

HB

545

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

It is the intent of the Legislature in enacting CS HB 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.



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Al Adams, Chair  
House Finance Committee

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.

# 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 99611-9998  
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

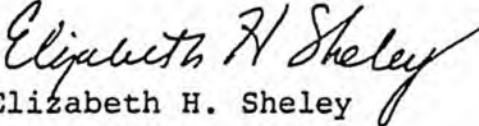
House Judiciary Committee  
RE: House Bill 545  
March 29, 1988  
PAGE 3

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

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:

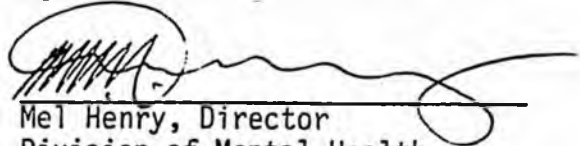
The intent of this legislation is to remedy the situation in which current legislation fails to protect mentally incapable persons from sexual assault unless there is forcible rape. This legislation expands the types of sexual contact that would be construed as sexual assaults and thereby offers greater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

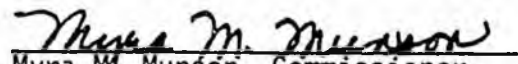


Mel Henry, Director  
Division of Mental Health  
and Developmental Disabilities

Date:

18<sup>th</sup> April, 1988

Approved:

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

Date:

4/18/88

FISCAL NOTE

REQUEST:

Effective Date: \_\_\_\_\_  
Title: Outstanding crimes relating to sexual assault...mentally incapable.  
Sponsor: Judiciary Committee  
Requestor: \_\_\_\_\_

Agency Affected: Health & Social Services  
BRU: various  
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-
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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)

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

Prepared by: Mel Henry, Director

Phone: 465-3377

Division: Mental Health & Developmental Disabilities

Date: \_\_\_\_\_

Approved by Commissioner: Myra M. Munson

Date: 4/18/88

Agency: Health & Social Services

Distribution (by preparer):

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

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.

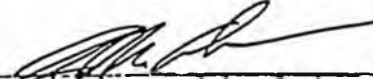
Section 2 leaves the current statute on sexual penetration with a person who is temporarily incapacitated--e.g., a person who is extremely intoxicated--unchanged, except that the term "incapacitated" has been eliminated. That is, former AS 11.41.420(a)(2)(B) would be .420(a)(3)(B) under this bill. The 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

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# ALASKA NETWORK

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ON

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# DOMESTIC VIOLENCE

---

AND

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# SEXUAL ASSAULT

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

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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);  
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)

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## 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

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  
THE LEGISLATURE

POUCH Y - STATE CAPITOL  
JUNEAU, ALASKA 99811  
907-465-3800

LEGISLATIVE AFFAIRS AGENCY  
LEGISLATIVE REFERENCE LIBRARY

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. Judiciary March 30, 1988

# 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:**  <sup>endorses</sup> FINANCE letter of intent

**ATTACHES NEW FISCAL NOTE(S):**

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

**SIGNING-DO PASS:**

Al Adams  
Pat Kunkel  
Ron Larson  
Tom Jace  
Bob Wheeler  
Alvin Sargent  
Steve Thayer  
John  
Ray Brown  
Mike Dean

**SIGNING OTHER RECOMMENDATIONS:**

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Al Adams  
 Chairman's signature



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.

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-Barrett Date: 4-15-88  
Agency: Department of Corrections

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

**RECEIVED**  
APR 18 1988  
LEGISLATIVE FINANCE

STATE OF ALASKA  
1988 LEGISLATIVE SESSION

BILL VERSION: HB 545 (JUD)  
PUBLISH DATE: \_\_\_\_\_

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  
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)

**RECEIVED**

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.

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.

JAN 11 1984

Library References

- |   |  |
|---|--|
| 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         |

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

Example query for INSTA-CITE: IC 692 P.2d 874

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

## CHAPTER 9A.44

### SEXUAL OFFENSES

§ 9A.44.010—Written motion—Admissibility.  
Section added under this chapter.

§ 9A.44.020—

§ 9A.44.030—first degree rape—Restrictions on re-  
striction—Application to offenses before Ju-

§ 9A.44.040—

§ 9A.44.050—

§ 9A.44.060—first degree.

§ 9A.44.070—second degree.

§ 9A.44.080—third degree.

§ 9A.44.090—Victim's statement—Conditions.

Section added to this chapter.

Section decodified and added to this chapter  
by ex.s. c 244.

#### Primary References

- § 9A.44.010—Jury instructions,
- § 9A.44.020—Incest, definition, see Wash.F.
- § 9A.44.030—vol. 11, WPIC 46.05.
- § 9A.44.040—Sexual intercourse, definition,
- § 9A.44.050—Wash.Prac. vol. 11, WPIC 45

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#### Electronic Research

Revised Code of Washington Annotated :  
Enter a citation in INSTA-CITE  
and case history. Enter a constitution-  
al law database for cases of interest  
: IC 692 P.2d 874

Constitution:

2.030

Following the Preface pages of this volume

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**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.

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

Evidence of complaints made by female is restricted to bare complaint unless statement is strictly part of res gestae, 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 charging commission by two alternative means, where constitutionally sufficient evidence supported both charged alternatives. *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.  
C.J.S. Rape § 86 et seq.  
Probation, deferred sentences, see Wash.Prac. vol. 13, Ferguson, § 4318.

Sentencing guidelines, mandatory minimum sentence, see Wash.Prac. vol. 13, Ferguson, § 4307.

### 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.  
Rape, second degree, elements, Wash.Prac. vol. 11, WPIC 41.

#### 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 kidnaping 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, and 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. *State v. 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

## WASHINGTON CRIMINAL

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1. 118, § 2.

### Historical Note

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### Review Commentaries

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	Rape, second degree Wash.Prac. vol. 1
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### Notes of Decisions

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#### 2. Included offenses

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and degree under forcible compulsion section of that statute, and, under offenses as charged, proved and instructed upon, the same evidence of physical violence 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 remedy 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 property 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), preceding "felony" inserted "class C"; and, following "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—criminal 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) 36 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 of 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.

## WASHINGTON CRIMINAL

### of Decisions

#### 3. Marriage subsequent to

In prosecution for statutory rape of one under age of consent, victim married defendant, it is error to require wife to appear in court for being identified by witness, and condition as to pregnancy and could be observed by defendant in reality compelling witness to testify against defendant. State v. ... (1907) 48 Wash. 93, 92 P. 9

#### 4. Pregnancy

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

In prosecution for carnal knowledge of female under age of consent, error to permit jury to consider credibility of prosecuting witness that offense has been committed at time at which it occurred. State v. Jensen (1961) 58 Wash.2d 171, 361 P.2d 739.

Where charge is carnal knowledge of child, pregnancy can be shown to prove corpus delicti and admissibility of prosecutrix. State v. ... (1957) 50 Wash.2d 139, 309 P.2d 100.

#### 5. Multiple convictions for

Legislature did not intend that defendant be convicted of both non-statutory rape and statutory rape for same intercourse. State v. Birgen ... Wash.App. 1, 651 P.2d 240.

...ent liberties when he knew that his spouse to have sexual intercourse with her.

...ss than fourteen years of age.

...ess than sixteen years of age, or thirty-eight months older than the victim, and authority over the person of the victim.

(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.