

**S B**

**513**

## FISCAL NOTE

**REQUEST:**

Revision Date: \_\_\_\_\_  
 Title: "An act relating to unlawful  
 exploitation of a minor..."  
 Sponsor: Senate Judiciary  
 Requestor: Senate Judiciary

Agency Affected: Department of Law  
 BRU: Prosecution  
 Components: All

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE						
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**FUNDING:** (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
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.

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 Richard I. Pegues, Director  
 Division: Administrative Services  
 Phone: 465-3672  
 Date: April 18, 1990

Approved by Commissioner: Richard I. Pegues / FOR /  
 Douglas B. Baily, Attorney General  
 Date: April 18, 1990  
 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. SB 513

This bill amends AS 11.41.455 to include audio recordings in the crime of unlawful exploitation of a minor. The bill also amends AS 11.61.125(a) to include the distribution of any material, which aurally depicts conduct described in the unlawful exploitation of a minor statute, in the crime of distribution of child pornography. The conduct that is already prohibited by these statutes is fairly comprehensive. Consequently, the addition of audio recordings will not have a fiscal impact.

STATE OF ALASKA  
THE LEGISLATURE

POUCH Y STATE CAPITOL  
JUNEAU ALASKA 99811  
907 465-3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M

February 23, 1990

SUBJECT: Amendments to child pornography laws  
(Work Order No. 6-2285)

TO: Senator Jan Faiks, Chair  
Senate Judiciary Committee

FROM: John B. Gaguine *JBG*  
Legislative Counsel

Enclosed is a bill amending the two child pornography statutes in Alaska, AS 11.41.455 (unlawful exploitation of a minor) and AS 11.61.125 (distribution of child pornography). I added the amendment to the latter statute to keep the two statutes consistent.

My gut feeling is that this bill may present serious constitutional problems. It is now well established that restrictions on visual child pornography are constitutionally acceptable, because the free speech elements are outweighed by the damage that child pornography does to the child. However, it seems to me that a court might well reach a different balance when there is no visual element involved. A court would probably approve a law that banned audio recording of the actual sexual acts listed in AS 11.41.455(a). But that statute also bans simulated acts. Since an aural recording of simulated acts does not require the child even to undress, let alone engage in any physical conduct, it seems quite possible that a court would not find the harm necessary to counterbalance the free speech interests.

If I may be of further assistance, please advise.

JBG:gc  
G13/105

Enclosure

(2) telephones another and fails to terminate the connection with intent to impair the ability of that person to place or receive telephone calls;

(3) makes repeated telephone calls at extremely inconvenient hours;

(4) makes an anonymous or obscene telephone call or a telephone call that threatens physical injury;

(5) subjects another person to offensive physical contact; or

(6) violates a provision of an order issued under AS 25.35.010(b) or 25.35.020 restraining the respondent from communicating directly or indirectly with the petitioner.

(b) Harassment is a class B misdemeanor. (§ 7 ch 166 SLA 1978; am § 10 ch 61 SLA 1982)

**Cross references.** — For provisions authorizing arrest without warrant in certain cases where the police officer has rea-

sonable cause to believe that the person has committed a crime under this section, see AS 12.25.030(b).

NOTES TO DECISIONS

For case construing former AS 11.45.035 relating to illegal use of telephones, see *Anniskette v. State*, 489 P.2d 1012 (Alaska 1971).

Quoted in *Allen v. State*, 759 P.2d 541 (Alaska Ct. App. 1988).

Cited in *Brower v. State*, 728 P.2d 645 (Alaska Ct. App. 1986).

**Collateral references.** — Misuse of telephones as disorderly conduct, 97 ALR2d 504.

Validity, construction, and application of state criminal statute forbidding use of telephone to annoy or harass, 95 ALR3d 411.

Forum state's jurisdiction over nonresident defendant in action based on obscene or threatening telephone call from out of state, 37 ALR4th 852.

**Sec. 11.61.125. Distribution of child pornography.** (a) A person commits the crime of distribution of child pornography if the person brings or causes to be brought into the state for distribution, or in the state distributes, or in the state possesses, prepares, publishes, or prints with intent to distribute, any material that visually depicts conduct described in AS 11.41.455(a), knowing that the production of the material involved the use of a child under 18 years of age who engaged in the conduct.

(b) This section does not apply to acts that are an integral part of the exhibition or performance of a motion picture if the acts are performed within the scope of employment by a motion picture operator or projectionist employed by the owner or manager of a theater or other place for the showing of motion pictures, unless the motion picture operator or projectionist

(1) has a financial interest in the theater or place in which employed; or

(2) causes the performance or motion picture to be performed or exhibited without the consent of the manager or owner of the theater or other place of showing.

(c) Distribution of child pornography is a class C felony.

(d) In this section, "distribution" includes delivering, selling, renting, leasing, lending, giving, circulating, exhibiting, presenting, providing, and exchanging, whether or not for monetary or other consideration. (§ 2 ch 57 SLA 1983; am §§ 1, 2 ch 39 SLA 1985)

**Cross references.** — For crime of unlawful exploitation of a minor, see AS 11.41.455.

**Effect of amendments.** — The 1985 amendment in subsection (a) deleted "sale or" preceding "distribution" and "sell, or exhibit to others for commercial consideration" preceding "any material." inserted

"in the state distributes, or," and substituted "in" for "under" following "conduct described"; and added subsection (d).

**Collateral references.** — Validity and construction of statutes and ordinances regulating sexual performance by child, 21 ALR4th 239.

**Sec. 11.61.130. Misconduct involving a corpse.** (a) A person commits the crime of misconduct involving a corpse if

(1) except as authorized by law or in an emergency, the person intentionally disinters, removes, conceals, or mutilates a corpse;

(2) the person engages in sexual penetration of a corpse; or

(3) the person detains a corpse for a debt or demand or upon a lien or charge.

(b) Misconduct involving a corpse is a class A misdemeanor. (§ 7 ch 166 SLA 1978)

**Collateral references.** — 22 Am. Jur. 2d, Dead Bodies, §§ 47-50.

25A C.J.S., Dead Bodies, §§ 8(2)-8(4).  
Action at law for desecration of grave, 172 ALR 554.

Immunity from liability for unlawful treatment of dead body in operation of hospital by state or governmental unit or agency, 25 ALR2d 244.

Liability in damages for withholding corpse from relatives, 48 ALR3d 240.

Validity, construction, and application of statutes making it a criminal offense to mistreat or wrongfully dispose of dead body, 81 ALR3d 1071.

**Sec. 11.61.140. Cruelty to animals.** (a) A person commits the crime of cruelty to animals if the person

(1) intentionally inflicts severe and prolonged physical pain or suffering on an animal;

(2) recklessly neglects an animal and, as a result of that neglect, causes the death of the animal or causes severe pain or suffering to the animal; or

(3) kills an animal by the use of a decompression chamber.

(b) It is a defense to a prosecution under (a)(1) or (2) of this section that the conduct of the defendant

(1) conformed to accepted veterinary practice;

(2) was part of scientific research governed by accepted standards;  
or

## NOTES TO DECISIONS

Applied in *Jager v. State*, 748 P.2d 1172 (Alaska Ct. App. 1988).

**Sec. 11.41.450. Incest.** (a) A person commits the crime of incest if, being 18 years of age or older, that person engages in sexual penetration with another who is related, either legitimately or illegitimately, as

- (1) an ancestor or descendant of the whole or half blood;
  - (2) a brother or sister of the whole or half blood; or
  - (3) an uncle, aunt, nephew, or niece by blood.
- (b) Incest is a class C felony. (§ 3 ch 166 SLA 1978)

## NOTES TO DECISIONS

Death of defendant abated prosecution under former section. *Hartwell v. State*, 423 P.2d 282 (Alaska 1967). (Decided under former AS 11.40.110.)

Cited in *Theodore v. State*, 692 P.2d 987 (Alaska Ct. App. 1985).

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.

#### NOTES TO DECISIONS

**Conviction and sentence upheld.** — See Depp v. State, 686 P.2d 712 (Alaska Ct. App. 1984).

**Applied in** Qualr v. State, 652 P.2d 481 (Alaska Ct. App. 1982).

**Cited in** Lawrence v. State, 764 P.2d 318 (Alaska Ct. App. 1988).

**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) "mentally incapable" means suffering from a mental disease or defect that renders the person incapable of understanding the nature or consequences of the person's conduct, including the potential for harm to that person;

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

(4) "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; am § 5 ch 96 SLA 1988; am § 28 ch 50 SLA 1989)

**Revisor's notes.** — Reorganized in 1988 to alphabetize the defined terms.

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