent to. That definition is vague; it is both hard to prove and hard to defend against in a pluralistic society. The definition in section 5 focuses on the reason why mentally incapable adults should not be capable of giving valid consents to sexual behavior: a consent is meaningless if it is given by someone who does not understand the potential harm in the situation. The proposed definition is significantly more protective of the mentally disabled than comparable statutes from other states.

I appreciate this opportunity to comment on this bill. Please let me know if I can provide any further information or assistance on this bill.

Very truly yours,



Dana Fabe
Public Defender

DF:rjb

POSITION PAPER
HOUSE BILL NO. 545

For an Act entitled: "An Act amending crimes relating to sexual assault as they relate to persons who are mentally incapable."

Effect of Bill:

The purpose of this legislation is to protect mentally incapable persons from sexual assault from care providers and from the general public.

Discussion:

The intent of this legislation is to remedy the situation in which current legislation fails to protect mentally incapable persons from sexual assault unless there is forcible rape. This legislation expands the types of sexual contact that would be construed as sexual assaults and thereby offers greater protection. The Division and the Department supports the intent of this legislation, but have some concerns.

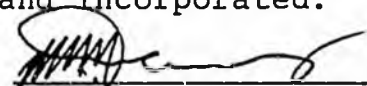
Under Sexual Assault in the First Degree, SECT. I(A)(3), lines 17 through 20 is intended to address assault by care providers. In reality it might protect only clients that are involuntary commitments. If the words "or through service in a program receiving public funds" were added to the end of line 20, this should serve to strengthen the intent. This should also be added to line 29.

This legislation may unintentionally prohibit any form of sexual contact between married persons when one of them, but not both, is mentally incapable. The same concerns are present in the situation in which the couple is unmarried, but cohabitating, dating, etc., in a "legitimate" consensual relationship.

Recommendations:

The Division and Department supports passage of this legislation if the above concerns are addressed and incorporated.

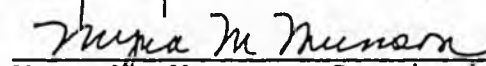
Proposed by:


Mel Henry, Director
Division of Mental Health
and Developmental
Disabilities

Date:

3/30/88

Approved:


Myra M. Munson, Commissioner
Department of Health
and Social Services

Date:

3/30/88

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Health & Social Services
 Title: ...amending crimes relating to sexual assault as they relate to...mentally incapable. BRJ: various
 Sponsor: House Judiciary Committee Components: _____
 Requestor: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
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FUNDING: (Thousands of Dollars)


GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-


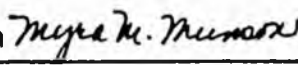
POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

The passage of HB 545 would have no significant fiscal impact on the Department of Health & Social Services.

Prepared by: Mel Henry, Director  Phone: 465-3370
 Division: Mental Health & Developmental Disabilities Date: 3/30/88

 Approved by Commissioner: Myra M. Munson  Date: 3/30/88
 Agency: Health & Social Services

Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

130 Seward, No. 301 • Juneau, Alaska 99801 • (907) 586-3650

Abused Women's Aid in Crisis (AWAIC);
Advocates for Victims of Violence (AVV);
Aiding Women in Abuse and Rape Emergencies (AWARE);
Alaska Women's Resource Center (AWRC); Arctic Women in Crisis (AWIC);
Bering Sea Women's Group (BSWG); Emmonak Women's Shelter;
Kodiak Women's Resource & Crisis Center (KWRCC);
Maniilaq Regional Women's Crisis Program; MEN, Inc.;
Safe & Fear-Free Environment (SAFE); Sikkans Against Family Violence (SAFV);
Southwestern Alaska Council for the
Prevention of Child Sexual Assault (SWACPCSA);
South Peninsula Women's Services (SPWS);
Standing Together Against Rape (STAR); Tundra Women's Coalition (TWC);
Valley Women's Resource Center (VWRC);
Women in Crisis Counseling & Assistance (WICCA);
Women in Safe Homes (WISH); Women's Resource & Crisis Center (WRCC)

SUPPORT OF HOUSE BILL 545 AN ACT AMENDING CRIMES RELATING TO SEXUAL ASSAULT AS THEY RELATE TO PERSONS WHO ARE MENTALLY INCAPABLE

The Alaska Network on Domestic Violence and Sexual Assault strongly supports House Bill 545. Current law does not sanction sexual assault of the mentally incapable unless the assault involves penetration. This bill would close this significant gap by criminalizing a sexual assault that involves sexual contact.

It also changes the statutes to most severely penalize a person in a position of legal authority over a mentally incapable person who sexually victimizes their charge. A caretaker has a special trust relationship with his or her charge that carries with it power over and knowledge of the mental incapacity of the victim. Caretakers who abrogate this trust by preying on this special relationship should be the most severely penalized.

Mentally incapacitated people are very vulnerable to sexual assault. The Network is aware of two studies on this subject. The first was the Seattle Rape Relief Disabilities Project completed in 1981. In this study, 75% of the developmentally disabled people surveyed had been sexually assaulted during their lifetime. 99% of the perpetrators involved were known to the victims.

The second study was conducted by the California State Committee on the Sexuality of the Developmentally Disabled in 1986. Statwide professionals working in the field in California agreed that 98% of their clients had been victims of sexual assault. The study also concluded that developmentally disabled people do not self report because of their vulnerability in general; the fact that they are frequently dependent on their assailant to meet basic needs; their lack of awareness of the benefits of reporting; and their lack of awareness of the services available to them. It was found that professionals often do not report because of a lack of knowledge about their legal obligation to report (California has a mandatory reporting law for abuse of the developmentally disabled.), and their perception that the system will not adequately respond.

This last point is extremely relevant to Alaska given the fact that there is currently no legal response to a developmentally disabled person who has been sexually assaulted unless actual penetration has occurred.

The Network strongly urges passage of this bill.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907.465.3800

LEGISLATIVE AFFAIRS AGENCY
LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. JUD.	4-8-88	1:30p.m.
H. JUD.	3-30-88	1:30p.m.

HOUSE COMMITTEE REPORT

(7)

Date referred: 3/22/88

FURTHER REFERRALS:

4/11
— Fun

DATE: April 8, 1988

The Judiciary Committee has considered HB 545

"An Act amending crimes relating to sexual assault as they relate to persons who are mentally incapable."

RECOMMENDS:

- replace with CS H3545 (Jud) the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note same as previous zero fiscal note published _____
- zero with analysis

SIGNING DO PASS:

[Signature]

[Signature]

[Signature]

[Signature]

[Signature]

SIGNING OTHER RECOMMENDATIONS:

[Signature]

Chairman's signature

SENATE COMMITTEE REPORT

Rev'd 4/26

FURTHER

FINANCE

DATE TURNED INTO OFFICE _____

4/26/88

Mr. President:

JUDICIARY

Committee considered CSHB 545 (JUD)

amending crimes relating to sexual assault as they relate to persons who are mentally incapable

and recommended

[] replace with _____ CS _____) [] same title
[] or adopt _____ CS _____) [] new title

[] attached amendment(s) and

[] do pass

[] do not pass

[] no recommendation

individual recommendations

[] further referral to _____

letter of intent adopted House L of I adopted

Committee attached or [] adopted fiscal note(s)

[] new [] updated or previous

[] zero fiscal impact

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

Ruth Roden
William Dugan

Joe Josephson - No Recommendation

[Signature]
Chairman signature and recommendation

[] Committee Backup attached

JOHN SUND, REPRESENTATIVE

*2504 2nd Avenue
Ketchikan, Alaska 99901
(907) 225-5552*

*While in Juneau
P. O. Box V
Juneau, Alaska 99811
(907) 465-4919*

April 22, 1988

JH For JS

From: John Sund, Chair
House Judiciary Committee

To: Max Gruenberg, House Majority Leader

Re: HB 545 "Amending crimes relating to sexual assault as
they relate to persons who are mentally incapable."

I would like to see the House adopt:

Judiciary Committee Substitute for HB 545

House Finance Committee Letter of Intent for CSHB 545 (Jud)

5-2078B

Chenoweth
4/8/88

Original sponsor: Judiciary Committee

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 545 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act amending crimes relating to sexual assault as
7 they relate to persons who are mentally incapable."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 11.41.410(a) is repealed and reenacted to read:

10 (a) A person commits the crime of sexual assault in the first
11 degree if,12 (1) being any age, the defendant engages in sexual pene-
13 tration with another person without consent of that person;14 (2) being any age, the defendant attempts to engage in
15 sexual penetration with another person without consent of that person
16 and causes serious physical injury to that person;17 (3) being over the age of 18, the defendant engages in
18 sexual penetration with another person

19 (A) who the defendant knows is mentally incapable;

20 and

21 (B) who is entrusted to the defendant's care

22 (i) by authority of law; or

23 (ii) in a facility or program that is required by
24 law to be licensed by the Department of Health and Social
25 Services.

26 * Sec. 2. AS 11.41.420(a) is amended to read:

27 (a) An offender commits the crime of sexual assault in the
28 second degree if [THE OFFENDER ENGAGES IN]29 (1) the offender engages in sexual contact with another

1 person without consent of that person; [OR]

2 (2) being over the age of 18, the offender engages in
3 sexual contact [PENETRATION] with a person

4 (A) who the offender knows is mentally incapable; and

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7 (ii) in a facility or program that is required by
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16 WOULD NOT ENGAGE IN SEXUAL PENETRATION]; or

17 (B) [IS] incapacitated.

18 * Sec. 3. AS 11.41 is amended by adding a new section to read:

19 Sec. 11.41.425. SEXUAL ASSAULT IN THE THIRD DEGREE. (a) An
20 offender commits the crime of sexual assault in the third degree if,
21 being over the age of 18, the offender engages in sexual contact with
22 a person who the offender knows is

23 (1) mentally incapable; or

24 (2) temporarily incapable of appraising the nature of the
25 person's conduct and is physically unable to express unwillingness to
26 act.

27 (b) Sexual assault in the third degree is a class C felony.

28 * Sec. 4. AS 11.41 is amended by adding a new section to read:

29 Sec. 11.41.432. DEFENSE. It is a defense to a crime charged

1 under AS 11.41.410(a)(3), 11.41.420(a)(2), 11.41.420(a)(3), or 11.41.-
2 425 that the offender is

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5 the court for a separation, divorce, or dissolution of the marriage.

6 * Sec. 5. AS 11.41.470 is amended by adding a new paragraph to read:

7 (4) "mentally incapable" means a person who suffers from a
8 mental disease or defect that renders the person incapable of under-
9 standing the nature or consequences of the person's conduct, including
10 the potential for harm to that person.

5-2078B
Chenoweth
4/6/88

Original sponsor: Judiciary Committee

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Original sponsor: Judiciary Committee

Handwritten notes:
+ finance letter of intent
4/11/00 HJ Journal
@ 3065
passed 38-0

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE
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#1 Purpose section as per letter of intent something else

Sponsored by CMC
fills gap in CA law
WA law
2 tier penalty structure

Small FN
letter of intent

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Sexual

himself
or
another.

Vague

knowing

in issue

too

WA DA

20 people in 4/05
in Seattle

• IF victim knows they are
having sex - out of protected population

10303
#1
MG
suffers from a mental disease or defect that renders the person incapable of understanding the nature or consequences of the offender's conduct, including the potential for harm to the victim.

Sec. 5 AS 11.41.470 is amended by adding a new paragraph to read

(4) "mentally incapable" means

2
MG
a person who suffers from a mental disease or defect that renders the person incapable of giving ^{knowing} consent to sexual contact.

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE

2 HOUSE BILL NO. 545

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4 FIFTEENTH LEGISLATURE - SECOND SESSION

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20 authority of law.

21 * Sec. 2. AS 11.41.420(a) is amended to read:

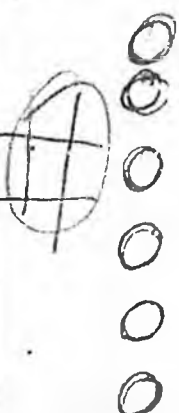
22 (a) An offender commits the crime of sexual assault in the
23 second degree if [THE OFFENDER ENGAGES IN]

24 (1) the offender engages in sexual contact with another
25 person without consent of that person; [OR]

26 (2) being over the age of 18, the offender engages in
27 sexual contact [PENETRATION] with a person who the offender knows is
28 mentally incapable and who is entrusted to the offender's care by
29 authority of law; or

undesignated

too narrow



1 (3) being over the age of 18, the offender engages in
2 sexual penetration with a person who the offender knows is

3 (A) mentally incapable; or

4 (B) temporarily incapable of appraising the nature of
5 the person's conduct and physically unable to express unwilling-
6 ness to act

7 [(A) IS SUFFERING FROM A MENTAL DISORDER OR DEFECT
8 WHICH RENDERS THE PERSON INCAPABLE OF APPRAISING THE NATURE OF
9 THE CONDUCT UNDER CIRCUMSTANCES IN WHICH A PERSON WHO IS CAPABLE
10 OF APPRAISING THE NATURE OF THE CONDUCT WOULD NOT ENGAGE IN
11 SEXUAL PENETRATION; OR

12 (B) IS INCAPACITATED].

13 * Sec. 3. AS 11.41 is amended by adding a new section to read:

14 Sec. 11.41.425. SEXUAL ASSAULT IN THE THIRD DEGREE. (a) An
15 offender commits the crime of sexual assault in the third degree if,
16 being over the age of 18, the offender engages in sexual contact with
17 a person who the offender knows is

18 (1) mentally incapable; or

19 (2) temporarily incapable of appraising the nature of the
20 person's conduct and is physically unable to express unwillingness to
21 act.

22 (b) Sexual assault in the third degree is a class C felony.

23 * Sec. 4. AS 11.41 is amended by adding a new section to read:

24 Sec. 11.41.432. DEFENSE. It is a defense to a crime charged
25 under AS 11.41.410(a)(3), 11.41.420(a)(2), 11.41.420(a)(3), or 11.41.-
26 425 that the offender is mentally incapable.

27 * Sec. 5. AS 11.41.470(1) is repealed and reenacted to read:

28 (1) "mentally incapable" means a person who suffers from a
29 mental disease or defect that renders the person incapable of

1 understanding the nature or consequences of the person's conduct,
2 including the potential for harm to that person;

March 17, 1988

From: Cecelia Watson

To: John Sund

Re: Proposed legislation which would address sexual assault of the mentally incapable adult.

This legislation would fix some very large holes in existing sexual assault statutes where they affect developmentally disabled adults. Dana Fabe, Dwayne McConnell, Stephanie Joannides, and advocates for the developmentally disabled adult are unanimous in their assessments of these statutes.

Mentally incapable adults are at high risk for physical and sexual abuse. It is a well-known but little publicized fact that abusers frequently seek employment at institutions which have a large population of vulnerable adults. This situation allows the abuser easy access to potential victims with small chance of discovery.

If made into law, HB 344 should raise public consciousness in this area and result in increased reporting of abuse. Under current law, however, many cases could not be adequately prosecuted and some cases could not be prosecuted at all.

The attached draft by Susan Orlansky addresses some of these problems.

1. Under current law, sexual contact with another person is only a crime if it is done without the consent of that person. 'Without consent' is basically defined as coercion with force or threat of force. This has two effects:
 - a. Sexual contact with a mentally incapable adult can not be prosecuted.
 - b. When sexual penetration of the mentally incapable adult has been charged, but cannot be proved definitely, the offender cannot be prosecuted on the lesser charge of sexual contact -- even if sexual contact has obviously occurred.
2. Under current law, sexual penetration with a mentally incapable adult is sexual assault in the second degree. In other words, a person who rapes a comatose person in a nursing home has committed sexual assault in the second degree.
3. In certain circumstances, there is consensual sex between developmentally disabled adults. According to current law, this is illegal.

There was some discussion about the urgency of this legislation. Obviously, the statutes need to be fixed -- but it is relatively late in the session to initiate a bill. It was felt that it was vital to pass this or similar legislation this session. Public awareness in this area is increasing, and with the passage of HB 344, we should have more reporting of incidents which are almost certainly occurring all the time. We need to be able to prosecute appropriately.

HOUSE FINANCE COMMITTEE
LETTER OF INTENT
FOR
CS HB 545 (Judiciary)

It is the intent of the Legislature in enacting CSHB 545 (Judiciary) that a developmentally disabled or mentally ill person not be deprived of the right of consensual sexual expression with a person who is not in a caretaker relationship as described in 11.41.410 (a) (3) (B) and 11.41.420 (a) (2) (B), whether he or she lives independently or in a supervised setting.

Al Adams

Al Adams, Chair
House Finance Committee

(Preferred Letter of Intent)

To: JS

FM: JFD

Date: 4/22

RE: HB545

• The bill makes sexual contact against a mentally incapable person a crime.

Present Law:

- contact with "normal" person
- sexual penetration with mentally incapable

• Penalties are structured so that caretakers are held to a higher standard of care

HB545

- Sponsored by Committee
- Fills gap in the law
 - Sexual contact not now illegal if against mentally incapable person
 - Have to prosecute as harassment
- Adopts Washington Law
- 2-tier penalty structure
 - higher for caregivers
 - lower for non-caregivers
- Small Fiscal Note 30K for DA's experts

REVISED
LETTER OF INTENT
CSHB 545 (JUD)

It is the intent of the Legislature in enacting CSHB 545 to protect the health and welfare of those persons who are, either temporarily or permanently, "mentally incapable." The Legislature recognizes that "mentally incapable" persons, as defined in AS 11.41.470 (4), comprise a very small segment of the much broader population of mentally impaired persons. This legislation applies only to persons who are "mentally incapable" and is not intended to prohibit sexual expression of members of the broad population of mentally impaired persons, whether they live independently or in a supervised setting.

The Legislature recognizes that a caretaker of a "mentally incapable" person occupies a position of trust and authority over that person. Therefore, the Legislature holds caretakers to a higher standard of conduct than non-caretakers and has established higher penalties for sexual assaults committed by caretakers, who have abrogated the trust and responsibility given to them by their position.

DRAFT 4/19/88

LETTER OF INTENT
CSHB 545 Judiciary

It is the intent of the legislature in enacting CSHB 545 (Judiciary) that a developmentally disabled or mentally ill person not be deprived of the right of consensual sexual expression with a person who is not in a caretaker relationship as described in 11.41.410 (a)(3)(B) and 11.41.420 (a)(2)(B), whether he or she lives independently or in a supervised setting.

Adopted
4/8/88

DRAFT 4/8/88

LETTER OF INTENT
CSHB 545 Judiciary

It is the intent of the legislature in enacting CSHB 545 (Judiciary) that a developmentally disabled or mentally ill person not be deprived of the right of consensual sexual expression, whether he or she lives independently or in a supervised setting.

Other States

5 incapable of understanding nature

3 can give legal consent

1 feeble-minded or imbecile or insane

Michigan

person ... incapable of appraising the nature of the conduct

Massachusetts

unlawful sexual intercourse = a person who is feeble-minded or imbecile or insane

Idaho

incapable because of their lunacy or any other unsoundness of mind of giving legal consent

Florida

incapable of appraising the nature of the conduct

Hawaii incapable of appraising the nature of the conduct

Ark - incapable of consent because he's mentally defective or mentally incapacitated

Colorado - incapable of appraising the nature of the conduct

CA - mental disorder or developmental or physical disability of giving legal consent.

OR - incapable of appraising the nature of the conduct.

D R A F T

1. Add a new subsection to present AS 11.41.410:

AS 11.41.410

(a) A person commits the crime of sexual assault in the first degree if,

(3) being over the age of 18, the defendant engages in sexual penetration with another person who the defendant knows is mentally incapable and who is entrusted to the defendant's care by authority of law.

2. Replace present AS 11.41.420(a)(2) and add a new subsection (3):

AS 11.41.420

(a) An offender commits the crime of sexual assault in the second degree if,

(1) the offender engages in sexual contact with another person without consent of that person; or

(2) being over the age of 18, the offender engages in sexual contact with another person who the offender knows is mentally incapable and who is entrusted to the offender's care by authority of law; or

(3) being over the age of 18, the offender engages in sexual penetration with a person who the offender knows is

(i) mentally incapable, or

(ii) temporarily incapable of appraising the nature of his or her own conduct and physically unable to express unwillingness to act.

3. Add AS 11.41.430:

AS 11.41.430

(a) A person commits the crime of sexual assault in the third

degree if, being over the age of 18, the person engages in sexual contact with a person who the offender knows is

(i) mentally incapable, or

(ii) temporarily incapable of appraising the nature of his or her own conduct and physically unable to express unwillingness to act.

(b) Sexual assault in the third degree is a class C felony.

4. Add AS 11.41.431:

AS 11.41.431

It is a defense to a crime charged under AS 11.41.410(a)(3), .420(a)(2), (3), or .430 that the defendant is mentally incapable, as defined in AS 11.41.470(4).

5. Eliminate present AS 11.41.470(1) and add a new subsection (4):

AS 11.41.470

(1) [defining "incapacitated"] repealed

(4) "mentally incapable" means that a person over the age of 18 suffers from a mental disease or defect which renders the person incapable of understanding the nature or consequences of his or her conduct, including the potential for harm to himself or another.

COMMENTS

These statutes create new crimes penalizing sexual penetration or sexual contact with mentally incapable people, those who are incapable of understanding the nature and consequences of their conduct. Adults who are developmentally incapable of giving a meaningful consent to sexual conduct should be protected from being sexually victimized. The harshest penalties are imposed on those who exploit the mentally incapable by abusing their positions of legal authority over them.

The statutes define, as a new unclassified felony, sexual penetration of the mentally incapable by people legally charged with authority to care for them. This category would include staff at an institution

where the mentally incapable person resides or attends training or day care programs as well as professional caregivers hired to care for a mentally incapable person in his or her own home. The category would exclude the neighbor or friend who stays with the mentally incapable person occasionally as a sort of babysitter.

The class B felony now includes sexual contact with a mentally incapable person by a legal caregiver and sexual penetration with a mentally incapable person by a defendant who is not a legal caregiver. The majority of abuse of mentally incapable people occurs by legal caregivers. Sexual contact with a mentally incapable person by non-caregiver is a new class C felony.

The current statute on sexual penetration with a person who is temporarily incapacitated remains virtually unchanged in AS 11.41.420 except that the term "incapacitated" has been eliminated. That term has a very different meaning in Title 13, and it is helpful to eliminate the confusion which arises from giving a term two different meanings.

The statutes provide that a person who is himself or herself mentally incapable cannot be charged with a crime of sexual abuse of another mentally incapable person. Practically speaking, the defense of mental incapability provides a means of decriminalizing sexual conduct between mentally incapable people. Between incapable people, sexual conduct has none of the exploitive character that exists when a non-incapable person preys upon an incapable person. Such conduct is ordinarily voluntary (even if the parties lack the legal capacity to "consent"), and it occurs almost exclusively within institutions for the mentally incapable. It is better dealt with through institutional rules than through the criminal justice system.

Alaska State Legislature



House of Representatives House Judiciary Committee

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990

MEMORANDUM

TO: Senator Dick Eliason, Chairman
Senate Rules Committee

FROM: Representative John Sund, Chairman
House Judiciary Committee

May 7, 1988

RE: HB 545 "An Act amending crimes relating to sexual assault as they relate to persons who are mentally incapable."

I would appreciate it if you could calendar this bill.

The purpose of HB 545 is to correct a gap in the criminal law as it relates to sexual assault against persons who are mentally incapable. Current law does not provide penalties for sexual assault of these persons unless the assault involves penetration or force. Sexual assaults involving sexual contact are either not prosecuted at all or prosecuted as "harassment."

This bill addresses both sexual penetration and sexual contact assaults and provides a two-step penalty structure with harsher penalties for offenders who are caretakers of the mentally incapable.

Finally, HB 545 provides a definition of a mentally incapable person which focuses on his or her lack of capability to give knowing consent. This would replace confusing and moralistic language in the current sexual assault statute.

POSITION PAPER

CS HB 545 (Judiciary)

The Alaska Public Defender Agency is a totally reactive agency which provides representation to indigent persons when appointed by the court. This agency does not make policy nor does it initiate litigation. Only proposed legislation with fiscal or program ramifications for this agency can be said to have a direct agency impact. Thus, the Public Defender Agency submits position papers for legislation which will affect this agency fiscally or programatically or will require this agency to litigate constitutional issues raised by the legislation.

Fiscal impact: X None See attached fiscal note _____

Program impact: X None See analysis below _____

Constitutional impact: X None See analysis below _____

The Alaska Public Defender Agency supports this legislation.

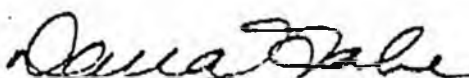
This bill fills a gap in the existing criminal code by penalizing sexual contact by caregivers with mentally incapable people who are incapable of understanding the nature and consequences of their conduct. It also increases the penalties for sexual penetration offenses committed against a mentally incapable person by someone with a legal duty to care for the person. Adults who are developmentally incapable of giving a meaningful consent to sexual conduct should be protected from being sexually victimized. The harshest penalties should be imposed on those who exploit the mentally incapable by abusing their positions of legal authority over them.

Because this bill presumes that a category of adults lack the ability to consent to the full range of voluntary sexual behavior, the elements of the offenses and the definitions which they use must be narrowly drawn to protect those who require protection but not to deny a fundamental right to those who do indeed have the capacity to consent to sexual behavior. Given the need for sensitivity in drawing lines in this area, the bill's focus on caregivers employed by state licensed institutions for the more serious charge is substantially preferable to using broader concepts of having any position of authority or being temporarily entrusted to care for someone, such as are used in the child sexual abuse laws. Someone entrusted by law to care for a mentally incapable adult will always be in a position to know the extent of that person's incapacity, and the professional caregiver status makes any sexual overture inherently coercive. By contrast, a neighbor or friend occasionally entrusted to care for a mentally disabled adult may develop a genuine friendship which leads to a noncoercive sexual relationship, which is fully consensual but for the one adult's being so mentally impaired that the law defines him or her as legally incapable of consent. Though knowingly engaging in a sexual relationship with a mentally incapable person may be criminalized, the severe presumptive sentences for unclassified felonies should not apply to the neighbor or friend situation.

Section 2 leaves the current statute on sexual penetration with a person who is temporarily incapacitated--e.g., a person who is extremely intoxicated--unchanged, except that the term "incapacitated" has been eliminated. That is, former AS 11.41.420(a)(2)(B) would be .420(a)(3)(B) under this bill. The term "incapacitated" has a very different meaning in Title 13, and it is helpful to eliminate the confusion which arises from giving a term two different meanings. Section 3 creates a new offense for sexual contact with a temporarily incapable person.

Section 4 provides that a person who is himself or herself mentally incapable cannot be charged with a crime of sexual abuse of another mentally incapable person. Practically speaking, the defense of mental incapability provides a means of decriminalizing sexual conduct between mentally incapable people. Between incapable people, sexual conduct has none of the exploitive character that exists when a non-incapable person preys upon an incapable person. Such conduct is ordinarily voluntary (even if the parties lack the legal capacity to "consent"), and it occurs almost exclusively within institutions for the mentally incapable. It is better dealt with through institutional rules than through the criminal justice system. The defense for those who are married to mentally incapable persons will also ensure that a person whose spouse is rendered mentally incapable due to an accident are not charged with a crime.


Section 5 provides the critical definition of who is "mentally incapable." The proposed definition is far preferable to the definition in current AS 11.41.420(a)(2)(A). The present definition depends on a common morality, presuming that an incapable person's consent is invalid when the consent covers sexual activity that a "normal" (non-incapable) person would not consent to. That definition is vague; it is both hard to prove and hard to defend against in a pluralistic society. The definition in section 5 focuses on the reason why mentally incapable adults should not be capable of giving valid consents to sexual behavior: a consent is meaningless if it is given by someone who does not understand the potential harm in the situation. The proposed definition is significantly more protective of the mentally disabled than comparable statutes from other states.



Dana Fabe, Director
Public Defender Agency

4/13/88

Date



Commissioner John Andrews
Department of Administration

4/16/88

Date

POSITION PAPER
CS HOUSE BILL NO. 545 (JUDICIARY)

For an Act entitled: "An Act amending crimes relating to sexual assault as they relate to persons who are mentally incapable."

Effect of Bill:

The purpose of this legislation is to protect mentally incapable persons from sexual assault from care providers and from the general public.

Discussion:

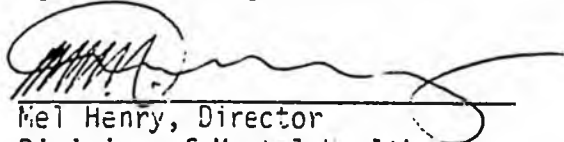
The intent of this legislation is to remedy the situation in which current legislation fails to protect mentally incapable persons from sexual assault unless there is forcible rape. This legislation expands the types of sexual contact that would be construed as sexual assaults and thereby offers greater protection.

The Department had some concerns about the original version of this bill. However, this committee substitute, in conjunction with the letter of intent accompanying the bill, adequately address those concerns.

Recommendations:

The Division and Department support passage of this legislation.

Proposed by:

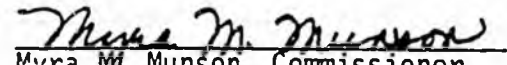


Mel Henry, Director
Division of Mental Health
and Developmental Disabilities

Date:

18th April, 1988

Approved:



Myra M. Munson, Commissioner
Department of Health and Social
Services

Date:

4/18/88

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION/THIRD JUDICIAL DISTRICT
OFFICE OF THE DISTRICT ATTORNEY

March 29, 1988

House Judiciary Committee
Box V
Juneau, Alaska 99801

Re: House Bill 545
Sexual Assault of Mentally Handicapped Persons

Dear Committee Members:

I am an Assistant District Attorney in Anchorage who prosecutes sexual assault cases. I have reviewed House Bill 545 which proposes significant amendments to the sexual assault laws relating to mentally handicapped victims. That bill greatly increases the protection against sexual exploitation of the mentally handicapped beyond present law.

The present criminal statute of second degree sexual assault does not adequately protect the mentally handicapped persons from sexual exploitation. It does not criminalize sexual contact crimes but only prohibits sexual penetration. It places a near impossible burden on the prosecution to prove that the mental handicap was so severe that the person does not even understand the nature of the conduct. Some judges say this means we have to prove the victim cannot even comprehend that someone is having sex with them. The proposed bill offers an alternative by allowing us instead to prove that the mental handicap affected the victim's ability to evaluate the consequences of her conduct even if she is capable of knowing that sex is occurring. The present second degree statute also includes a requirement to prove that the handicapped person would not have engaged in the conduct had they been mentally normal: The sex must occur "under circumstances in which a person who is capable of appraising the nature of the conduct would not engage in sexual penetration." Since it is very difficult to prove that normal people would not have engaged in sex under most circumstances, it is difficult to meet this burden of proof.

Two 1987 cases in Anchorage illustrate the problems

STEVE COWPER, GOVERNOR

REPLY TO:

- 1031 WEST 4th AVENUE, SUITE 520
ANCHORAGE, ALASKA 99501-5906
PHONE: (907) 277-8622
- P.O. BOX 470
DILLINGHAM, ALASKA 99576-0470
PHONE: (907) 842-2482
- 145 MAIN STREET LOOP, ROCKY MOUNTAIN
KENAI, ALASKA 99611-9998
PHONE: (907) 283-3131
- 326 CENTER AVE. SUITE 205
KODIAK, ALASKA 99615-9952
PHONE: (907) 486-5744
- 809 S. CHUGACH ST., SUITE 3
PALMER, ALASKA 99645-9952
PHONE: (907) 745-5027
- P.O. BOX 671
VALDEZ, ALASKA 99686-0671
PHONE: (907) 835-2462

House Judiciary Committee
RE: House Bill 545
March 29, 1988
PAGE 2

in the present law which would be alleviated by the proposed bill.

Our office prosecuted the manager of an apartment building which had a number of female mentally handicapped tenants placed there by a social service agency. He was convicted of sex crimes against four of these severely mentally handicapped women who lived in the complex. He could only be convicted of a felony on two of them because he only penetrated those two. The other two women were only fondled by him. For these fondling crimes he could only be convicted of the class B misdemeanor of harassment carrying a maximum 90 day jail sentence.

In another case prosecuted last year the judge acquitted one of two defendants who were having sex in a park in broad daylight with a severely schizophrenic woman. Eyewitnesses and medical evidence proved she was being forcibly assaulted. All of the witnesses agree that the woman was so mentally ill that she could not even understand that these men were having sex with her. Part of the reason for the acquittal was the ambiguous requirement of present law to prove that the woman would not have engaged in the sexual activity had she been mentally normal. The judge reasoned that even normal people sometimes engage in group sex in public so the state had failed to prove that element. He felt the only way to prove this element was to prove that the woman was being raped or being physically injured because this is the only sexual activity to which normal people would not consent. But he acquitted him on the rape charge apparently because the woman did not testify since she was too mentally ill to be a competent witness. In other words, he ruled that to prove second degree sexual assault under present law the state had to prove first degree sexual assault, but the state could not prove first degree because the victim was so mentally ill. This was the strongest case of second degree sexual assault which could be brought under present law yet the judge acquitted the defendant and did not let the case go to the jury.

As I read House Bill 545 it would create a strong policy for protecting severely mentally handicapped people from sexual exploitation but would not criminalize consensual

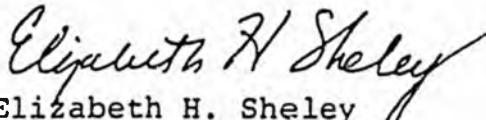
House Judiciary Committee
RE: House Bill 545
March 29, 1988
PAGE 3

sexual activity between two handicapped people or sexual activity with persons who were not severely mentally handicapped. The proposed law requires that the mental handicap be so severe that the person cannot either understand that sex is occurring or cannot give informed consent. These people need the protection of the criminal laws which this bill gives them without unnecessarily infringing on their privacy and sexual rights.

Very truly yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

DWAYNE W. MCCONNELL
DISTRICT ATTORNEY


Elizabeth H. Sheley
Assistant District Attorney

EHS:kch

357

ALASKA NETWORK

ON

DOMESTIC VIOLENCE

AND

SEXUAL ASSAULT

130 Seward, No. 301 • Juneau, Alaska 99801 • (907) 586-3650

Abused Women's Aid in Crisis (AWAIC);
Advocates for Victims of Violence (AVV);
Aiding Women in Abuse and Rape Emergencies (AWARE);
Alaska Women's Resource Center (AWRC); Arctic Women in Crisis (AWIC);
Bering Sea Women's Group (BSWG); Emmonak Women's Shelter;
Kodiak Women's Resource & Crisis Center (KWRC);
Manilaq Regional Women's Crisis Program; MEN, Inc.;
Safe & Fear-Free Environment (SAFE); Sikans Against Family Violence (SAFV);
Southwestern Alaska Council for the
Prevention of Child Sexual Assault (SWACPSA);
South Peninsula Women's Services (SPWS);
Standing Together Against Rape (STAR); Tundra Women's Coalition (TWC);
Valley Women's Resource Center (VWRC);
Women in Crisis Counseling & Assistance (WCCA);
Women in Safe Homes (WISH); Women's Resource & Crisis Center (WRCC)

SUPPORT OF HOUSE BILL 545
AN ACT AMENDING CRIMES RELATING TO SEXUAL ASSAULT AS THEY
RELATE TO PERSONS WHO ARE MENTALLY INCAPABLE

The Alaska Network on Domestic Violence and Sexual Assault strongly supports House Bill 545. Current law does not prohibit sexual assault of persons who are mentally incapable of consent unless the assault involves penetration or force can be proven. This bill would close this significant gap by criminalizing a sexual assault that involves sexual contact.

It also changes the statutes to most severely penalize a person in a position of legal authority over a mentally incapable person who sexually victimizes their charge. A caretaker has a special trust relationship with his or her charge that carries with it power over and knowledge of the mental incapacity of the victim. Caretakers who abrogate this trust by preying on this special relationship should be the most severely penalized.

Mentally incapacitated people are very vulnerable to sexual assault. The Network is aware of two studies on this subject. The first was the Seattle Rape Relief Disabilities Project completed in 1981. In this study, 75% of the developmentally disabled people surveyed had been sexually assaulted during their lifetime. 99% of the perpetrators involved were known to the victims.

The second study was conducted by the California State Committee on the Sexuality of the Developmentally Disabled in 1986. Statewide professionals working in the field in California agreed that 98% of their clients had been victims of sexual assault. The study also concluded that developmentally disabled people do not self report because of their vulnerability in general; the fact that they are frequently dependent on their assailant to meet basic needs; their lack of awareness of the benefits of reporting; and their lack of awareness of the services available to them. It was found that professionals often do not report because of a lack of knowledge about their legal obligation to report (California has a mandatory reporting law for abuse of the developmentally disabled.), and their perception that the system will not adequately respond.

This last point is extremely relevant to Alaska given the fact that there is currently no legal response to a developmentally disabled person incapable of consent who has been sexually assaulted unless actual penetration has occurred or force can be proven.

The Network strongly urges passage of this bill.



ADVOCACY SERVICES OF ALASKA

325 East 3rd, 4th Floor
Anchorage, AK. 99501-2606
(907) 274-3658 TTD

127 S. Franklin
Juneau, AK. 99801
(907) 586-1627 TTD

280 Cushman, Suite 3H
Fairbanks, AK. 99701
(907) 456-1070 TTD

March 29, 1988

Representative John Sund
Chairperson
House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

Dear Representative Sund:

I understand that your Committee is considering House Bill 545 which would change the criminal statutes relating to sexual assaults committed against mentally incapable adults. This letter is to support this bill and to commend you for taking the initiative on this important issue.

A recent incident at the Harborview Developmental Center conclusively demonstrates the need for this type of legislative action. In that case, a staff member was discovered while having sexual contact with a severely impaired resident who clearly could not consent to such activity. We were all shocked to discover that sexual contact without penetration in such circumstances is not a crime under current statutes. This loophole must be closed as soon as possible.

I also understand that your Committee's bill would increase the penalties for sexual assaults committed against mentally incapable adults by care givers. We fully support these efforts. We must send a clear message that such violations of a position of trust will not be tolerated.

Again, I appreciate and support your efforts to protect these vulnerable members of our community. Please contact me if I can be of any assistance.

Sincerely,

Jeffrey L. Jasse
Supervising Attorney

JLJ:dw

SENATE COMMITTEE REPORT

FURTHER

DATE TURNED INTO OFFICE 5/7/88

4/29/88
Mr. President:

FINANCE Committee considered CSHB 545 (JUD)

amending crimes relating to sexual assault as they relate to persons
who are mentally incapable
and recommended

replace with _____ CS _____) same title
 or adopt _____ CS _____) new title

attached amendment(s) and

do pass

do not pass

no recommendation

individual recommendations

further referral to _____

letter of intent adopted H. Fil.

Committee attached or adopted fiscal note(s)

new updated or previous
 zero fiscal impact

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

[Handwritten signatures: Fred G. Magoff, J. ...]

[Handwritten signature: Rick Halford] do pass
Chairman signature and recommendation

Committee Backup attached

SENATE COMMITTEE REPORT

Nov 4/26

FURTHER

FINANCE

DATE TURNED INTO OFFICE _____

4/26/88

Mr. President:

JUDICIARY

Committee considered CSHB 545 (JUD)

amending crimes relating to sexual assault as they relate to persons who are mentally incapable

and recommended

[] replace with _____ CS _____) [] same title
[] or adopt _____ CS _____) [] new title

[] attached amendment(s) and

[] do pass

[] do not pass

[] no recommendation

individual recommendations

[] further referral to _____

letter of intent adopted House L of I adopted

Committee attached or [] adopted fiscal note(s)

[] new [] updated or previous

[] zero fiscal impact

MEMBERS SIGNING DO PASS

[Signature]
[Signature]

OTHER RECOMMENDATIONS

Joe Josephson - No Recommendation

[Signature]
Chairman signature and recommendation

[] Committee Backup attached

HOUSE COMMITTEE REPORT

(11)

Date referred: 4/11/88

FURTHER REFERRALS:

DATE: 4-20-88

The Finance Committee has considered HB 545

"An Act amending crimes relating to sexual assault as they relate to persons who are mentally incapable."

RECOMMENDS:

- replace with CS HB 545 (JUD) the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: ^{endorses} FINANCE letter of intent

ATTACHES NEW FISCAL NOTE(S):

- fiscal impact
- zero fiscal note
- zero with analysis
- same as previous fiscal note published 4-11-88
- same as previous zero fiscal note published _____

SIGNING-DO PASS:

Al Adams
Pat Kowchot
Ron Larson
Pete Jace
Bob Wheeler
Wm. M. Safford
Steve Thies
Don
Taylor Brown
Mike Dunn

SIGNING OTHER RECOMMENDATIONS:

Al Adams
 Chairman's signature

HOUSE COMMITTEE REPORT

(7)

Date referred: 3/22/88

FURTHER REFERRALS:

DATE: March 8, 1988

The Judiciary Committee has considered HB 545

"An Act amending crimes relating to sexual assault as they relate to persons who are mentally incapable."

RECOMMENDS:

- replace with (S H3545 (Jud)) the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note same as previous zero fiscal note published _____
- zero with analysis

SIGNING DO PASS:

[Handwritten signatures]

SIGNING OTHER RECOMMENDATIONS:

[Handwritten signature]

Chairman's signature

FISCAL NOTE

REQUEST:

Effective Date: 4/1/88
 Title: ... regarding crimes relating to sexual assault... mentally incapable.
 Sponsor: Judiciary Committee
 Requestor: _____

Agency: Health & Social Services
 BRU: various
 Comments: _____

EXPENDITURES REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Passage of CSHB545 (JUD) will have no significant fiscal impact on the Department of Health & Social Services.

Prepared by: Mel Henry, Director
 Division: Mental Health & Developmental Disabilities
 Approved by Commissioner: Myra M. Finson
 Agency: Health & Social Services

Phone: 465-3377
 Date: _____
 Date: 4/18/88

(12)

Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act amending crimes relating to sexual assault..."
Sponsor: _____
Requestor: _____

Agency Affected: Department of Corrections
BRU: _____
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
---------	-----	-----	-----	-----	-----	-----

REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
---------	-----	-----	-----	-----	-----	-----

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

ANALYSIS : (Attach a separate page if necessary)

This legislation will have minimal impact on the Department of Corrections.

Susan E. Knighton

Prepared by: Susan E. Knighton, Director Phone: 465-3376
Division: Administrative Services Date: 4-15-88

Approved by Commissioner: Susan Humphrey Barnett Date: 4-15-88
Agency: Department of Corrections

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act amending crimes relating to sexual assault...mentally incapable."
Sponsor: House Judiciary
Requestor: House Judiciary

Agency Affected: Public Safety
BRU: Alaska State Troopers
Components: Detachments & CIB

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL		-0-	-0-	-0-	-0-	-0-
REVENUE		-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME		0	0	0	0	0
PART-TIME		0	0	0	0	0
TEMPORARY		0	0	0	0	0

ANALYSIS : (Attach a separate page if necessary)

No fiscal impact is anticipated as a result of this legislation.

Prepared by: Diana Page, Administrative Assistant I Phone: 465-4322
Division: Commissioner's Office Date: 3/24/88


Approved by Commissioner: *Walter Anderson, Dep. Comm.* Date: 3-25-88
Agency: Public Safety

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

LETTER OF INTENT
FOR
CS HB 545 (Judiciary)

It is the intent of the Legislature in enacting CSHB 545 (Judiciary) that a developmentally disabled or mentally ill person not be deprived of the right of consensual sexual expression with a person who is not in a caretaker relationship as described in 11.41.410 (a) (3) (B) and 11.41.420 (a) (2) (B), whether he or she lives independently or in a supervised setting.



Al Adams, Chair
House Finance Committee

REVISED
LETTER OF INTENT
CSHB 545 (JUD)

It is the intent of the Legislature in enacting CSHB 545 to protect the health and welfare of those persons who are, either temporarily or permanently, "mentally incapable." The Legislature recognizes that "mentally incapable" persons, as defined in AS 11.41.470 (4), comprise a very small segment of the much broader population of mentally impaired persons. This legislation applies only to persons who are "mentally incapable" and is not intended to prohibit sexual expression of members of the broad population of mentally impaired persons, whether they live independently or in a supervised setting.

The Legislature recognizes that a caretaker of a "mentally incapable" person occupies a position of trust and authority over that person. Therefore, the Legislature holds caretakers to a higher standard of conduct than non-caretakers and has established higher penalties for sexual assaults committed by caretakers, who have abrogated the trust and responsibility given to them by their position.

April 30, 1988

MEMORANDUM

TO: Senator John Binkley, Co-Chair
Senator Rick Halford, Co-Chair
Senate Finance Committee

FROM: Representative John Sund

RE: HB 545 "An Act amending crimes relating to sexual assault as they relate to persons who are mentally incapable."

I would appreciate it if you could schedule this bill for hearing as soon as possible.

The purpose of this bill is to correct a gap in the criminal law as it relates to sexual assault against persons who are mentally incapable. Current law does not provide penalties for sexual assault of these persons unless the assault involves penetration or force. Sexual assaults involving sexual contact are either not prosecuted at all or prosecuted as "harassment."

This bill addresses both sexual penetration and sexual contact assaults and provides a two-step penalty structure with harsher penalties for offenders who are caretakers of the mentally incapable.

Finally, HB 545 provides a definition of a mentally incapable person which focuses on his or her lack of capability to give knowing consent. This would replace confusing and moralistic language in the current sexual assault statute.

HB 545 has a \$30,000 fiscal note from the Department of Law, Criminal Division.

POSITION PAPER

CS HB 545 (Judiciary)

The Alaska Public Defender Agency is a totally reactive agency which provides representation to indigent persons when appointed by the court. This agency does not make policy nor does it initiate litigation. Only proposed legislation with fiscal or program ramifications for this agency can be said to have a direct agency impact. Thus, the Public Defender Agency submits position papers for legislation which will affect this agency fiscally or programatically or will require this agency to litigate constitutional issues raised by the legislation.

Fiscal impact: X None See attached fiscal note _____
Program impact: X None See analysis below _____
Constitutional impact: X None See analysis below _____

The Alaska Public Defender Agency supports this legislation.

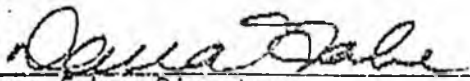
This bill fills a gap in the existing criminal code by penalizing sexual contact by caregivers with mentally incapable people who are incapable of understanding the nature and consequences of their conduct. It also increases the penalties for sexual penetration offenses committed against a mentally incapable person by someone with a legal duty to care for the person. Adults who are developmentally incapable of giving a meaningful consent to sexual conduct should be protected from being sexually victimized. The harshest penalties should be imposed on those who exploit the mentally incapable by abusing their positions of legal authority over them.

Because this bill presumes that a category of adults lack the ability to consent to the full range of voluntary sexual behavior, the elements of the offenses and the definitions which they use must be narrowly drawn to protect those who require protection but not to deny a fundamental right to those who do indeed have the capacity to consent to sexual behavior. Given the need for sensitivity in drawing lines in this area, the bill's focus on caregivers employed by state licensed institutions for the more serious charge is substantially preferable to using broader concepts of having any position of authority or being temporarily entrusted to care for someone, such as are used in the child sexual abuse laws. Someone entrusted by law to care for a mentally incapable adult will always be in a position to know the extent of that person's incapacity, and the professional caregiver status makes any sexual overture inherently coercive. By contrast, a neighbor or friend occasionally entrusted to care for a mentally disabled adult may develop a genuine friendship which leads to a noncoercive sexual relationship, which is fully consensual but for the one adult's being so mentally impaired that the law defines him or her as legally incapable of consent. Though knowingly engaging in a sexual relationship with a mentally incapable person may be criminalized, the severe presumptive sentences for unclassified felonies should not apply to the neighbor or friend situation.

Section 2 leaves the current statute on sexual penetration with a person who is temporarily incapacitated--e.g., a person who is extremely intoxicated--unchanged, except that the term "incapacitated" has been eliminated. That is, former AS 11.41.420(a)(2)(B) would be .420(a)(3)(B) under this bill. The term "incapacitated" has a very different meaning in Title 13, and it is helpful to eliminate the confusion which arises from giving a term two different meanings. Section 3 creates a new offense for sexual contact with a temporarily incapable person.

Section 4 provides that a person who is himself or herself mentally incapable cannot be charged with a crime of sexual abuse of another mentally incapable person. Practically speaking, the defense of mental incapability provides a means of decriminalizing sexual conduct between mentally incapable people. Between incapable people, sexual conduct has none of the exploitive character that exists when a non-incapable person preys upon an incapable person. Such conduct is ordinarily voluntary (even if the parties lack the legal capacity to "consent"), and it occurs almost exclusively within institutions for the mentally incapable. It is better dealt with through institutional rules than through the criminal justice system. The defense for those who are married to mentally incapable persons will also ensure that a person whose spouse is rendered mentally incapable due to an accident are not charged with a crime.

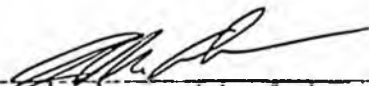
Section 5 provides the critical definition of who is "mentally incapable." The proposed definition is far preferable to the definition in current AS 11.41.420(a)(2)(A). The present definition depends on a common morality, presuming that an incapable person's consent is invalid when the consent covers sexual activity that a "normal" (non-incapable) person would not consent to. That definition is vague; it is both hard to prove and hard to defend against in a pluralistic society. The definition in section 5 focuses on the reason why mentally incapable adults should not be capable of giving valid consents to sexual behavior: a consent is meaningless if it is given by someone who does not understand the potential harm in the situation. The proposed definition is significantly more protective of the mentally disabled than comparable statutes from other states.



Dana Fabe, Director
Public Defender Agency

4/13/88

Date



Commissioner John Andrews
Department of Administration

4/16/88

Date

ALASKA NETWORK

ON

DOMESTIC VIOLENCE

AND

SEXUAL ASSAULT

130 Seward, No. 301 • Juneau, Alaska 99801 • (907) 586-3650

Abused Women's Aid in Crisis (AWAIC);
Advocates for Victims of Violence (AVV);
Aiding Women in Abuse and Rape Emergencies (AWARE);
Alaska Women's Resource Center (AWRC); Arctic Women in Crisis (AWIC);
Bering Sea Women's Group (BSWG); Emmonak Women's Shelter;
Kodiak Women's Resource & Crisis Center (KWRC);
Manilaq Regional Women's Crisis Program; MEN, Inc.;
Safe & Fear-Free Environment (SAFE); Sitkans Against Family Violence (SAFV);
Southwestern Alaska Council for the
Prevention of Child Sexual Assault (SWACPCSA);
South Peninsula Women's Services (SPWS);
Standing Together Against Rape (STAR); Tundra Women's Coalition (TWC);
Valley Women's Resource Center (VWRC);
Women in Crisis Counseling & Assistance (WICCA);
Women in Safe Homes (WISH); Women's Resource & Crisis Center (WRCC)

SUPPORT OF HOUSE BILL 545 AN ACT AMENDING CRIMES RELATING TO SEXUAL ASSAULT AS THEY RELATE TO PERSONS WHO ARE MENTALLY INCAPABLE

The Alaska Network on Domestic Violence and Sexual Assault strongly supports House Bill 545. Current law does not prohibit sexual assault of persons who are mentally incapable of consent unless the assault involves penetration or force can be proven. This bill would close this significant gap by criminalizing a sexual assault that involves sexual contact.

It also changes the statutes to most severely penalize a person in a position of legal authority over a mentally incapable person who sexually victimizes their charge. A caretaker has a special trust relationship with his or her charge that carries with it power over and knowledge of the mental incapacity of the victim. Caretakers who abrogate this trust by preying on this special relationship should be the most severely penalized.

Mentally incapacitated people are very vulnerable to sexual assault. The Network is aware of two studies on this subject. The first was the Seattle Rape Relief Disabilities Project completed in 1981. In this study, 75% of the developmentally disabled people surveyed had been sexually assaulted during their lifetime. 99% of the perpetrators involved were known to the victims.

The second study was conducted by the California State Committee on the Sexuality of the Developmentally Disabled in 1986. Statewide professionals working in the field in California agreed that 98% of their clients had been victims of sexual assault. The study also concluded that developmentally disabled people do not self report because of their vulnerability in general; the fact that they are frequently dependent on their assailant to meet basic needs; their lack of awareness of the benefits of reporting; and their lack of awareness of the services available to them. It was found that professionals often do not report because of a lack of knowledge about their legal obligation to report (California has a mandatory reporting law for abuse of the developmentally disabled.), and their perception that the system will not adequately respond.

This last point is extremely relevant to Alaska given the fact that there is currently no legal response to a developmentally disabled person incapable of consent who has been sexually assaulted unless actual penetration has occurred or force can be proven.

The Network strongly urges passage of this bill.

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION/THIRD JUDICIAL DISTRICT
OFFICE OF THE DISTRICT ATTORNEY

March 29, 1988

House Judiciary Committee
Box V
Juneau, Alaska 99801

Re: House Bill 545
Sexual Assault of Mentally Handicapped Persons

Dear Committee Members:

I am an Assistant District Attorney in Anchorage who prosecutes sexual assault cases. I have reviewed House Bill 545 which proposes significant amendments to the sexual assault laws relating to mentally handicapped victims. That bill greatly increases the protection against sexual exploitation of the mentally handicapped beyond present law.

The present criminal statute of second degree sexual assault does not adequately protect the mentally handicapped persons from sexual exploitation. It does not criminalize sexual contact crimes but only prohibits sexual penetration. It places a near impossible burden on the prosecution to prove that the mental handicap was so severe that the person does not even understand the nature of the conduct. Some judges say this means we have to prove the victim cannot even comprehend that someone is having sex with them. The proposed bill offers an alternative by allowing us instead to prove that the mental handicap affected the victim's ability to evaluate the consequences of her conduct even if she is capable of knowing that sex is occurring. The present second degree statute also includes a requirement to prove that the handicapped person would not have engaged in the conduct had they been mentally normal: The sex must occur "under circumstances in which a person who is capable of appraising the nature of the conduct would not engage in sexual penetration." Since it is very difficult to prove that normal people would not have engaged in sex under most circumstances, it is difficult to meet this burden of proof.

Two 1987 cases in Anchorage illustrate the problems

STEVE COWPER, GOVERNOR

REPLY TO:

1031 WEST 4th AVENUE, SUITE 520
ANCHORAGE, ALASKA 99501-5906
PHONE: (907) 277-8622

P.O. BOX 470
DILLINGHAM, ALASKA 99576-0470
PHONE: (907) 842-2482

145 MAIN STREET LOOP, ROOM 201
KENAI, ALASKA 99611-3998
PHONE: (907) 283-3131

326 CENTER AVE, SUITE 205
KODIAK, ALASKA 99615-9998
PHONE: (907) 486-5744

809 S. CHUGACH ST., SUITE 3
PALMER, ALASKA 99645-9998
PHONE: (907) 745-5027

P.O. BOX 671
VALDEZ, ALASKA 99686-0671
PHONE: (907) 835-2462

House Judiciary Committee
RE: House Bill 545
March 29, 1988
PAGE 2

in the present law which would be alleviated by the proposed bill.

Our office prosecuted the manager of an apartment building which had a number of female mentally handicapped tenants placed there by a social service agency. He was convicted of sex crimes against four of these severely mentally handicapped women who lived in the complex. He could only be convicted of a felony on two of them because he only penetrated those two. The other two women were only fondled by him. For these fondling crimes he could only be convicted of the class B misdemeanor of harassment carrying a maximum 90 day jail sentence.

In another case prosecuted last year the judge acquitted one of two defendants who were having sex in a park in broad daylight with a severely schizophrenic woman. Eyewitnesses and medical evidence proved she was being forcibly assaulted. All of the witnesses agree that the woman was so mentally ill that she could not even understand that these men were having sex with her. Part of the reason for the acquittal was the ambiguous requirement of present law to prove that the woman would not have engaged in the sexual activity had she been mentally normal. The judge reasoned that even normal people sometimes engage in group sex in public so the state had failed to prove that element. He felt the only way to prove this element was to prove that the woman was being raped or being physically injured because this is the only sexual activity to which normal people would not consent. But he acquitted him on the rape charge apparently because the woman did not testify since she was too mentally ill to be a competent witness. In other words, he ruled that to prove second degree sexual assault under present law the state had to prove first degree sexual assault, but the state could not prove first degree because the victim was so mentally ill. This was the strongest case of second degree sexual assault which could be brought under present law yet the judge acquitted the defendant and did not let the case go to the jury.

As I read House Bill 545 it would create a strong policy for protecting severely mentally handicapped people from sexual exploitation but would not criminalize consensual

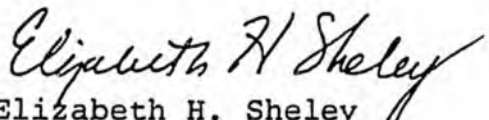
House Judiciary Committee
RE: House Bill 545
March 29, 1988
PAGE 3

sexual activity between two handicapped people or sexual activity with persons who were not severely mentally handicapped. The proposed law requires that the mental handicap be so severe that the person cannot either understand that sex is occurring or cannot give informed consent. These people need the protection of the criminal laws which this bill gives them without unnecessarily infringing on their privacy and sexual rights.

Very truly yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

DWAYNE W. MCCONNELL
DISTRICT ATTORNEY


Elizabeth H. Sheley
Assistant District Attorney

EHS:bch

609.341 DEFINITIONS.

Subdivision 1. For the purposes of sections 609.341 to 609.351, the terms in this section have the meanings given them.

Subd. 2. "Actor" means a person accused of criminal sexual conduct.

Subd. 3. "Force" means the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the complainant or another, which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the complainant to submit.

Subd. 4. "Consent" means a voluntary uncoerced manifestation of a present agreement to perform a particular sexual act.

Subd. 5. "Intimate parts" includes the primary genital area, groin, inner thigh, buttocks, or breast of a human being.

Subd. 6. "Mentally impaired" means that a person, as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact or to sexual penetration.

Subd. 7. "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling that person's conduct due to the influence of alcohol, a narcotic, anesthetic, or any other substance administered to that person without the person's agreement, or due to any other act committed upon that person without the person's agreement.

Subd. 8. "Personal injury" means bodily harm as defined in section 609.02, subdivision 7, or severe mental anguish or pregnancy.

Subd. 9. "Physically helpless" means that a person is (a) asleep or not conscious, (b) unable to withhold consent or to withdraw because of a physical condition, or (c) unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor.

Subd. 10. "Position of authority" includes but is not limited to any person who is a parent or acting in the place of a parent and charged with any of a parent's rights, duties or responsibilities to a child, or a person who is charged with any duty or responsibility for the health, welfare, or supervision of a child, either independently or through another, no matter how brief, at the time of the act.

Subd. 11. (a) "Sexual contact," for the purposes of sections 609.343, subdivision 1, clauses (a) to (f), and 609.345, subdivision 1, clauses (a) to (e), and (h) to (j), includes any of the following acts committed without the complainant's consent, for the purpose of satisfying the actor's sexual or aggressive impulses, except in those cases where consent is not a defense:

- (i) the intentional touching by the actor of the complainant's intimate parts, or
- (ii) the touching by the complainant of the actor's, the complainant's, or another's intimate parts effected by coercion or the use of a position of authority, or by inducement if the complainant is under 13 years of age or mentally impaired, or
- (iii) the touching by another of the complainant's intimate parts effected by coercion or the use of a position of authority, or
- (iv) in any of the cases above, of the clothing covering the immediate area of the intimate parts.

(b) "Sexual contact," for the purposes of sections 609.343, subdivision 1, clauses (g) and (h), and 609.345, subdivision 1, clauses (f) and (g), includes any of the following acts, if the acts can reasonably be construed as being for the purpose of satisfying the actor's sexual or aggressive impulses:

- (i) the intentional touching by the actor of the complainant's intimate parts;
- (ii) the touching by the complainant of the actor's, the complainant's, or another's intimate parts;

- (iii) the touching by another of the complainant's intimate parts; or
- (iv) in any of the cases listed above, touching of the clothing covering the immediate area of the intimate parts.

Subd. 12. "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion however slight into the genital or anal openings of the complainant's body of any part of the actor's body or any object used by the actor for this purpose, where the act is committed without the complainant's consent, except in those cases where consent is not a defense. Emission of semen is not necessary.

Subd. 13. "Complainant" means a person alleged to have been subjected to criminal sexual conduct, but need not be the person who signs the complaint.

Subd. 14. "Coercion" means words or circumstances that cause the complainant reasonably to fear that the actor will inflict bodily harm upon, or hold in confinement, the complainant or another.

Subd. 15. **Significant relationship.** "Significant relationship" means a situation in which the actor is:

- (1) the complainant's parent, stepparent, or guardian;
- (2) any of the following persons related to the complainant by blood, marriage, or adoption: brother, sister, stepbrother, stepsister, first cousin, aunt, uncle, nephew, niece, grandparent, great-grandparent, great-uncle, great-aunt; or
- (3) an adult who jointly resides intermittently or regularly in the same dwelling as the complainant and who is not the complainant's spouse.

Subd. 16. "Patient" means a person who seeks or obtains psychotherapeutic services.

Subd. 17. "Psychotherapist" means a physician, psychologist, nurse, chemical dependency counselor, social worker, clergy, or other person, whether or not licensed by the state, who performs or purports to perform psychotherapy.

Subd. 18. "Psychotherapy" means the professional treatment, assessment, or counseling of a mental or emotional illness, symptom, or condition.

Subd. 19. "Emotionally dependent" means that the nature of the patient's or former patient's emotional condition and the nature of the treatment provided by the psychotherapist are such that the psychotherapist knows or has reason to know that the patient or former patient is unable to withhold consent to sexual contact or sexual penetration by the psychotherapist.

Subd. 20. "Therapeutic deception" means a representation by a psychotherapist that sexual contact or sexual penetration by the psychotherapist is consistent with or part of the patient's treatment.

History: 1975 c 374 s 2; 1977 c 130 s 8; 1979 c 258 s 9-11; 1981 c 51 s 1; 1982 c 385 s 1; 1982 c 469 s 9; 1984 c 525 s 3; 1984 c 588 s 5,6; 1985 c 24 s 3,4; 1985 c 286 s 14; 1985 c 297 s 1-5; 1986 c 351 s 6,7; 1986 c 444

609.342 CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE.

Subdivision 1. **Crime defined.** A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the first degree if any of the following circumstances exists:

(a) the complainant is under 13 years of age and the actor is more than 36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(b) the complainant is at least 13 but less than 16 years of age and the actor is more than 48 months older than the complainant and in a position of authority over the complainant, and uses this authority to cause the complainant to submit. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(c) circumstances existing at the time of the act cause the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another;

(d) the actor is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit;

(c) the actor causes personal injury to the complainant, and either of the following circumstances exist:

(i) the actor uses force or coercion to accomplish sexual penetration; or

(ii) the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless;

(f) the actor is aided or abetted by one or more accomplices within the meaning of section 609.05, and either of the following circumstances exists:

(i) an accomplice uses force or coercion to cause the complainant to submit; or

(ii) an accomplice is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant reasonably to believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit;

(g) the actor has a significant relationship to the complainant and the complainant was under 16 years of age at the time of the sexual penetration. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense; or

(h) the actor has a significant relationship to the complainant, the complainant was under 16 years of age at the time of the sexual penetration, and:

(i) the actor or an accomplice used force or coercion to accomplish the penetration;

(ii) the actor or an accomplice was armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it could be a dangerous weapon and used or threatened to use the dangerous weapon;

(iii) circumstances existed at the time of the act to cause the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another;

(iv) the complainant suffered personal injury; or

(v) the sexual abuse involved multiple acts committed over an extended period of time.

Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense.

Subd. 2. **Penalty.** A person convicted under subdivision 1 may be sentenced to imprisonment for not more than 20 years or to a payment of a fine of not more than \$35,000, or both.

Subd. 3. **Stay.** Except when imprisonment is required under section 609.346, if a person is convicted under subdivision 1, clause (g), the court may stay imposition or execution of the sentence if it finds that:

(a) a stay is in the best interest of the complainant or the family unit; and

(b) a professional assessment indicates that the offender has been accepted by and can respond to a treatment program.

If the court stays imposition or execution of sentence, it shall include the following as conditions of probation:

(1) incarceration in a local jail or workhouse; and

(2) a requirement that the offender complete a treatment program.

History: 1975 c 374 s 3; 1981 c 51 s 2; 1983 c 204 s 1; 1984 c 628 art 3 s 11; 1985 c 24 s 5; 1985 c 286 s 15; 1986 c 444

609.343 CRIMINAL SEXUAL CONDUCT IN THE SECOND DEGREE.

Subdivision 1. **Crime defined.** A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the second degree if any of the following circumstances exists:

(a) the complainant is under 13 years of age and the actor is more than 36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense. In a prosecution under this clause, the state is not required to prove that the sexual contact was coerced;

(b) the complainant is at least 13 but less than 16 years of age and the actor is more than 48 months older than the complainant and in a position of authority over the complainant, and uses this authority to cause the complainant to submit. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(c) circumstances existing at the time of the act cause the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another;

(d) the actor is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it to be a dangerous weapon and uses or threatens to use the dangerous weapon to cause the complainant to submit;

(e) the actor causes personal injury to the complainant, and either of the following circumstances exist:

(i) the actor uses force or coercion to accomplish the sexual contact; or

(ii) the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless;

(f) the actor is aided or abetted by one or more accomplices within the meaning of section 609.05, and either of the following circumstances exists:

(i) an accomplice uses force or coercion to cause the complainant to submit; or

(ii) an accomplice is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit;

(g) the actor has a significant relationship to the complainant and the complainant was under 16 years of age at the time of the sexual contact. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense; or

(h) the actor has a significant relationship to the complainant, the complainant was under 16 years of age at the time of the sexual contact, and:

(i) the actor or an accomplice used force or coercion to accomplish the contact;

(ii) the actor or an accomplice was armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it could be a dangerous weapon and used or threatened to use the dangerous weapon;

(iii) circumstances existed at the time of the act to cause the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another;

(iv) the complainant suffered personal injury; or

(v) the sexual abuse involved multiple acts committed over an extended period of time.

Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense.

Subd. 2. **Penalty.** A person convicted under subdivision 1 may be sentenced to imprisonment for not more than 15 years or to a payment of a fine of not more than \$30,000, or both.

Subd. 3. **Stay.** Except when imprisonment is required under section 609.346, if a person is convicted under subdivision 1, clause (g), the court may stay imposition or execution of the sentence if it finds that:

(a) a stay is in the best interest of the complainant or the family unit; and

(b) a professional assessment indicates that the offender has been accepted by and can respond to a treatment program.

If the court stays imposition or execution of sentence, it shall include the following as conditions of probation:

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State Capitol
Madison, Wis.

- (1) incarceration in a local jail or workhouse; and
- (2) a requirement that the offender complete a treatment program.

History: 1975 c 374 s 4; 1979 c 258 s 12; 1981 c 51 s 3; 1983 c 204 s 2; 1984 c 628 art 3 s 11; 1985 c 24 s 6; 1985 c 286 s 16; 1986 c 444

609.344 CRIMINAL SEXUAL CONDUCT IN THE THIRD DEGREE.

Subdivision 1. Crime defined. A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if any of the following circumstances exists:

(a) the complainant is under 13 years of age and the actor is no more than 36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant shall be a defense;

(b) the complainant is at least 13 but less than 16 years of age and the actor is more than 24 months older than the complainant. In any such case it shall be an affirmative defense, which must be proved by a preponderance of the evidence, that the actor believes the complainant to be 16 years of age or older. If the actor in such a case is no more than 48 months but more than 24 months older than the complainant, the actor may be sentenced to imprisonment for not more than five years. Consent by the complainant is not a defense;

(c) the actor uses force or coercion to accomplish the penetration;

(d) the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless;

(e) the complainant is at least 16 but less than 18 years of age and the actor is more than 48 months older than the complainant and in a position of authority over the complainant, and uses this authority to cause the complainant to submit. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(f) the actor has a significant relationship to the complainant and the complainant was at least 16 but under 18 years of age at the time of the sexual penetration. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(g) the actor has a significant relationship to the complainant, the complainant was at least 16 but under 18 years of age at the time of the sexual penetration, and:

(i) the actor or an accomplice used force or coercion to accomplish the penetration;

(ii) the actor or an accomplice was armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it could be a dangerous weapon and used or threatened to use the dangerous weapon;

(iii) circumstances existed at the time of the act to cause the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another;

(iv) the complainant suffered personal injury; or

(v) the sexual abuse involved multiple acts committed over an extended period of time.

Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(h) the actor is a psychotherapist and the complainant is a patient of the psychotherapist and the sexual penetration occurred during the psychotherapy session. Consent by the complainant is not a defense;

(i) the actor is a psychotherapist and the complainant is a patient or former patient of the psychotherapist and the patient or former patient is emotionally dependent upon the psychotherapist; or

(j) the actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception. Consent by the complainant is not a defense.

Subd. 2. **Penalty.** A person convicted under subdivision 1 may be sentenced to imprisonment for not more than ten years or to a payment of a fine of not more than \$20,000, or both.

Subd. 3. **Stay.** Except when imprisonment is required under section 609.346, if a person is convicted under subdivision 1, clause (f), the court may stay imposition or execution of the sentence if it finds that:

- (a) a stay is in the best interest of the complainant or the family unit; and
- (b) a professional assessment indicates that the offender has been accepted by and can respond to a treatment program.

If the court stays imposition or execution of sentence, it shall include the following as conditions of probation:

- (1) incarceration in a local jail or workhouse; and
- (2) a requirement that the offender complete a treatment program.

History: 1975 c 374 s 5; 1979 c 258 s 13; 1983 c 204 s 3; 1984 c 588 s 7; 1984 c 628 art 3 s 11; 1985 c 24 s 7; 1985 c 286 s 17; 1985 c 297 s 6; 1986 c 351 s 8; 1986 c 444; 1Sp1986 c 3 art 1 s 80

609.345 CRIMINAL SEXUAL CONDUCT IN THE FOURTH DEGREE.

Subdivision 1. **Crime defined.** A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the fourth degree if any of the following circumstances exists:

(a) the complainant is under 13 years of age and the actor is no more than 36 months older than the complainant. Neither mistake as to the complainant's age or consent to the act by the complainant is a defense. In a prosecution under this clause, the state is not required to prove that the sexual contact was coerced;

(b) the complainant is at least 13 but less than 16 years of age and the actor is more than 48 months older than the complainant or in a position of authority over the complainant and uses this authority to cause the complainant to submit. In any such case, it shall be an affirmative defense which must be proved by a preponderance of the evidence that the actor believes the complainant to be 16 years of age or older;

(c) the actor uses force or coercion to accomplish the sexual contact;

(d) the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless;

(e) the complainant is at least 16 but less than 18 years of age and the actor is more than 48 months older than the complainant and in a position of authority over the complainant, and uses this authority to cause the complainant to submit. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(f) the actor has a significant relationship to the complainant and the complainant was at least 16 but under 18 years of age at the time of the sexual contact. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(g) the actor has a significant relationship to the complainant, the complainant was at least 16 but under 18 years of age at the time of the sexual contact, and:

- (i) the actor or an accomplice used force or coercion to accomplish the contact;
- (ii) the actor or an accomplice was armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it could be a dangerous weapon and used or threatened to use the dangerous weapon;
- (iii) circumstances existed at the time of the act to cause the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another;
- (iv) the complainant suffered personal injury; or
- (v) the sexual abuse involved multiple acts committed over an extended period of time.

Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(h) the actor is a psychotherapist and the complainant is a patient of the psychotherapist and the sexual contact occurred during the psychotherapy session. Consent by the complainant is not a defense;

(i) the actor is a psychotherapist and the complainant is a patient or former patient of the psychotherapist and the patient or former patient is emotionally dependent upon the psychotherapist; or

(j) the actor is a psychotherapist and the complainant is a patient or former patient and the sexual contact occurred by means of therapeutic deception. Consent by the complainant is not a defense.

Subd. 2. **Penalty.** A person convicted under subdivision 1 may be sentenced to imprisonment for not more than five years or to a payment of a fine of not more than \$10,000, or both.

Subd. 3. **Stay.** Except when imprisonment is required under section 609.346, if a person is convicted under subdivision 1, clause (f), the court may stay imposition or execution of the sentence if it finds that:

(a) a stay is in the best interest of the complainant or the family unit; and

(b) a professional assessment indicates that the offender has been accepted by and can respond to a treatment program.

If the court stays imposition or execution of sentence, it shall include the following as conditions of probation:

(1) incarceration in a local jail or workhouse; and

(2) a requirement that the offender complete a treatment program.

History: 1975 c 374 s 6; 1976 c 124 s 9; 1979 c 258 s 14; 1981 c 51 s 4; 1983 c 204 s 4; 1984 c 588 s 8; 1984 c 628 art 3 s 11; 1985 c 24 s 8; 1985 c 286 s 18; 1985 c 297 s 7; 1986 c 351 s 9; 1986 c 444; 1Sp1986 c 3 art 1 s 81

609.346 SUBSEQUENT OFFENSES.

Subdivision 1. **Definition; conviction of offense.** For purposes of this section, the term "offense" means a completed offense or an attempt to commit an offense.

Subd. 2. **Subsequent offense; penalty.** If a person is convicted of a second or subsequent offense under sections 609.342 to 609.345 within 15 years of the prior conviction, the court shall commit the defendant to the commissioner of corrections for imprisonment for a term of not less than three years, nor more than the maximum sentence provided by law for the offense for which convicted, notwithstanding the provisions of sections 242.19, 243.05, 609.11, 609.12 and 609.135.

Subd. 3. **Prior convictions under similar statutes.** For the purposes of this section, an offense is considered a second or subsequent offense if, prior to conviction of the second or subsequent offense, the actor has been at any time convicted under sections 609.342 to 609.345 or under any similar statute of the United States, or this or any other state.

History: 1975 c 374 s 7; 1978 c 723 art 1 s 16; 1981 c 273 s 4; 1984 c 588 s 9; 1984 c 655 art 1 s 77; 1986 c 351 s 10,11; 1Sp1986 c 3 art 1 s 70,71

609.347 EVIDENCE.

Subdivision 1. In a prosecution under sections 609.342 to 609.346, the testimony of a complainant need not be corroborated.

Subd. 2. In a prosecution under sections 609.342 to 609.346, there is no need to show that the complainant resisted the actor.

Subd. 3. In a prosecution under sections 609.342 to 609.346 or 609.365, evidence of the complainant's previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury, except by court order

(4) is otherwise authorized by a court order issued prior to the violation of subdivision 1.

The defenses provided in this subdivision are in addition to and do not limit other defenses available under this chapter or chapter 611.

[For text of subs 3 and 4, see M.S.1986]

Subd. 5. Dismissal of charge. A felony charge brought under this section shall be dismissed if:

(a) the person voluntarily returns the child within 14 days after taking, detaining, or failing to return the child in violation of this section; or

(b)(1) the person taking the action and the child have not left the state of Minnesota; and (2) within a period of 14 days after taking the action, (i) a motion or proceeding under chapter 518, 518A, 518B, or 518C is commenced by the person taking the action, or (ii) the attorney representing the person taking the action has consented to service of process by the party whose rights are being deprived, for any motion or action pursuant to chapter 518, 518A, 518B, or 518C.

Clause (a) does not apply if the person returns the child as a result of being located by law enforcement authorities.

This subdivision does not prohibit the filing of felony charges or an offense report before the expiration of the 14 days.

Subd. 6. Penalty. Except as otherwise provided in subdivision 5, whoever violates this section may be sentenced to imprisonment for not more than two years or to payment of a fine of \$4,000, or both.

[For text of subd 7, see M.S.1986]

History: 1987 c 246 s 1-3

609.321 PROSTITUTION; DEFINITIONS.

[For text of subs 1 to 11, see M.S.1986]

Subd. 12. A "public place" means a public street or sidewalk, a pedestrian skyway system as defined in section 469.125, subdivision 4, a hotel, motel, or other place of public accommodation, or a place licensed to sell intoxicating liquor, wine, nonintoxicating malt beverages, or food.

History: 1987 c 291 s 242

609.341 DEFINITIONS.

[For text of subs 1 to 6, see M.S.1986]

Subd. 7. "Mentally incapacitated" means that a person under the influence of alcohol, a narcotic, anesthetic, or any other substance, administered to that person without the person's agreement, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration.

[For text of subs 8 to 10, see M.S.1986]

Subd. 11. (a) "Sexual contact," for the purposes of sections 609.343, subdivision 1, clauses (a) to (f), and 609.345, subdivision 1, clauses (a) to (e), and (h) to (j), includes any of the following acts committed without the complainant's consent, except in those cases where consent is not a defense, and committed with sexual or aggressive intent:

(i) the intentional touching by the actor of the complainant's intimate parts, or

(ii) the touching by the complainant of the actor's, the complainant's, or another's intimate parts effected by coercion or the use of a position of authority, or by inducement if the complainant is under 13 years of age or mentally impaired, or

(iii) the touching by another of the complainant's intimate parts effected by coercion or the use of a position of authority, or

(iv) in any of the cases above, the touching of the clothing covering the immediate area of the intimate parts.

(b) "Sexual contact," for the purposes of sections 609.343, subdivision 1, clauses (g) and (h), and 609.345, subdivision 1, clauses (f) and (g), includes any of the following acts committed with sexual or aggressive intent:

- (i) the intentional touching by the actor of the complainant's intimate parts;
- (ii) the touching by the complainant of the actor's, the complainant's, or another's intimate parts;
- (iii) the touching by another of the complainant's intimate parts; or
- (iv) in any of the cases listed above, touching of the clothing covering the immediate area of the intimate parts.

[For text of subds 12 and 13, see M.S.1986]

Subd. 14. "Coercion" means words or circumstances that cause the complainant reasonably to fear that the actor will inflict bodily harm upon, or hold in confinement, the complainant or another, or force the complainant to submit to sexual penetration or contact, but proof of coercion does not require proof of a specific act or threat.

[For text of subds: 15 and 16, see M.S.1986]

Subd. 17. "Psychotherapist" means a physician, psychologist, nurse, chemical dependency counselor, social worker, clergy, marriage and family therapist, mental health service provider, or other person, whether or not licensed by the state, who performs or purports to perform psychotherapy.

[For text of subds 18 to 20, see M.S.1986]

History: 1987 c 198 s 1-3; 1987 c 347 art 1 s 22

609.344 CRIMINAL SEXUAL CONDUCT IN THE THIRD DEGREE.

Subdivision 1. **Crime defined.** A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if any of the following circumstances exists:

(a) the complainant is under 13 years of age and the actor is no more than 36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant shall be a defense;

(b) the complainant is at least 13 but less than 16 years of age and the actor is more than 24 months older than the complainant. In any such case it shall be an affirmative defense, which must be proved by a preponderance of the evidence, that the actor believes the complainant to be 16 years of age or older. If the actor in such a case is no more than 48 months but more than 24 months older than the complainant, the actor may be sentenced to imprisonment for not more than five years. Consent by the complainant is not a defense;

(c) the actor uses force or coercion to accomplish the penetration;

(d) the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless;

(e) the complainant is at least 16 but less than 18 years of age and the actor is more than 48 months older than the complainant and in a position of authority over the complainant, and uses this authority to cause the complainant to submit. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(f) the actor has a significant relationship to the complainant and the complainant was at least 16 but under 18 years of age at the time of the sexual penetration. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(g) the actor has a significant relationship to the complainant, the complainant was at least 16 but under 18 years of age at the time of the sexual penetration, and:

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f sections 609.343, subdivision 1, clauses (f) and (g), includes any of the following ent:

of the complainant's intimate parts; the actor's, the complainant's, or another's

plainant's intimate parts; or the removal of the clothing covering the immedi-

d 13, see M.S.1986]

circumstances that cause the complainant bodily harm upon, or hold in confinement, complainant to submit to sexual penetration require proof of a specific act or threat.

f 16, see M.S.1986]

physician, psychologist, nurse, chemical marriage and family therapist, mental therapist or not licensed by the state, who

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IN THE THIRD DEGREE.

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he complainant, the complainant was of the sexual penetration, and:

(i) the actor or an accomplice used force or coercion to accomplish the penetration;

(ii) the actor or an accomplice was armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it could be a dangerous weapon and used or threatened to use the dangerous weapon;

(iii) circumstances existed at the time of the act to cause the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another;

(iv) the complainant suffered personal injury; or

(v) the sexual abuse involved multiple acts committed over an extended period of time.

Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(h) the actor is a psychotherapist and the complainant is a patient of the psychotherapist and the sexual penetration occurred during the psychotherapy session. Consent by the complainant is not a defense;

(i) the actor is a psychotherapist and the complainant is a patient or former patient of the psychotherapist and the patient or former patient is emotionally dependent upon the psychotherapist;

(j) the actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception. Consent by the complainant is not a defense; or

(k) the actor accomplishes the sexual penetration by means of false representation that the penetration is for a bona fide medical purpose by a health care professional. Consent by the complainant is not a defense.

[For text of subds 2 and 3, see M.S.1986]

History: 1987 c 94 s 1

609.345 CRIMINAL SEXUAL CONDUCT IN THE FOURTH DEGREE.

Subdivision 1. Crime defined. A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the fourth degree if any of the following circumstances exists:

(a) the complainant is under 13 years of age and the actor is no more than 36 months older than the complainant. Neither mistake as to the complainant's age or consent to the act by the complainant is a defense. In a prosecution under this clause, the state is not required to prove that the sexual contact was coerced;

(b) the complainant is at least 13 but less than 16 years of age and the actor is more than 48 months older than the complainant or in a position of authority over the complainant and uses this authority to cause the complainant to submit. In any such case, it shall be an affirmative defense which must be proved by a preponderance of the evidence that the actor believes the complainant to be 16 years of age or older;

(c) the actor uses force or coercion to accomplish the sexual contact;

(d) the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless;

(e) the complainant is at least 16 but less than 18 years of age and the actor is more than 48 months older than the complainant and in a position of authority over the complainant, and uses this authority to cause the complainant to submit. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(f) the actor has a significant relationship to the complainant and the complainant was at least 16 but under 18 years of age at the time of the sexual contact. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(g) the actor has a significant relationship to the complainant, the complainant was at least 16 but under 18 years of age at the time of the sexual contact, and:

CHAPTER 9A.44

SEXUAL OFFENSES

Section

- 9A.44.010. Definitions.
- 9A.44.020. Testimony—Evidence—Written motion—Admissibility.
- 9A.44.030. Defenses to prosecution under this chapter.
- 9A.44.040. Rape in the first degree.
- 9A.44.045. Minimum term for first degree rape—Restrictions on release from confinement—Application to offenses before July 1, 1984.
- 9A.44.050. Rape in the second degree.
- 9A.44.060. Rape in the third degree.
- 9A.44.070. Statutory rape in the first degree.
- 9A.44.080. Statutory rape in the second degree.
- 9A.44.090. Statutory rape in the third degree.
- 9A.44.100. Indecent liberties.
- 9A.44.110. Repealed.
- 9A.44.120. Admissibility of child's statement—Conditions.
- 9A.44.900. Decodifications and additions to this chapter.
- 9A.44.901. Construction—Sections decodified and added to this chapter.
- 9A.44.902. Effective date—1979 ex.s. c 244.

Section 9A.44.110

Library References

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| Criminal practice, post-trial proceedings, departure from the guidelines, first offender, see Wash.Prac. vol. 13, Ferguson, § 4321. | Jury instructions, Incest, definition, see Wash.Prac. vol. 11, WPIC 46.05. Sexual intercourse, definition, see Wash.Prac. vol. 11, WPIC 45.01. |
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WESTLAW Electronic Research

WESTLAW supplements West's Revised Code of Washington Annotated and is useful for additional research. Enter a citation in INSTA-CITE for display of any parallel citations and case history. Enter a constitution, statute or rule citation in a case law database for cases of interest.

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Example query for Washington Constitution:
Const. Constitution /s 8 +3 5

Example query for statute: 59.12.030

Also, see the WESTLAW guide following the Preface pages of this volume.

9A.44.050

9A.44.010. Definitions

As used in this chapter:

(1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

(2) "Married" means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in an appropriate court for legal separation or for dissolution of his or her marriage.

(3) "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause;

(4) "Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act;

(5) "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped;

(6) "Consent" means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.

Formerly § 9.79.140, enacted by Laws 1975, 1st Ex.Sess., ch. 14, § 1. Recodified as § 9A.44.010 by Laws 1979, Ex.Sess., ch. 244, § 17, eff. July 1, 1979. Amended by Laws 1981, ch. 123, § 1.

Historical Note

Laws 1979, Ex.Sess., ch. 244, § 17, recodified the section.

Laws 1981, ch. 123, § 1, in subsec. (2), added the language following "means one who is legally married to another".

Source:

Laws 1873, p. 187, § 37.

Laws 1909, ch. 249, § 185.

RRS § 2437.

Former § 9.79.030.

Laws 1973, 1st Ex.Sess., ch. 154, § 124.

TER 9A.44

SEXUAL OFFENSES

Written motion—Admissibility.
under this chapter.

1st degree rape—Restrictions on release
Application to offenses before July 1,

2nd degree.

3rd degree.

4th degree.

Statement—Conditions.

Provisions to this chapter.

Decodified and added to this chapter.
s. c 244.

References

Jury instructions,

Incest, definition, see Wash.Prac.
vol. 11, WPIC 46.05.

Sexual intercourse, definition, see
Wash.Prac. vol. 11, WPIC 45.01.

Electronic Research

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case history. Enter a constitution,
law database for cases of interest.

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Institution:

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See the Preface pages of this volume.

979) 23 of complaining witness where...
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(1980) 94 Wash.2d 733, 619 P.2d 968.

In attempted rape prosecution...
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received mental health treatment...
submit to psychological examination...
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victim's prior mental history might...
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events at time of incident. State v. ...
mos (1980) 94 Wash.2d 733, 619 P.2d 968.

In absence of any compelling rea...
sions judge did not abuse discret...
by refusing to order a psychiatric ex...
amination of alleged rape victim. State...
Demos (1979) 25 Wash.App. 15, 605 P.2d 786, affirmed 94 Wash.2d 733, 619 P.2d 968.

23. Evidence

Evidence of secretor-type tests, res...
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include him in class of people wh...
might have committed rape. State...
Nicholas (1983) 34 Wash.App. 775, P.2d 1356.

Statements made by rape victim...
physician for purpose of diagnosis...
treatment are considered inherentl...
trustworthy because declarant's well...
ing rests on truth of the statement...
State v. Fleming (1980) 27 Wash.App. 952, 621 P.2d 779.

Testimony of two victims, positiv...
identifying defendant as perpetrator...
two crimes, was substantial eviden...
which permitted jury to disbelieve...
defendant's alibi witnesses and to find...
defendant guilty on two counts of first...
degree rape while armed with a deadl...
weapon. State v. Edwards (1979) 2...
Wash.App. 893, 600 P.2d 566.

Evidence showing lustful disposition...
should only be admitted in sex offense...
case where it tends to show lustful incli...
nation toward offended female. State v. ...
Whalon (1970) 1 Wash.App. 785, 464 P.2d 730.

Evidence of complaints made by fe...
male is restricted to bare complaint un...
less statement is strictly part of res ges...
tate. in cases of rape and similar crimes...
State v. King (1961) 58 Wash.2d 77, 360 P.2d 757.

24. Unanimity of jury

Jury unanimity was not required on...
one of two alternative means charged in...
prosecution for first-degree rape charg...
ing commission by two alternative...
means, where constitutionally sufficient...
evidence supported both charged alter...
natives. State v. Whitney (1987) 108...
Wash.2d 506, 739 P.2d 1150.

9A.44.045. Minimum term for first degree rape—Restrictions on release from confinement—Application to offenses before July 1, 1984

No person convicted of rape in the first degree shall be granted a deferred or suspended sentence except for the purpose of commitment to an inpatient treatment facility: *Provided*, That every person convicted of rape in the first degree shall be confined for a minimum of three years: *Provided further*, That the board of prison terms and paroles shall have authority to set a period of confinement greater than three years but shall never reduce the minimum three-year period of confinement; nor shall the board release the convicted person during the first three years of confinement as a result of any type of good time calculation; nor shall the department of corrections permit the convicted person to participate in any work release program or furlough program during the first three years of confinement. This section applies only to offenses committed prior to July 1, 1984.

Enacted by Laws 1982, ch. 192, § 12, eff. April 1, 1982.

Law Review Commentaries

Forcible rape in Washington—criminal and civil sanctions. 19 Gonzaga L.Rev. 363 (1983/84).

Library References

Rape §64. Sentencing guidelines, mandatory minimum sentence, see Wash.Prac. vol. 13, Ferguson, § 4307.
C.J.S. Rape § 86 et seq.
Probation, deferred sentences, see Wash.Prac. vol. 13, Ferguson, § 4318.

9A.44.050. Rape in the second degree

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

- (a) By forcible compulsion; or
 (b) When the victim is incapable of consent by reason of physically helpless or mentally incapacitated.

(2) Rape in the second degree is a class B felony.

Formerly § 9.79.180, enacted by Laws 1975, 1st Ex.Sess., ch. 14. Amended by Laws 1979, Ex.Sess., ch. 244, § 2, eff. July 1, 1979. Recodified as § 9A.44.050 by Laws 1979, Ex.Sess., ch. 244, § 17, eff. July 1, 1979. Amended by Laws 1983, ch. 118, § 2.

Historical Note

Laws 1979, Ex.Sess., ch. 244, §§ 2, 17, recodified the section; and, in subsec. (2), preceding "felony" inserted "class B"; and, following "felony" deleted ", and shall be punished by imprisonment in the state penitentiary for not more than ten years".

Laws 1983, ch. 118, § 2, at the end of the introductory paragraph of subsec. (1), deleted ", not married to the perpetrator".

Source:

Laws 1854, p. 80, § 33.

Laws 1869, p. 204, § 35.
 Laws 1873, p. 187, § 37.
 Code 1881, §§ 812, 814.
 Laws 1886, p. 84, § 1.
 Laws 1897, ch. 19, § 1.
 Laws 1909, ch. 249, §§ 183, 184.
 Laws 1919, ch. 132, § 1.
 Laws 1937, ch. 74, § 1.
 Laws 1943, ch. 112, § 1.
 RRS §§ 2435, 2436.
 Former §§ 9.79.010, 9.79.020.
 Laws 1973, 1st Ex.Sess., ch. 118, §§ 122, 123.

Law Review Commentaries

Forcible rape in Washington—criminal and civil sanctions. 19 Gonzaga L.Rev. 363 (1983/84).

Library References

Rape ⇔ 1.
 C.J.S. Rape § 1 et seq.
 Jury instructions,
 Defenses, rape, second degree or indecent liberties, see Wash.Prac. vol. 11, WPIC 19.03.

Rape, second degree, definition, Wash.Prac. vol. 11, WPIC 41.03.
 Rape, second degree, elements, Wash.Prac. vol. 11, WPIC 41.04.

Notes of Decisions

Corpus delicti 1
 Included offenses 2

1. Corpus delicti

Threat of defendant to take his own child, in order to coerce defendant's estranged wife into engaging in sexual intercourse, constituted a threat of kidnapping when without legal authority and, as such, went to forcible compulsion so as to constitute crime of second-degree rape. State v. Tuitasi (1986) 46 Wash. App. 206, 729 P.2d 75.

Proof that male person had sexual intercourse with female, not his wife, that at time she was incapable of giving her consent thereto because of unconsciousness of mind, would establish corpus delicti of crime of rape under provision now contained in this statute. Stat Meyer (1951) 37 Wash.2d 759, 226 P.2d 204.

2. Included offenses

Where defendant was charged with assault in the second degree under section of statute relating to assault with intent to commit a felony, defendant was charged with attempted rape in the

...lsion; or
...s incapable of consent by reason of
...entally incapacitated.

...d degree is a class B felony.
...ted by Laws 1975, 1st Ex.Sess., ch. 14,
...Sess., ch. 244, § 2, eff. July 1, 1979. Recodified
...979, Ex.Sess., ch. 244, § 17, eff. July 1,
...1. 118, § 2.

Historical Note

§§ 2, 17, Laws 1869, p. 204, § 35.
n subsec. Laws 1873, p. 187, § 37.
ed "class Code 1881, §§ 812, 814.
deleted", Laws 1886, p. 84, § 1.
isonment Laws 1897, ch. 19, § 1.
not more Laws 1909, ch. 249, §§ 183, 184.
Laws 1919, ch. 132, § 1.
he end of Laws 1937, ch. 74, § 1.
of subsec. Laws 1943, ch. 112, § 1.
he perpe- RRS §§ 2435, 2436.
Former §§ 9.79.010, 9.79.020.
Laws 1973, 1st Ex.Sess., ch.
§§ 122, 123.

Review Commentaries

n—crimi-
Gonzaga

Library References

Rape, second degree, definition,
Wash.Prac. vol. 11, WPIC 42.01.
Rape, second degree, elements,
Wash.Prac. vol. 11, WPIC 42.02.

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ash.Prac.

Notes of Decisions

Proof that male person had sexual
intercourse with female, not his wife, and
that at time she was incapable of giving
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Meyer (1951) 37 Wash.2d 759, 226 P.2d
204.

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6 Wash.

2. Included offenses

Where defendant was charged with
assault in the second degree under section
of statute relating to assault with intent
to commit a felony, defendant was
charged with attempted rape in the

...nd degree under forcible compulsion
...section of that statute, and, under of-
...fenses as charged, proved and instructed
...the same evidence of physical vio-
...lence on part of defendant constituted
...the "assault" * * * committed with intent
...to commit rape" element of the crime of
...assault in the second degree and the
...attempt to engage in sexual intercourse

* * * by forcible compulsion" element
of the crime of attempted rape in the
second degree, only one offense was
committed, not two; appropriate reme-
dy was to set aside the conviction of the
lesser offense of attempted rape in the
second degree. State v. Hinz (1979) 22
Wash.App. 906, 594 P.2d 1350, affirmed
93 Wash.2d 510, 610 P.2d 1322.

9A.44.060. Rape in the third degree

(1) A person is guilty of rape in the third degree when, under
circumstances not constituting rape in the first or second degrees,
such person engages in sexual intercourse with another person, not
married to the perpetrator:

(a) Where the victim did not consent as defined in RCW 9A.44.-
010(6), to sexual intercourse with the perpetrator and such lack of
consent was clearly expressed by the victim's words or conduct, or

(b) Where there is threat of substantial unlawful harm to proper-
ty rights of the victim.

(2) Rape in the third degree is a class C felony.

Formerly § 9.79.190, enacted by Laws 1975, 1st Ex.Sess., ch. 14, § 6.
Amended by Laws 1979, Ex.Sess., ch. 244, § 3, eff. July 1, 1979. Recodified
as § 9A.44.060 by Laws 1979, Ex.Sess., ch. 244, § 17, eff. July 1, 1979.

Historical Note

Laws 1979, Ex.Sess., ch. 244, §§ 3, 17,
recodified the section; and, in subsec.
(1)(a), substituted a reference to RCW
9A.44.010(6) for a reference to RCW
9.79.140(6); and, in subsec. (2), preced-
ing "felony" inserted "class C"; and, fol-
lowing "felony" deleted ", and shall be
punished by imprisonment in the state
penitentiary for not more than five
years".

Laws 1869, p. 204, § 35.
Laws 1873, p. 187, § 37.
Code 1881, §§ 812, 814.
Laws 1886, p. 84, § 1.
Laws 1897, ch. 19, § 1.
Laws 1909, ch. 249, §§ 183, 184.
Laws 1919, ch. 132, § 1.
Laws 1937, ch. 74, § 1.
Laws 1943, ch. 112, § 1.
RRS §§ 2435, 2436.
Former §§ 9.79.010, 9.79.020.
Laws 1973, 1st Ex.Sess., ch. 154,
§§ 122, 123.

Source:

Laws 1854, p. 80, § 33.

Law Review Commentaries

Forcible rape in Washington—crimi-
nal and civil sanctions. 19 Gonzaga
L.Rev. 363 (1983/84).

Library References

Rape ⇐1.
C.J.S. Rape § 1 et seq.
Jury instructions, rape, third degree,

Definition, see Wash.Prac. vol. 11,
WPIC 42.01.
Elements, see Wash.Prac. vol. 11,
WPIC 42.02.

Notes of Decisions

Intent 1
 Marriage subsequent to offense 3
 Multiple convictions for same act 5
 Pregnancy 4
 Sex life of victim 2

1. Intent

Every laying on of hands upon female of age of fifteen does not necessarily imply intent to have carnal knowledge. *State v. Leach* (1950) 36 Wash.2d 641, 219 P.2d 972.

2. Sex life of victim

In a prosecution for carnal knowledge of female child, testimony concerning prior acts of intercourse between defendant and prosecuting witness is admissible to show his lustful disposition toward her. *State v. Harold* (1954) 45 Wash.2d 505, 275 P.2d 895.

State was not required to prove previous chastity of prosecuting witness, nor would proof of unchastity in any way rebut state's proof that defendant carnally knew female, or that she was under age of eighteen years, or that she was not his wife, since former statute merely recited "any female child under the age of eighteen years," not any chaste female under eighteen years of age. *State v. Linton* (1950) 35 Wash.2d 67, 216 P.2d 761.

In prosecution for statutory rape, evidence that prosecutrix had sexual intercourse with others is not admissible. *State v. Gay* (1914) 82 Wash. 423, 144 P. 711.

9A.44.100. Indecent liberties

(1) A person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another:

(a) By forcible compulsion; or

(b) When the other person is less than fourteen years of age; or

(c) When the other person is less than sixteen years of age and the perpetrator is more than forty-eight months older than the person and is in a position of authority over the person; or

3. Marriage subsequent to offense
 In prosecution for statutory rape on one under age of consent, who had since married defendant, it is error to require wife to appear in court for purpose of being identified by witness, when her condition as to pregnancy was apparent and could be observed by jury, thereby in reality compelling wife to become witness against defendant. *State v. Winnett* (1907) 48 Wash. 93, 92 P. 904.

4. Pregnancy

Instruction that pregnancy of complaining witness is not in and of itself evidence that defendant is guilty of specific act of carnal knowledge charged in information, is correct statement of law, and sufficient cautionary instruction, if any be needed. *State v. Jennen* (1961) 58 Wash.2d 171, 361 P.2d 739.

In prosecution for carnal knowledge of female under age of consent, it is not error to permit jury to consider pregnancy of prosecuting witness as evidence that offense has been committed and of time at which it occurred. *State v. Jennen* (1961) 58 Wash.2d 171, 361 P.2d 739.

Where charge is carnal knowledge of child, pregnancy can be shown, as it proves corpus delicti and affects credibility of prosecutrix. *State v. Chambers* (1957) 50 Wash.2d 139, 309 P.2d 1055.

5. Multiple convictions for same act

Legislature did not intend that defendant be convicted of both nonconsensual rape and statutory rape for single act of intercourse. *State v. Birgen* (1982) 33 Wash.App. 1, 651 P.2d 240.

of Decisions

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Indecent liberties when he knowingly his spouse to have sexual contact

Less than fourteen years of age; or less than sixteen years of age and thirty-eight months older than the authority over the person; or

(d) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.

(2) For purposes of this section:

(a) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.

(b) "Person in a position of authority" means any person who is a parent or acting in the place of a parent and is charged with any of a parent's rights, duties, or responsibilities to a child, or a person who is charged with any duty or responsibility for the health, welfare, education, or supervision of a child, either independently or through another, no matter how briefly, at the time of the act.

(3) Indecent liberties is a class B felony.

Formerly § 9A.88.100, enacted by Laws 1975, 1st Ex.Sess., ch. 260, § 9A.88.100. Recodified as § 9A.44.100 by Laws 1979, Ex.Sess., ch. 244, § 17, eff. July 1, 1979. Amended by Laws 1986, ch. 131, § 1.

Historical Note

Laws 1979, Ex.Sess., ch. 244, § 17, recodified the section without change.

Laws 1986, ch. 131, § 1, in subsec. (1), inserted subd. (c); relettered former subd. (c) as (d); in subsec. (2), inserted subdivision designation "(a)"; and added subd. (b).

Source:
Code 1881, § 816.

Laws 1905, ch. 33, § 1.
Laws 1909, ch. 249, §§ 189, 190.
Laws 1935, ch. 74, § 2.
RRS §§ 2441, 2442.
Former §§ 9.79.070, 9.79.080.
Laws 1955, ch. 127, § 1.
Laws 1973, 1st Ex.Sess., ch. 154,
§§ 128, 129.

Law Review Commentaries

Impact of common law and reform statutes on rape prosecutions. Wallace D. Loh. 55 Wash.L.Rev. 543 (1980).

Library References

Infants § 13, 20.
Obscenity § 3.
C.J.S. Assault and Battery § 74.
C.J.S. Infants §§ 5 et seq., 95 et seq.
C.J.S. Obscenity § 8 et seq.
Jury instructions,
Defenses, rape, second degree or indecent liberties, see Wash.Prac. vol. 11, WPIC 19.03.
Indecent liberties, definition, see Wash.Prac. vol. 11, WPIC 49.01.

Indecent liberties, elements, see Wash.Prac. vol. 11, WPIC 49.02.
Indecent liberties, sexual contact, definition, see Wash.Prac. vol. 11, WPIC 49.03.
Sexual intercourse, definition, see Wash.Prac. vol. 11, WPIC 45.01.
Words and Phrases (Perm.Ed.)

WESTLAW Electronic Research

See WESTLAW guide following the Preface of this volume.

April 6, 1988

Re: HB 545 -- phrase 'nature or consequences' in definition of 'mentally incapable.'

Concerns had been raised re:

1. workability of definition -- i.e., would it be too difficult to prove whether a victim is incapable of understanding the consequences of the conduct? What kind of proofs are required?
2. need for expensive expert testimony
3. ? over-broad application -- possibility of interfering with the right of the developmentally disabled for sexual expression.

The State of Washington has used a similar definition since 1976.

Becky Roe, Senior Attorney in the Sexual Assault Division of King County, Washington (population 1,750,000) gave following info:

1. their division has prosecuted 20 cases under this definition since 1976, obtaining convictions in 19.
2. they used expert testimony in one of those cases.
3. victim's capacity was evaluated generally by looking at how they made life decisions in general; planning a meal, going to the store, working, thinking ahead, etc. Occasionally, some objective testing was done.
4. there have been no challenges to definition, either by appeals or by people concerned over a civil rights issue.
5. there was an attempt 1-2 yrs ago to try to get a more concrete definition -- several large meetings involving prosecutor's ofc., legislators, etc. They looked at other states, discussed the matter at length and decided their current definition was the best available.
6. she felt definition easier to work with in practice than it would appear.

Barbara Corey-Brulet, Senior Attorney, Prosecutor's Ofc., Pierce County, Washington (pop. 750,000) commented:

1. their division has prosecuted 8 cases under this definition in the last 3 years, obtaining convictions in 6.
2. she used expert testimony in 5 of the 8 cases.

All other comments were similar to Ms. Roe's, except she felt the definition was difficult to work with. She did mention spending much thought on the issue, concluding that the definition was the best available.

I talked with people from Seattle Rape Relief, Washington Assembly of Citizens with Disabilities -- all support the Washington statute.

CW

NUGGETS OF INFORMATION ON HB 545

BILL DOES TWO THINGS:

- 1. Creates new crimes of sexual assault
 - a. fills in "hole" *Gap*
 - b. higher penalties for crimes committed by caretakers
- 2. provides workable definition of mentally incapable person.

OLD SEXUAL ASSAULT CRIME AGAINST MENTALLY INCAPABLE PERSONS:
2nd degree sexual assault: penetration

NEW SEXUAL ASSAULT CRIMES AGAINST MENTALLY INCAPABLE PERSONS:

1st degree	2nd degree	3rd degree
caretaker penetration	caretaker contact	non-
	non-caretaker penetration	caretaker contact

OLD DEFINITION OF MENTALLY INCAPABLE PERSON

Evaluates consent of mentally incapable person in light of:

- 1. Person's capability to understand the nature of the conduct.
- 2. Whether a person capable of understanding the conduct would have consented to the act. !!!!!

NEW DEFINITION -- INCAPABLE OF UNDERSTANDING THE NATURE OR CONSEQUENCES OF THE CONDUCT. (*adds "consequences" to old definition, deletes moral judgment*)

- 1. Does not center on what the person understands but on what they are capable of understanding.
- 2. Capability evaluated by objective and subjective testing, focusing on person's ability to conceptualize and make everyday decisions.
- 3. Definition in place in Washington since 1976 -- no challenges. (other states surveyed; neither Washington or we were able to come up with more effective definition.)

THE CS MAKES THREE CHANGES:

- 1. Clarifies caregiver definition. Adds to "entrusted to the defendant's care by the authority of law" ; or in a facility or program that is required by law to be licensed by the Department of Health and Social Services.
- 2. Adds marriage as a defense to crimes charged under sections dealing with mental incapability. This in no way affects the application of the marital rape law.
- 3. Restores 11.41.470(1) and adds new paragraph (4) which defines "mentally incapable."

ALL EXPERTS CONTACTED (TOTAL OF 9 OR 10 IN AK, WA, CA) UNANIMOUSLY AGREE THAT SEXUAL ASSAULT LAWS REGARDING THE MENTALLY INCAPABLE AND CAREGIVER MUST BE FIRM AND RELATIVELY INFLEXIBLE.

either the foreign personal representative appointed before death.

A foreign personal representative as a personal representative shall be allowed at the same rate as provided for a personal representative who responds. (§ 1 ch 78 SLA 1972)

Personal Representative.

A judgment or order rendered in any jurisdiction in favor of the estate of a decedent is as binding on the personal representative as if the personal representative were a party to the proceeding.

Permissible Actions.

(§ 13.21.075 SLA 1972.)

Protection of Persons and Property.

(§§ 13.26.155-13.26.165) Conservatorship and Minors (§§ 13.26.165-

Article 1. General Provisions.

Section	Section
5. Definitions and use of terms	15. Facility of payment or delivery
10. Jurisdiction of subject matter; consolidation of proceedings	20. Delegation of powers by parent or guardian
13. Court records of proceedings; access; sealing	

Sec. 13.26.005. Definitions and use of terms. Unless otherwise apparent from the context, in AS 13.06 — AS 13.36:

(1) "essential requirements for physical health or safety" means the health care, food, shelter, clothing, personal hygiene, and protection without which serious physical injury or illness is more likely than not to occur;

(2) "full guardian" means a guardian who possesses the legal duties and powers enumerated in AS 13.26.150(c);

(3) "guardian" includes full guardian and partial guardian;

(4) "incapacitated person" means a person whose ability to receive and evaluate information or to communicate decisions is impaired for reasons other than minority to the extent that the person lacks the ability to provide the essential requirements for the person's physical health or safety without court-ordered assistance;

(5) "partial guardian" means a guardian who possesses fewer than all of the legal duties and powers of a full guardian, and whose rights, powers, and duties have been specifically enumerated by court order;

(6) a "protected person" is a minor or other person for whom a conservator has been appointed or other protective order has been made;

(7) a "protective proceeding" is a proceeding under the provisions of AS 13.26.165 to determine that a person cannot effectively manage or apply the person's estate to necessary ends, either because the person lacks the ability or is otherwise inconvenienced, or because the person is a minor, and to secure administration of the estate by a conservator or other appropriate relief;

(8) "respondent" means a person who, in a guardianship proceeding under this chapter, is alleged to be an incapacitated person and for whom the appointment of a guardian or alternative assistance is sought; "respondent" includes a person seeking the appointment of a guardian or alternative assistance for oneself;

(9) "visitor" means a person trained or experienced in law, medical care, mental health care, pastoral care, education, rehabilitation, or social work, who is an officer, employee, or special appointee of the court with no personal interest in the proceedings;

(10) a "ward" is a person for whom a guardian has been appointed; a "minor ward" is a minor for whom a guardian has been appointed

NOTES TO DECISIONS

Death of defendant abated prosecution under former section. *Hartwell v. State*, Sup. Ct. Op. No. 391 (File No. 704), 423 P.2d 282 (1967), decided under former AS 11.40.110.

Collateral references. — Aiding and abetting offense of incest by one not related to party, 5 ALR 784; 74 ALR 1110; 131 ALR 1322.
 Relationship created by adoption as within statute regarding incest, 151 ALR 1146.
 Consent as element of incest, 36 ALR2d 1299.

Sexual intercourse between persons related by half blood, 72 ALR2d 706.
 Prosecutrix as accomplice or victim, 74 ALR2d 705.
 Rape, incest as included within charge of, 76 ALR2d 484.

Sec. 11.41.455. Unlawful exploitation of a minor. (a) A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a live performance, film, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct listed in (1) — (6) of this subsection, the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, or televises a child under 18 years of age engaged in, the following actual or simulated conduct:

- (1) sexual penetration;
- (2) the lewd touching of another person's genitals, anus, or breast;
- (3) the lewd touching by another person of the child's genitals, anus, or breast;
- (4) masturbation;
- (5) bestiality; or
- (6) the lewd exhibition of the child's genitals.

(b) A parent, legal guardian, or person having custody or control of a child under 18 years of age commits the crime of unlawful exploitation of a minor if, in the state, the person permits the child to engage in conduct described in (a) of this section knowing that the conduct is intended to be used in producing a live performance, film, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct.

(c) Unlawful exploitation of a minor is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 57 SLA 1983)

Cross references. — For crime of distribution of child pornography, see AS 11.61.125.

Effect of amendments. — The 1983 amendment, in subsection (a), substituted "magazine, or other printed material that visually depicts the conduct listed in (1) — (6) of this subsection, the person" for "or magazine that depicts such conduct, the person," substituted "18 years" for "16 years" in two places, and added "the following actual or simulated conduct" to the end, all in the introductory paragraph; substituted "lewd" for "obscene" in paragraphs (2), (3) and (6); and deleted "female" preceding "breast" in paragraph

(3). The amendment also redesignated former subsection (b) as subsection (c) and added present subsection (b).

NOTES TO DECISIONS

Applied in *Qualle v. State*, Ct. App. Op. No. 138 (File No. 5666), 652 P.2d 481 (1982).

Sec. 11.41.460. Indecent exposure. (a) An offender commits the crime of indecent exposure if the offender intentionally exposes the offender's genitals to another person with reckless disregard for the offensive, insulting, or frightening effect the act may have on that person.

(b) Indecent exposure before a person under 16 years of age is a class A misdemeanor. Indecent exposure before a person 16 years of age or older is a class B misdemeanor. (§ 4 ch 78 SLA 1983)

Sec. 11.41.470. Definitions. For purposes of AS 11.41.410 — 11.41.470, unless the context requires otherwise,

(1) "incapacitated" means temporarily incapable of appraising the nature of one's own conduct and physically unable to express unwillingness to act;

(2) "victim" means the person alleged to have been subjected to sexual assault in any degree or sexual abuse of a minor in any degree;

(3) "without consent" means that a person

(A) with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone; or

(B) is incapacitated as a result of an act of the defendant. (§ 3 ch 166 SLA 1978; am § 5 ch 78 SLA 1983)

Cross references. — For definition of substituted "one's own conduct and" for terms used in this title, see AS 11.81.900.

Effect of amendments. — The 1983 amendment deleted "that a person is" preceding "temporarily incapable" and deleted "imminent" preceding "death" and preceding "kidnapping" in paragraph (3)(A).

NOTES TO DECISIONS

Applied in *Nicholson v. State*, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982); *Juneby v. State*, Ct. App. Op. No. 259 (File No. 5606), 665 P.2d 30 (1983); *Reynolds v. State*, Ct. App. Op. No. 262 (File No. 6890), P.2d (1983).

Quoted in *Woods v. State*, Sup. Ct. Op. No. 2698 (File No. 6180), P.2d (1983).

Cited in *Hartley v. State*, Ct. App. Op. No. 153 (File No. 5737), 653 P.2d 1052 (1982).

Sec. 11.41.440. Sexual abuse of a minor in the fourth degree.**NOTES TO DECISIONS**

Specific intent crime. -- Sexual abuse of a minor is a specific intent crime. *J.E.C. v. State*, Ct. App. Op. No. 371 (File No. 6806), 681 P.2d 1358 (1984).

Instructions. -- The trial court erred in its instructions regarding the mens rea required for sexual abuse of a minor under former AS 11.41.440(a)(2) and contributing to the delinquency of a minor under former AS 11.51.130(a)(4). *Flink v. State*, Ct. App. Op. No. 370 (File Nos. 6962, 7060), 683 P.2d 725 (1984).

Although the trial court erred in refusing to give defendant's proposed instruction that he had to have a specific intent to arouse or gratify his or the child's sexual desires in order to be convicted of violating former AS 11.41.440(a)(2), this error was harmless beyond reasonable doubt where the jury was told that defendant had to knowingly engage in sexual contact with the child. *J.E.C. v. State*, Ct. App. Op. No. 371 (File No. 6806), 681 P.2d 1358 (1984).

Probationary sentence. -- Although a probationary sentence may properly be used when a first offender is convicted of a class C felony involving sexual abuse of a child, such a sentence will be appropriate only if mitigating circumstances exist and the offender is a promising candidate for rehabilitation through probationary su-

pervision. *State v. Coats*, Ct. App. Op. No. 291 (File No. 7102), 669 P.2d 1329 (1983).

Conviction under pre-1983 section upheld. -- See *Moor v. State*, Ct. App. Op. No. 543 (File No. A-315), 709 P.2d 498 (1985).

Conviction and sentence under pre-1983 section upheld. -- See *Depp v. State*, Ct. App. Op. No. 390 (File No. 7002), 686 P.2d 712 (1984).

Conviction reversed. -- Conviction under the pre-1983 version of this section was reversed where the jury was not properly instructed regarding the culpable mental state for the crime. *Potts v. State*, Ct. App. Op. No. 553 (File No. A-247), 712 P.2d 385 (1985).

Remand in light of *Flink v. State*. -- Case involving a non-jury trial under this section as it read before 1983 was remanded for application of the specific intent standard that the defendant acted with the specific intent to achieve his own sexual arousal or the sexual arousal of the victim. *Colgan v. State*, Ct. App. Op. No. 554 (File No. A-589), 711 P.2d 533 (1985).

Applied in *Higgs v. State*. Ct. App. Op. No. 344 (File No. A-46), 676 P.2d 610 (1984).

Cited in *State v. R.H.*, Ct. App. Op. No. 375 (File No. 7768), 683 P.2d 269 (1984); *Kizzire v. State*, Ct. App. Op. No. 591 (File No. A-933), 715 P.2d 272 (1986).

Sec. 11.41.443. Spousal relationship no defense. In a prosecution under AS 11.41.410 or 11.41.420, it is not a defense that the victim was, at the time of the alleged offense, the legal spouse of the defendant. (§ 1 ch 43 SLA 1985)

Sec. 11.41.445. General provisions. (a) In a prosecution under AS 11.41.434 — 11.41.440 it is an affirmative defense that, at the time of the alleged offense, the victim was the legal spouse of the defendant unless the offense was committed without the consent of the victim.

(b) In a prosecution under AS 11.41.410 — 11.41.440, whenever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant reasonably believed the victim to be that age or older, unless the victim was under 13 years of age at the time of the alleged offense. (§ 3 ch 166 SLA 1978; am § 2 ch 43 SLA 1985)

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Cited in *Theodore No. 435* (File No. / (1985).

Sec. 11.41.45

Conviction and
See *Depp v. State*, (File No. 7002), 636

Sec. 11.41.47

Applied in *Nathaniel Op. No. 284* (File No. P.2d 851 (1983); *Wilk Op. No. 294* (File No. (1983).

Article

Sec. 11.41.500

I. General Considerations
II. Former Law.

I. GENERAL CONSIDERATIONS

Legislative intent clearly intended that dangerous instrument — should be used in the offense of robbery; beyond that, offenders who used particularly dangerous subcategory instrument — should be given an enhanced presumption. *State*, Ct. App. Op. No. 590, 706 P.2d 115 (1985).
Crime and sentence for use of firearm in the use of a firearm

FISCAL NOTE

REQUEST:

Revision Date: April 8, 1988
Title: "An Act amending crimes relating to sexual assault...mentally incapable."
Sponsor: House Judiciary
Requestor: House Judiciary

Agency Affected: Department of Law
BRU: Prosecution
Components: First, Second, Third and Fourth Judicial Districts

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL		30.0	30.9	31.8	32.8	33.8
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	30.0	30.9	31.8	32.8	33.8

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	30.0	30.9	31.8	32.8	33.8
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see the attached analysis.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director Phone: 465-3672
Division: Administrative Services Date: April 8, 1988
Richard I. Pegues FOR
Approved by Commissioner: Grace Berg Schaible, Atty. Gen. Date: April 8, 1988
Agency: Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

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APR 11 1988

LEGISLATIVE FINANCE

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 545

After further thought and evaluation, the Department of Law is herewith revising its fiscal note for HB 545. The department now believes that the number of occasions on which it would have to prove that victims are "mentally incapable" should be reduced from 24 to 15 occasions. Thus, the annual amount required should be \$30,000. Although the incidence rate in Alaska may appear high when compared to other jurisdictions, this is reflective of the high number of sexual abuse offenders that are prosecuted in Alaska. The department's previous analysis of the cost of expert witnesses remains the same.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 545

Fiscal Analysis

	<u>1st Dist</u>	<u>2nd Dist</u>	<u>3rd Dist</u>	<u>4th Dist</u>	<u>Total</u>
Contractual (Expert Witness Fees)	4,000	6,000	12,000	8,000	30,000
	_____	_____	_____	_____	_____
Total	4,000	6,000	12,000	8,000	30,000

Costs beyond FY 89 have been increased 3% annually to reflect inflation.

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act amending crimes relating to sexual assault..."
Sponsor: _____
Requestor: _____

Agency Affected: Department of Corrections
BRU: _____

Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
---------	-----	-----	-----	-----	-----	-----

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

ANALYSIS : (Attach a separate page if necessary)

This legislation will have minimal impact on the Department of Corrections.

Susan E. Knighton

Prepared by: Susan E. Knighton, Director Phone: 465-3376
Division: Administrative Services Date: 4-15-88

Approved by Commissioner: Susan Humphrey Barnett Date: 4-15-88
Agency: Department of Corrections

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

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APR 18 1988

LEGISLATIVE FINANCE

415

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 545 (Jud)
PUBLISH DATE: Senate 5/7/88

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Dept of Law
Title: Amending sexual assault crimes BRU: Prosecution
relating to the mentally incapable
Sponsor: House Judiciary Components: First, Second, Third
Requestor: Senate Finance Committee & Fourth Judicial Districts

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: *Rick Halford* Phone: 465-3753
Division: Senator Rick Halford, Co-chairman Date: May 5, 1988
Senate Finance Committee
Approved by Commissioner: _____ Date: _____
Agency: _____

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

FISCAL NOTE

REQUEST:

Revision Date: April 8, 1988
 Title: "An Act amending crimes relating to sexual assault...mentally incapable."
 Sponsor: House Judiciary
 Requestor: House Judiciary
 Agency Affected: Department of Law
 BRU: Prosecution
 Components: First, Second, Third and Fourth Judicial Districts

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
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GRANTS, CLAIMS						
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TOTAL OPERATING	-0-	30.0	30.9	31.8	32.8	33.8
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	30.0	30.9	31.8	32.8	33.8
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see the attached analysis.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director Phone: 465-3672
 Division: Administrative Services Date: April 8, 1988
 Approved by Commissioner: Richard I. Pegues / FOR / Grace Berg Schaible, Atty. Gen. Date: April 8, 1988
 Agency: Department of Law

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 545

After further thought and evaluation, the Department of Law is herewith revising its fiscal note for HB 545. The department now believes that the number of occasions on which it would have to prove that victims are "mentally incapable" should be reduced from 24 to 15 occasions. Thus, the annual amount required should be \$30,000. Although the incidence rate in Alaska may appear high when compared to other jurisdictions, this is reflective of the high number of sexual abuse offenders that are prosecuted in Alaska. The department's previous analysis of the cost of expert witnesses remains the same.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 545

	<u>Fiscal Analysis</u>				
	<u>1st Dist</u>	<u>2nd Dist</u>	<u>3rd Dist</u>	<u>4th Dist</u>	<u>Total</u>
Contractual (Expert Witness Fees)	4,000	6,000	12,000	8,000	30,000
	_____	_____	_____	_____	_____
Total	4,000	6,000	12,000	8,000	30,000

Costs beyond FY 89 have been increased 3% annually to reflect inflation.

Incest as included within charge of rape. 76 ALR2d 484.

Criminal responsibility of husband for rape, or assault to commit rape, on wife. 84 ALR2d 1017.

Fraud or impersonation, rape by. 91 ALR2d 591.

Impotency as defense to charge of rape, attempt to rape, or assault with intent to commit rape. 23 ALR3d 1351.

Rape or similar offense based on intercourse with woman who is allegedly mentally deficient. 31 ALR3d 1227.

Liability of parent for injury to unemancipated child caused by parent's negligence. 41 ALR3d 904.

Seizure or detention for purpose of com-

mitting rape, robbery, or similar offense as constituting separate crime of kidnapping. 43 ALR3d 699.

Consent as defense in prosecution for sodomy. 58 ALR3d 636.

Multiple instances of forcible intercourse involving same defendant and same victim as constituting multiple crimes of rape. 81 ALR3d 1228.

What constitutes offense of "sexual battery." 87 ALR3d 1250.

Constitutionality of rape laws limited to protection of females only. 99 ALR3d 129.

Validity and construction of statute defining crime of rape to include activity traditionally punishable as sodomy or the like. 3 ALR4th 1009.

Sec. 11.41.410. Sexual assault in the first degree. (a) A person commits the crime of sexual assault in the first degree if,

(1) being any age, the defendant engages in sexual penetration with another person without consent of that person;

(2) being any age, the defendant attempts to engage in sexual penetration with another person without consent of that person and causes serious physical injury to that person;

(3) *[Repealed, § 10 ch 78 SLA 1983.]*

(4) *[Repealed, § 10 ch 78 SLA 1983.]*

(b) Sexual assault in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 3 ch 166 SLA 1978; am § 8 ch 102 SLA 1980; am § 6 ch 143 SLA 1982; am § 10 ch 78 SLA 1983)

Cross references. — For evidence of past sexual conduct in trials of sexual assault in any degree or attempt to commit sexual assault in any degree, see AS 12.45.045.

Effect of amendments. — The 1980 amendment inserted "or aids, induces, causes or encourages a person under 13 years of age to engage in sexual penetration with another person" near the end of paragraph (3) in subsection (a).

The 1982 amendment substituted "an

unclassified felony and is punishable as provided in AS 12.55" for "a class A felony" at the end of subsection (b).

The 1983 amendment repealed paragraphs (3) and (4) of subsection (a).

Legislative history reports. — For a report on Chapter 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement, No. 44, May 29, 1980, or 1980 House Journal Supplement, No. 79, May 28, 1980.

NOTES TO DECISIONS

I. General Consideration.

II. Former Law.

A. Generally.

B. Age of Consent.

C. Procedure.

I. GENERAL CONSIDERATION.

History of first-degree sexual assault statute. — See *Reynolds v. State*, Ct. App.

Op. No. 262 (File No. 6890), 664 P.2d 621 (1983).

Constitutionality. — In order to prove a violation of AS 11.41.410(a)(1), the state

not applicable to the crime of rape of a person under 16 years by a person 19 years or older, made punishable by former AS 11.15.130(a) by "any term of years." *Edenshaw v. State*, Ct. App. Op. No. 005 (File No. 5239), 631 P.2d 506 (1981).

What must be reflected in sentence for forcible rape. — Although the perpetrator of such a crime as forcible rape may not be beyond rehabilitation, the crime itself deserves community condemnation; in addition to serving rehabilitative purposes the sentence must reflect such condemnation as well as act as a deterrent to the offender and to others. *Newsom v. State*, Sup. Ct. Op. No. 1136 (File No. 2189), 533 P.2d 904 (1975).

Sentence for rape upheld. — See *Gordon v. State*, Sup. Ct. Op. No. 831 (File No. 1535), 501 P.2d 772 (1972); *Torres v. State*, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974); *Newsom v. State*, Sup. Ct. Op. No. 1136 (File No. 2189), 533 P.2d 904 (1975); *Ames v. State*, Sup. Ct. Op. No. 1137 (File No. 2145), 533 P.2d 246, modified on rehearing, 537 P.2d 1116 (1975); *Coleman v. State*, Sup. Ct. Op. No. 1288 (File No. 2331), 553 P.2d 40 (1976); *Nukapigak v. State*, Sup. Ct. Op. No. 1410 (File No. 2915), 562 P.2d 697 (1977), aff'd on rehearing, 576 P.2d 982 (1978); *Bordewick v. State*, Sup. Ct. Op. No. 1500 (File No. 3341), 569 P.2d 184 (1977); *Morrell v. State*, Sup. Ct. Op. No. 1577 (File No. 2790), 575 P.2d 1200 (1978); *Alexander v. State*, Sup. Ct. Op. No. 1622 (File No. 3505), 578 P.2d 591 (1978); *State v. Wassilie*, Sup. Ct. Op. No. 1630 (File No. 3691), 578 P.2d 971 (1978); *Moore v. State*, Sup. Ct. Op. No. 1880 (File No. 4032), 597 P.2d 975 (1979); *Wagner v. State*, Sup. Ct. Op. No. 1897 (File No. 4381), 598 P.2d 936 (1979); *Wikstrom v. State*, Sup. Ct. Op. No. 1987 (File No. 4535), 603 P.2d 908 (1979); *Tate v. State*, Sup. Ct. Op. No. 2020 (File No. 4550), 606 P.2d 1 (1980); *Mallott v. State*, Sup. Ct. Op. No. 2027 (File No. 3364), 608 P.2d 737 (1980); *Alexander v.*

State, Sup. Ct. Op. No. 2077 (File No. 3522), 611 P.2d 469 (1980); *Cochrane v. State*, Sup. Ct. Op. No. 2086 (File No. 4531), 611 P.2d 61 (1980); *Helmer v. State*, Sup. Ct. Op. No. 2181 (File No. 4383), 616 P.2d 884 (1980); *Tuckfield v. State*, Sup. Ct. Op. No. 2266 (File No. 4569), 621 P.2d 1350 (1981); *Edenshaw v. State*, Ct. App. Op. No. 005 (File No. 5239), 631 P.2d 506 (1981); *Kompkoff v. State*, Ct. App. Op. No. 015 (File No. 5324), 626 P.2d 1091 (1981); *Williams v. State*, Ct. App. Op. No. 139 (File No. 5676), 652 P.2d 478 (1982).

Sentence for rape held excessive. — See *Ahvik v. State*, Sup. Ct. Op. No. 2123 (File No. 4556), 613 P.2d 1252 (1980); *Hintz v. State*, Sup. Ct. Op. No. 2334 (File No. 3541), 627 P.2d 207 (1981); *Qualle v. State*, Ct. App. Op. No. 138 (File No. 5666), 652 P.2d 481 (1982).

Sentences of 15 years for rape of one victim; 10 years concurrent with the 15-year term for burglarizing her residence; 10 years for burglarizing another victim's residence; six months concurrent with the 10-year burglary term for assault on the second victim; 15 years for rape of a third victim; and 10 years concurrent with the 15-year sentence for burglarizing the third victim's residence, for a total of 40 years incarceration, was error. *Nix v. State*, Ct. App. Op. No. 157 (File No. 5481), 653 P.2d 1093 (1982).

Sentence for rape too lenient. — See *State v. Lancaster*, Sup. Ct. Op. No. 1247 (File No. 2571), 550 P.2d 1257 (1976); *State v. Wassilie*, Sup. Ct. Op. No. 1630 (File No. 3691), 578 P.2d 971 (1978); *State v. Jensen*, Ct. App. Op. No. 126 (File No. 5879), 650 P.2d 422 (1982).

Sentence for attempted rape upheld. — See *Shelton v. State*, Sup. Ct. Op. No. 2074 (File No. 3908), 611 P.2d 24 (1980) (decided under former AS 11.15.130).

Sentence for assault with intent to rape upheld. — See *Fomin v. State*, Sup. Ct. Op. No. 2214 (File No. 5013), 619 P.2d 718 (1980).

Sec. 11.41.420. Sexual assault in the second degree. (a) An offender commits the crime of sexual assault in the second degree if the offender engages in

(1) sexual contact with another person without consent of that person; or

(2) sexual penetration with a person who the offender knows

(A) is suffering from a mental disorder or defect which renders the person incapable of appraising the nature of the conduct under circumstances in which a person who is capable of appraising the nature of the conduct would not engage in sexual penetration; or

(B) is incapacitated.

(b) Sexual assault in the second degree is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 78 SLA 1983)

Effect of amendments. — The 1983 amendment rewrote subsection (a).

NOTES TO DECISIONS

For cases construing former crime of rape, see notes to AS 11.41.410.

Attempted sexual assault in the first degree and sexual assault in the second degree are closely related, since sexual penetration involves sexual contact and both offenses proceed on a theory of coerced assent. *Nicholson v. State*, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Constitutionality of conviction where original charge was under AS 11.41.410. — Where defendant was charged with attempted sexual assault in the first degree, he was thereby assumed to have notice that he might be convicted of second-degree sexual assault because of the similarities in the elements of the two offenses, and his conviction for the latter offense did not violate due process. *Nicholson v. State*, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Evidence. — Where victim woke up in early morning hours to find defendant

in her bed and fondling her breast, and where she testified that she was temporarily in shock and afraid he would hurt her, a jury could find that victim's momentary acquiescence in defendant's fondling her breast constituted second-degree sexual assault. *Nicholson v. State*, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Instructions. — The trial judge did not err in refusing to instruct on the lesser included offense of attempted sexual contact in the second degree. *Johnson v. State*, Ct. App. Op. No. 267 (File No. 6662), 665 P.2d 566 (1983).

Sentence upheld. — Sentence of eight years with three years suspended for sexual assault in the second degree was not clearly mistaken. *Howard v. State*, Ct. App. Op. No. 260 (File Nos. 6027, 6123), 664 P.2d 603 (1983).

Cited in *Stores v. State*, Sup. Ct. Op. No. 2252 (File No. 3595), 625 P.2d 820 (1980).

Sec. 11.41.430. [Repealed. § 10 ch 78 SLA 1983. For current law, see AS 11.41.420(a)(2).]

Sec. 11.41.434. Sexual abuse of a minor in the first degree. (a) An offender commits the crime of sexual abuse of a minor in the first degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age or aids, induces, causes, or encourages a person who is under 13 years of age to engage in sexual penetration with another person; or

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age and who

(A) is entrusted to the offender's care by authority of law; or

(B) is the offender's son or daughter, including an illegitimate or adopted child, or a stepchild.

(b) Sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 2 ch 78 SLA 1983)

(3). The amendment also redesignated former subsection (b) as subsection (c) and added present subsection (b).

NOTES TO DECISIONS

Applied in *Quelle v. State*, Ct. App. Op. No. 138 (File No. 5666), 652 P.2d 481 (1982).

Sec. 11.41.460. Indecent exposure. (a) An offender commits the crime of indecent exposure if the offender intentionally exposes the offender's genitals to another person with reckless disregard for the offensive, insulting, or frightening effect the act may have on that person.

(b) Indecent exposure before a person under 16 years of age is a class A misdemeanor. Indecent exposure before a person 16 years of age or older is a class B misdemeanor. (§ 4 ch 78 SLA 1983)

Sec. 11.41.470. Definitions. For purposes of AS 11.41.410 — 11.41.470, unless the context requires otherwise,

(1) "incapacitated" means temporarily incapable of appraising the nature of one's own conduct and physically unable to express unwillingness to act;

(2) "victim" means the person alleged to have been subjected to sexual assault in any degree or sexual abuse of a minor in any degree;

(3) "without consent" means that a person

(A) with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone; or

(B) is incapacitated as a result of an act of the defendant. (§ 3 ch 166 SLA 1978; am § 5 ch 78 SLA 1983)

Cross references. — For definition of terms used in this title, see AS 11.81.900.

Effect of amendments. — The 1983 amendment deleted "that a person is" preceding "temporarily incapable" and

substituted "one's own conduct and" for "his conduct and is" in paragraph (1) and deleted "imminent" preceding "death" and preceding "kidnapping" in paragraph (3)(A).

NOTES TO DECISIONS

Applied in *Nicholson v. State*, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982); *Juneby v. State*, Ct. App. Op. No. 259 (File No. 5606), 665 P.2d 30 (1983); *Reynolds v. State*, Ct. App. Op. No. 262 (File No. 6890), P.2d (1983).

Quoted in *Woods v. State*, Sup. Ct. Op. No. 2698 (File No. 6180), P.2d (1983).

Cited in *Hartley v. State*, Ct. App. Op. No. 153 (File No. 5737), 653 P.2d 1052 (1982).

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 545
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act amending crimes relating to sexual assault...mentally incapable."
Sponsor: House Judiciary
Requestor: House Judiciary
Agency Affected: Public Safety
BRU: Alaska State Troopers
Components: Detachments & CIB

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
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GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL		-0-	-0-	-0-	-0-	-0-
REVENUE		-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME		0	0	0	0	0
PART-TIME		0	0	0	0	0
TEMPORARY		0	0	0	0	0

ANALYSIS : (Attach a separate page if necessary)

No fiscal impact is anticipated as a result of this legislation.

Prepared by: Diana Page, Administrative Assistant I Phone: 465-4322
Division: Commissioner's Office Date: 3/24/88

Approved by Commissioner: *Walter Anderson, Dep. Comm.* Date: 3-25-88
Agency: Public Safety

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Department of Law
 Title: "An Act amending crimes relating to sexual assault...mentally incapable." BRU: Prosecution
 Sponsor: House Judiciary Components: First, Second, Third and Fourth Judicial Districts
 Requestor: House Judiciary

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL		48.0	49.4	50.9	52.4	54.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		48.0	49.4	50.9	52.4	54.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		48.0	49.4	50.9	52.4	54.0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see the attached analysis.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director Phone: 465-3672
 Division: Administrative Services Date: March 25, 1988
 Approved by Commissioner: Richard I. Pegues / FOR /
Grace Berg Schaible, Atty. Gen. Date: March 25, 1988
 Agency: Department of Law

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 545.

This bill amends AS 11.41 relating to sexual assault of persons who are mentally incapable, by establishing new crimes for sexual assault in the first, second, and third degrees for offenders who have varying levels of sexual contact with persons who are mentally incapable.

The department estimates that this bill will result in up to 24 new prosecutions annually. This increase is not sufficient enough to warrant additional prosecutor staff, although some additional prosecutor time will be required. The department will, however, have an additional out-of-pocket expense in proving that victims are "mentally incapable." This cost involves the hire of expert witness psychologists or psychiatrists, the costs for whom vary between \$100 and \$150 per hour. A straightforward case usually requires about eight hours of work, both for expert preparation and expert testimony, at an average cost of \$1,000. A more complicated case, on the other hand, may require twenty-five or more hours, at a cost of \$3,125. Also, the state must pay for standby time whenever an expert travels to locations distant from the expert's practice to testify. On these occasions, the department has to pay between \$1,000 and \$1,500 per day for the time that is lost to an expert's usual practice. The department therefore believes that its cost for expert testimony in these cases will average about \$2,000 per case, or \$48,000 annually.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HE 545.

Fiscal Analysis

	<u>1st Dist</u>	<u>2nd Dist</u>	<u>3rd Dist</u>	<u>4th Dist</u>	<u>Total</u>
Contractual (Expert Witness Fees)	6,000	10,000	18,000	14,000	48,000
	_____	_____	_____	_____	_____
Total	6,000	10,000	18,000	14,000	48,000

Costs beyond FY 89 have been increased 3% annually to reflect inflation.