

ALASKA LEGISLATURE COMMITTEE BILL FILES - 1987 - 1988 8879

HB 545, CSHB 545 *Lea. Files* 398 *398*

HRB

545

**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 Giddys  
Pat Gunkel  
Ron Larson  
Pete Jare  
Chouler  
Wm Boyed  
Alc. Thier  
Don  
Lay Brown  
Mike Dunn

**SIGNING OTHER RECOMMENDATIONS:**

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

Al Giddys  
 Chairman's signature

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-
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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	-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)

RECEIVED  
APR 18 1988

LEGISLATIVE FINANCE

**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

	<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.

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, Chair  
House Finance Committee

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

5 (B) who is entrusted to the offender's care

6 (i) by authority of law; or

7 (ii) in a facility or program that is required by  
8 law to be licensed by the Department of Health and Social  
9 Services; or

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

12 (A) mentally incapable; [IS SUFFERING FROM A MENTAL  
13 DISORDER OR DEFECT WHICH RENDERS THE PERSON INCAPABLE OF APPRAIS-  
14 ING THE NATURE OF THE CONDUCT UNDER CIRCUMSTANCES IN WHICH A  
15 PERSON WHO IS CAPABLE OF APPRAISING THE NATURE OF THE CONDUCT  
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.

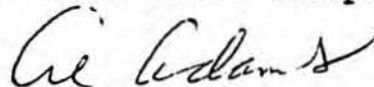
28 \* Sec. 4. AS 11.41 is amended by adding a new section to read:

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  
3               (1) mentally incapable; or  
4               (2) married to the person and neither party has filed with  
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.

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.



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Al Adams, Chair  
House Finance Committee

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.

1216 4-20-88  
rec'd 4-21-88

STATE OF ALASKA  
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB545 (JUD.)  
PUBLISH DATE: \_\_\_\_\_

FISCAL NOTE

REQUEST:

Revision Date: 4/11/88  
Title: ...amending 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-

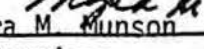
POSITIONS:

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: Me1 Henry, Director  Phone: 465-3370  
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)

**RECEIVED**  
**JUD**

APR 21 1988

LEGISLATIVE FINANCE

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:

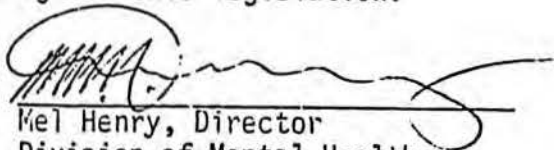
The intent of this legislation is to remedy the situation in which current legislation fails to protect mentally incapable persons from sexual assault unless there is forcible rape. This legislation expands the types of sexual contact that would be construed as sexual assaults and thereby offers greater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

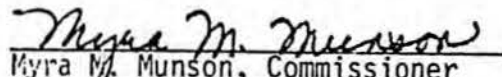


Mel Henry, Director  
Division of Mental Health  
and Developmental Disabilities

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:

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-

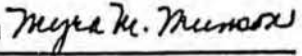
POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

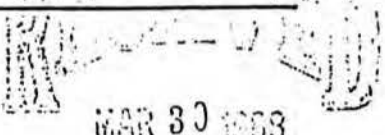
ANALYSIS : (Attach a separate page if necessary)

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. Funson  Date: 3/30/88  
 Agency: Health & Social Services

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



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.

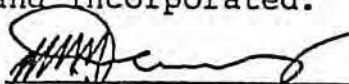
Under Sexual Assault in the First Degree, SECT. I(A)(3), lines 17 through 20 is intended to address assault by care providers. In reality it might protect only clients that are involuntary commitments. If the words "or through service in a program receiving public funds" were added to the end of line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

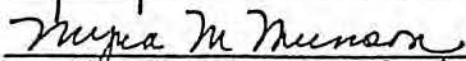
Proposed by:

  
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: 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						
<b>TOTAL OPERATING</b>	<b>-0-</b>	<b>30.0</b>	<b>30.9</b>	<b>31.8</b>	<b>32.8</b>	<b>33.8</b>
<b>CAPITAL</b>						
<b>REVENUE</b>						

**FUNDING: (Thousands of Dollars)**

GENERAL FUND	-0-	30.0	30.9	31.8	32.8	33.8
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>						

**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)

**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

	<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.

FISCAL NOTE

REQUEST:

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

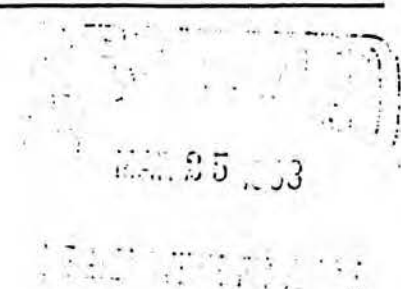
Approved by Commissioner: Richard I. Pegues / FOR / Grace Berg Schnaible, Atty. Gen.

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. 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)	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.

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						
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 H. 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)

# 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:

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- 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  
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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

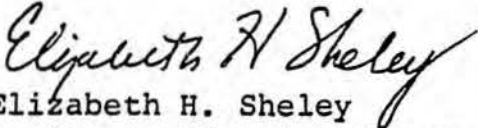
House Judiciary Committee  
RE: House Bill 545  
March 29, 1988  
PAGE 3

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  
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.

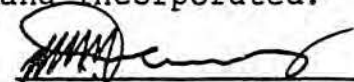
Under Sexual Assault in the First Degree, SECT. I(2)(3), lines 17 through 20 is intended to address assault by care providers. In reality it might protect only clients that are involuntary commitments. If the words "or through service in a program receiving public funds" were added to the end of line 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.

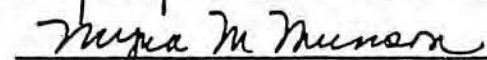
Proposed by:

  
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

STATE OF ALASKA  
1988 LEGISLATIVE SESSION

BILL VERSION: HB 545  
PUBLISH DATE: \_\_\_\_\_

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:

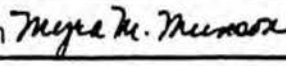
FULL-TIME						
PART-TIME						
TEMPORARY						

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   
 Division: Mental Health & Developmental Disabilities

Phone: 465-3370  
 Date: 3/30/88

Approved by Commissioner: Myra M. Munson   
 Agency: Health & Social Services

Date: 3/30/88

Distribution (by preparer):

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

# 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*

Dana Fabe  
Public Defender

DF:rjb

# 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 (AVVI);  
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); Siksans 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 (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.



## 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

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 the 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 *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 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).

**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)

*Washington*

## 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.

REPEALED 9A.44.110

### Library References

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

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.

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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, re-codified 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.

## CHAPTER 9A.44

## SEXUAL OFFENSES

Written motion—Admissibility.  
Motion under this chapter.  
Rule.

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

degree.

degree.

first degree.

second degree.

third degree.

Witness's statement—Conditions.

Amendments to this chapter.

Text as recodified and added to this chapter.  
Ex.S. c 244.

## Primary References

Model Jury instructions,  
Criminal Code, definition, see Wash.Prac.  
vol. 11, WPIC 46.05.

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

## Electronic Research

Revised Code of Washington Annotated and  
Case Reports. Enter a citation in INSTA-CITE for  
the statute and case history. Enter a constitution,  
or statute, in the law database for cases of interest.

See also: IC 692 P.2d 874

Constitution:

2.030

Following the Preface pages of this volume.

979) 23 of complaining witness where  
ling reason is shown. State v. [redacted]  
(1980) 94 Wash.2d 733, 619 P.2d [redacted]

In attempted rape prosecution, court did not abuse its discretion in denying motion to have victim, who received mental health treatment in, submit to psychological examination where defendant presented no compelling reason why victim should have submitted to possibly traumatic psychiatric examination when other more traditional and less intrusive means of assessing her credibility and perceptual ability were presumably available, and court carefully left issue open for further consideration if testimony showed victim's prior mental history might have had bearing upon her recitation of events at time of incident. State v. [redacted] (1980) 94 Wash.2d 733, 619 P.2d 968.

In absence of any compelling reasons, motions judge did not abuse discretion by refusing to order a psychiatric examination of alleged rape victim. State v. [redacted] (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, results of which tended to some degree to make it more probable that defendant, guilty of rape and burglary with which he was charged, was properly admitted, despite assertion that test results were irrelevant since they merely tended to include him in class of people who might have committed rape. State v. [redacted] (1983) 34 Wash.App. 775, 60 P.2d 1356.

Statements made by rape victim to physician for purpose of diagnosis and treatment are considered inherently trustworthy because declarant's well-being rests on truth of the statement. State v. [redacted] (1980) 27 Wash.App. 952, 621 P.2d 779.

Testimony of two victims, positively identifying defendant as perpetrator in two crimes, was substantial evidence 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 deadly weapon. State v. [redacted] (1979) 27 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 inclination toward offended female. State v. [redacted] (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. [redacted] (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. [redacted] (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 41.03.  
 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, 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 also charged with attempted rape in the second degree.

## WASHINGTON CRIMINAL

ulsion; or

s incapable of consent by reason of  
entally incapacitated.

1 degree is a class B felony.

ted by Laws 1975, 1st Ex.Sess., ch. 14,  
.Sess., ch. 244, § 2, eff. July 1, 1979. Recodified  
1979, Ex.Sess., ch. 244, § 17, eff. July 1,  
i. 118, § 2.

### Historical Note

§§ 2, 17, Laws 1869, p. 204, § 35.  
n subsec. Laws 1873, p. 187, § 37.  
ed "class Code 1881, §§ 812, 814.  
feleted", 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.  
f subsec. Laws 1943, ch. 112, § 1.  
he perpe- RRS §§ 2435, 2436.  
Former §§ 9.79.010, 9.79.020.  
Laws 1973, 1st Ex.Sess., ch. 154,  
§§ 122, 123.

### Review Commentaries

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### Library References

Rape, second degree, definition,  
Wash.Prac. vol. 11, WPIC 41.01.  
Rape, second degree, elements,  
Wash.Prac. vol. 11, WPIC 41.02.

### Notes of Decisions

Proof that male person had sexual  
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Meyer (1951) 37 Wash.2d 759, 226 P.2d  
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### 2. Included offenses

Where defendant was charged with  
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of statute relating to assault with intent  
to commit a felony, defendant was also  
charged with attempted rape in the

## SEXUAL OFFENSES

9A.44.060

and degree under forcible compulsion  
of that statute, and, under of-  
fenses as charged, proved and instructed  
upon, 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 no more than five  
years".

### 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. 154,  
§§ 122, 123.

### 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

## 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.

## 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.

## 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.

## 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.

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.

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.

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.

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.

## 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.

## 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

## f Decisions

## 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.

ent liberties when he knowingly his spouse to have sexual contact

ss than fourteen years of age; or  
ess than sixteen years of age and  
rty-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.

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE

2 HOUSE BILL NO. 545

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 who the defendant knows is  
19 mentally incapable and who is entrusted to the defendant's care by  
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

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;

CSHB

545

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

*SKC*

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

*Paul G. Hauff*  
*Jim Dineen*  
*W. Kunkle*  
*John P. ...*  
*Paul ...*

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

*Rick Halford do pass*  
Chairman signature and recommendation

Committee Backup attached

**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						
<b>TOTAL OPERATING</b>		-0-	-0-	-0-	-0-	-0-

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

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

**FUNDING: (Thousands of Dollars)**

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>		-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)

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.



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Al Adams, Chair  
House Finance Committee

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

5 (B) who is entrusted to the offender's care

6 (i) by authority of law; or

7 (ii) in a facility or program that is required by  
8 law to be licensed by the Department of Health and Social  
9 Services; or

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

12 (A) mentally incapable; [IS SUFFERING FROM A MENTAL  
13 DISORDER OR DEFECT WHICH RENDERS THE PERSON INCAPABLE OF APPRAIS-  
14 ING THE NATURE OF THE CONDUCT UNDER CIRCUMSTANCES IN WHICH A  
15 PERSON WHO IS CAPABLE OF APPRAISING THE NATURE OF THE CONDUCT  
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

3 (1) mentally incapable; or

4 (2) married to the person and neither party has filed with  
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.

STATE OF ALASKA  
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 545 (JUD)  
PUBLISH DATE: HOUSE 4/11/88

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. *by SFC 5/5/88*

*Richard I. Pegues*

Prepared by: Richard I. Pegues, Director  
Division: Administrative Services

Phone: 465-3672  
Date: April 8, 1988

Approved by Commissioner: Grace Berg Schaible, Atty. Gen.  
Agency: Department of Law

Date: April 8, 1988

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.

CSHB 545 (JUL  
HOUSE 4/11/88

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.

CSHB 545 (JUD)  
HOUSE 4/11/88Fiscal 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.

373

STATE OF ALASKA  
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 545 (Jud)  
PUBLISH DATE: HOUSE 4/21/88

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)

RECEIVED  
APR 18 1988  
LEGISLATIVE FINANCE

# Alaska State Legislature



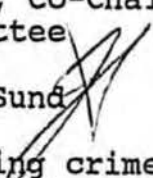
## House of Representatives House Judiciary Committee

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

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.

SENATE COMMITTEE REPORT

Hand 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

Adopted House letter of intent

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

John Kaden  
William Dargatzis

2 Joe Josephson - No Recommendation

William Dargatzis  
Chairman signature and recommendation

[ ] Committee Backup attached

A

## 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.

**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.        |

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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.

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.

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Section 9A.44.050

CHAPTER 9A.44

SEXUAL OFFENSES

Written motion—Admissibility.  
Motion under this chapter.  
Rule.

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

First degree.  
Second degree.  
Third degree.

Statement—Conditions.  
Additions to this chapter.  
Section recodified and added to this chapter.  
W.S.A. 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

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

Constitution:

2.030

Following the Preface pages of this volume.

SEXUAL OFFENSES

9A.44.010

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.

79) 23 of complaining witness where (1980) 94 Wash.2d 733, 619 P.2d 968.

In attempted rape prosecution, court did not abuse its discretion in denying motion to have victim, who received mental health treatment in submit to psychological examination where defendant presented no compelling reason why victim should have submitted to possibly traumatic psychiatric examination when other more traditional and less intrusive means of assessing her credibility and perceptual abilities were presumably available, and court carefully left issue open for further consideration if testimony showed victim's prior mental history might have had bearing upon her recitation of events at time of incident. State v. Demos (1980) 94 Wash.2d 733, 619 P.2d 968.

In absence of any compelling reasons, judge did not abuse discretion by refusing to order a psychiatric examination of alleged rape victim. State v. 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, results of which tended to some degree to make it more probable that defendant, with guilt of rape and burglary with which he was charged, was properly admitted, despite assertion that test results were irrelevant since they merely tended to include him in class of people who might have committed rape. State v. Nicholas (1983) 34 Wash.App. 775, 603 P.2d 1356.

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

Testimony of two victims, positively identifying defendant as perpetrator of two crimes, was substantial evidence 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 deadly weapon. State v. Edwards (1979) 27 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 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 being 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. 15, §§ 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, see Wash.Prac. vol. 11, WPIC 41.03.

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

#### 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, and that at time she was incapable of giving her consent thereto because of unsoundness of mind, would establish corpus delicti of crime of rape under provisions 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 also charged with attempted rape in the sec

lision; or

s incapable of consent by reason of  
entally incapacitated.

1 degree is a class B felony.

ted by Laws 1975, 1st Ex.Sess., ch. 14,  
Sess., ch. 244, § 2, eff. July 1, 1979. Recodified  
1979, Ex.Sess., ch. 244, § 17, eff. July 1, 1979,  
118, § 2.

#### Historical Note

§§ 2, 17, Laws 1869, p. 204, § 35.  
n subsec. Laws 1873, p. 187, § 37.  
ed "class Code 1881, §§ 812, 814.  
feleted". Laws 1886, p. 84, § 1.  
isonment Laws 1897, ch. 19, § 1.  
not more Laws 1909, ch. 249, §§ 183, 184.  
Laws 1919, ch. 132, § 1.  
ne end of Laws 1937, ch. 74, § 1.  
f subsec. Laws 1943, ch. 112, § 1.  
ne perpe- RRS §§ 2435, 2436.  
Former §§ 9.79.010, 9.79.020.  
Laws 1973, 1st Ex.Sess., ch. 154,  
§§ 122, 123.

#### Review Commentaries

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#### Library References

Rape, second degree, definition,  
Wash.Prac. vol. 11, WPIC 41.01.  
Rape, second degree, elements,  
ee or in- Wash.Prac. vol. 11, WPIC 41.01.  
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 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.

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#### 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 also charged with attempted rape in the

nd 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".

#### 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. 154,  
§§ 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, 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.

## 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) 55 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) 55 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.

## 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

## f Decisions

## 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.

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ent liberties when he knowingly his spouse to have sexual contact

ss than fourteen years of age; or  
ess than sixteen years of age and  
rty-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, re-codified 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.

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, 51 ALR3d 1225.

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

Constitutionality of rape laws limited to protection of females only, 39 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 531 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, 575 P 2d 982, 1978; *Bordewick v State*, Sup Ct Op No 1500 File No 3341, 569 P 2d 154, 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, 575 P 2d 591, 1978; *State v Wassile*, Sup Ct Op No 1630 File No 3691, 575 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, 595 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 2151 File No 4383, 616 P 2d 584, 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; *Qualie v State*, Ct App Op No 135 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 Wassile*, Sup Ct Op No 1630 File No 3691, 575 P 2d 971, 1978; *State v Jensen*, Ct App Op No 126 File No 5679, 650 P 2d 422, 1982.

**Sentence for attempted rape upheld.** — See *Shelton v State*, Sup Ct Op No 2074 File No 3905, 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 715, 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 the 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 *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 terms used in this title, see AS 11.81.900 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".

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

#### NOTES TO DECISIONS

Applied in *Nicholson v State Ct App Op* No 193 (File No 6192), 656 P 2d 1209 (1982); *Junby 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-

perision *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 495 (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)



## 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

# 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);  
Maniilaq Regional Women's Crisis Program; MEN, Inc.;  
Safe & Fear-Free Environment (SAFE); Siliaks 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 (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

## 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*

Dana Fabe  
Public Defender

DF:rjb

# 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  
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- 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

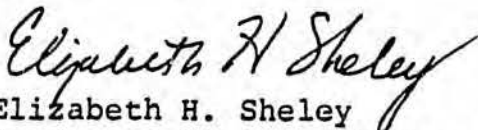
House Judiciary Committee  
RE: House Bill 545  
March 29, 1988  
PAGE 3

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 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  
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.

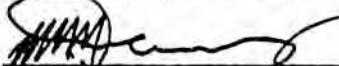
Under Sexual Assault in the First Degree, SECT. I(A)(3), lines 17 through 20 is intended to address assault by care providers. In reality it might protect only clients that are involuntary commitments. If the words "or through service in a program receiving public funds" were added to the end of line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

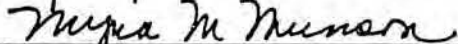
Proposed by:

  
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

STATE OF ALASKA  
1988 LEGISLATIVE SESSION

BILL VERSION: HB 545  
PUBLISH DATE: \_\_\_\_\_

FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_ Agency Affected: Health & Social Services  
Title: ...amending crimes relating to sexual assault as they relate to...mentally incapable. BRU: 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-

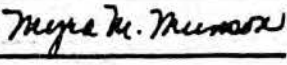
POSITIONS:

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

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