THE STATE of ALASKA
GOVERNOR MICHAEL J. DUNLEAVY

**Department of Law**
CRIMINAL DIVISION CENTRAL OFFICE

1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
Tel: (907) 269-5100
Fax: (907) 269-5110

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The Honorable Michael J. Dunleavy
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: HB 14: Assault; Sex Offenses; Sent. Aggravator (SCS CS HB 14(FIN))
Our file: 2019200405

Dear Governor Dunleavy:

At the request of your legislative director, the Department of Law has reviewed HB 14 relating to the offense of first-degree assault, the definition of "sexual contact," and eligibility for credit against a sentence for time spent on electronic monitoring or residential treatment before trial. This bill is designed to address issues in our criminal laws that were identified in the *Justin Schneider* case, where a man strangled a woman to the point of unconsciousness and then masturbated on her. Concerns were raised in three areas of the existing laws. First, that unwanted masturbation on another person was not treated as a sex offense under Alaska law and thus was not subject to the harsher penalties associated with sex offenses. Second, that strangulation to the point of unconsciousness did not qualify as first-degree assault for which harsher penalties would be available. Third, that a defendant could receive credit against his/her sentence for time spent on electronic monitoring while on bail.

**"Sexual contact" and contact with semen**

Section 4 of HB 14 adds unwanted contact with semen to the definition of "sexual contact."[1] Alaska statutes define and use the term "sexual contact" as an element in many sex offenses.[2] Therefore, by adding contact with semen to the definition of sexual contact, a person may be guilty of sexual assault or sexual abuse of a minor if the person knowingly causes another person to come into unwanted contact with semen and meets the other elements of those crimes.

Alaska's sexual-assault laws criminalize sexual penetration or sexual contact "without consent" of the other person. "Without consent" requires that the victim "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."[3] Therefore, should HB 14 become law, a person would be guilty of sexual assault if they caused a victim to come into contact with semen "without consent." Alaska's sexual assault laws also criminalize sexual activity when one party is not able to consent because that person is incapacitated, unaware, or mentally incapable. Should HB 14 become law, a person would also be guilty of sexual assault if they caused a victim incapable of giving consent to come into contact with semen.

Alaska's sexual-abuse-of-a-minor statutes focus on the sexual act and the difference in age between the offender and the victim. Under the provisions of HB 14, a person could be guilty of sexual abuse of a minor if they cause a person to come into contact with semen and there is enough of an age difference between the offender and victim to fall under the sexual-abuse-of-a-minor statutes.

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1 AS 11.81.900(b)(60) "'sexual contact' means knowingly touching, directly or through clothing, the victim's genitals, anus, or female breast; or knowingly causing the victim to touch, directly or through clothing, the defendant's or victim's genitals, anus, or female breast." There are exceptions for "normal caretaker responsibilities for a child", "recognized and lawful form of treatment" and "necessary part of a search of a person" in custody of DOC or DJJ.

2 *See* AS 11.41.410 – 11.41.440.

3 AS 11.41.470 (8). "Without consent" is also satisfied if the victim is incapacitated as a result of the offender's actions. Further, if the victim is mentally incapable, incapacitated (by actions other than the defendant's), or otherwise unaware that the sexual act is being committed the it is not necessary to show that the penetration or sexual contact occurred "without consent."

The sexual-abuse-of-a-minor statutes do not require the use of force or threat of force that is necessary to prove the "without consent" element of sexual assault. This results in some overlap between these offenses and harassment in the first degree.[4] A person is guilty of harassment in the first degree if, with intent to harass or annoy, they subject another person to offensive physical contact and the physical contact is with human or animal blood, mucus, saliva, semen, urine, vomitus, or feces.[5] Section 2 of HB 14 adds language to the statute defining first-degree harassment to clarify that the harassment statute applies only when the conduct does not constitute sexual abuse of a minor.

*Equal protection concerns*

In committee hearings, there was discussion about the use of the word "semen" versus the use of the word "ejaculate." Some suggested that the use of the word "semen" would raise equal protection issues because it targets males to the exclusion of females. The Department of Law does not see an equal protection issue with the use of the word "semen" for the following reasons.

Alaska's equal protection clause requires "equal treatment of those similarly situated."[6] To prove an equal protection violation, the person asserting the violation must first show that the law treats similarly situated persons differently.[7] When evaluating whether groups are similarly situated, the court will look to the state's reasons for treating the groups differently.[8] If the person establishes disparate treatment of similarly situated persons, then under Alaska's three-part analysis, the court must review and balance three factors: the significance of the individual right purportedly infringed, the importance of the regulatory interest asserted by the state, and the closeness of the fit between the challenged statute and the state's interest.[9] Additionally, in the context of criminal

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4 AS 11.61.118(a). Harassment in the first degree is a class A misdemeanor and is not a registerable sex offense.

5 *Id.*

6 *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 787 (Alaska 2005).

7 *Alaska Civil Liberties Union, supra.*

8 *Planned Parenthood of The Great Northwest v. State,* 375 P.3d 1122, 1135 (Alaska 2016).

9 *Anderson v. State*, 904 P.2d 433, 436 (Alaska App. 1995).

offenses, it is important that any distinctions made in regards to gender be made with some "logical justification having a basis in the actual conditions of human life."[10]

Here, it is clear that women and men would be treated differently under the provisions of the bill. However, because the bill targets contact with semen and only men produce semen, it treats the classes of people who can engage in the targeted conduct equally. This is not an irrational gender-based distinction, but a distinction made based on "actual conditions of human life" and a court would likely find this distinction reasonable.

Further, while the conduct targeted in the bill relates to contact with semen, the definition of "sexual contact"—a necessary element of many of Alaska's sexual-assault and sexual-abuse-of-a-minor statutes—clearly includes conduct that both men and women could perpetrate. Therefore, while contact with semen may apply only to men, women are not excluded from being charged with a sex offense. In fact, the existing law already includes distinctions between male and female anatomy for purposes of defining "sexual contact": only female breasts are included in the types of contact included in the definition of "sexual contact."[11]

Assuming *arguendo* that a court were to conclude that the legislation treats similarly situated persons differently, it would then look to the individual right purportedly infringed. Contact with semen, as well as other bodily fluids, is already criminalized as first-degree harassment (but only if the person's intent was to harass or annoy). Thus, the changes in the legislation mainly affect the penalties associated with conduct that may already be criminal in nature. As a result, the legislation impacts the "relatively narrow interest of a convicted offender in minimizing punishment for an offense."[12] This interest will not result in a strict scrutiny analysis by the court.[13]

Conversely, the state has a significant interest in protecting the health and welfare of the public. Criminalizing unwanted contact with certain bodily fluids is a valid way to further that state interest. Here, the bodily fluid in question, semen, is procured in a sexual manner and, when combined with the other elements of the sexual-assault and

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10 *Plas v. State*, 598 P.2d 966, 968 (Alaska 1979).

11 AS 11.81.900(b)(60).

12 *Maeckle v. State*, 792 P.2d 686, 689 (Alaska App. 1990).

13 *Id.*

sexual-abuse-of-a-minor statutes, furthers the legitimate state interest in addressing the state's rates of sexual assault and sexual abuse of a minor.[14] There was testimony provided in committee that more than 90% of Alaska's sexual assaults and sexual-abuse-of-a-minor offenses are committed by men.[15] Additionally, while there is a test that is used by the Alaska Crime Lab to identify the presence of semen, there is no corresponding test to distinguish female fluids from other sources of DNA. Therefore, even if the language were broadened to encompass female fluids, it would be almost impossible to prove at trial.[16] Also, the word semen is used throughout the criminal code, and the use of that word in this legislation maintains consistency with other criminal statutes.[17]

Finally, the legislature maintains broad authority to establish penalties for criminal offenders and how those penalties should be applied.[18] Here, the legislature has determined that contact with semen is a sexual offense when the circumstances under which that contact occurs satisfy the other elements of the state's sexual-assault and sexual-abuse-of-a-minor statutes. This conduct will be classified as a sex offense and sentenced accordingly. The language of the bill is specific to this conduct and closely fits the legislature's stated goal.

It is for the above reasons that adding contact with semen to the definition of "sexual contact" does not violate the equal protection clause of the United States or Alaska Constitution.

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[14] *See* Testimony of John Skidmore, Criminal Division Director, Department of Law at 1:55:32PM, Hearing on SB 12 (companion bill to HB 14) before the Senate Judiciary Comm. 34th Leg., 1st Sess. (February 13, 2019) discussing the difference between semen and other bodily fluids found in the criminal code.

[15] Testimony of John Skidmore, Criminal Division Director, Department of Law at 9:21: 27AM, Hearing on HB 14 before the House Finance Comm. 34th Leg., 1st Sess. (April 26, 2019). *See* also Department of Public Safety, Felony Level Sex Offenses, Crime in Alaska Supplemental Report 2017, https://dps.alaska.gov/getmedia/3b17e19d-f7e4-4c33-8986-59a68a8f957c/Felony-Level-Sex-Offenses-2017, at 13, published August 2018. (Male suspects comprised more than 96% of the total number of suspects).

[16] Testimony of John Skidmore, *supra*.

[17] *See* Harassment in the first degree (AS 11.61.118) and cruelty to animals (AS 11.61.140).

[18] *Anderson v. State*, 904 P.2d at 436.

**First-degree assault for strangulation to the point of unconsciousness**

Under current law, strangulation may be charged as an assault. The degree of assault depends on the circumstances and the offender's mental state.[19] But typically, strangulation is charged as second-degree assault—a class B felony—because first-degree assault—a class A felony—requires proof of "serious physical injury."[20] A "serious physical injury" is defined by statute as a physical injury that creates a substantial risk of death or causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of a body member or organ or that unlawfully terminates a pregnancy.[21] Proving that a strangulation caused that type of injury can be extremely difficult. In contrast, a person commits second-degree assault when the person intentionally causes physical injury to another by means of a dangerous instrument.[22] "Physical injury" is defined as "a physical pain or an impairment of physical condition."[23] The dangerous instrument is the object or body part used to strangle the other person.[24] The sentencing range for second-degree assault is presumptively 0-2 years for a first offense with a maximum of 10 years if an aggravating factor was established. The penalties for first-degree assault are significantly harsher.

Section 1 of HB 14 adds a new subsection to the statute defining first-degree assault to include strangulation to the point of unconsciousness. This eliminates the need to prove that the strangulation caused serious physical injury; instead, the State must prove only that the strangulation caused the person to lose consciousness. Thus, under this legislation, if the State can prove that a person knowingly caused another person to become unconscious by means of a dangerous instrument (strangulation), the person would be guilty of first-degree assault, which is a class A felony punishable by a presumptive range for a first offense of 3 to 6 years and a maximum of 20 years.

Section 8 of the bill establishes a new aggravating factor at sentencing if the State can show that a person knowingly caused another person to become unconscious by means of a dangerous instrument—that is, if the person strangled another person to the

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19 *See* AS 11.41.200 - 11.41.230.

20 AS 11.41.200(a).

21 AS 11.81.900(b)(58).

22 AS 11.41.210(a)(1).

23 AS 11.81.900(b)(48).

24 AS 11.81.900(b)(15).

point of unconsciousness. This aggravating factor would need to be proved to a jury beyond a reasonable doubt. An aggravating factor at sentencing allows the judge to impose a sentence that is above the presumptive range up to the maximum term allowed by law. However, if an aggravating factor is also an element of the offense for which the person was found guilty, the court may not use that aggravating factor to increase the person's sentence.[25] Therefore, if the person is found guilty of first-degree assault based on strangulation to the point of unconsciousness, as established in section 1, the court could not increase the person's sentence by using the aggravating factor enacted in section 8 of the bill. However, the aggravating factor would be available if the person was found guilty of another offense, such as sexual assault, and the circumstances also proved the aggravating factor established in the bill.

**Electronic monitoring and residential treatment**

The third issue addressed by HB 14 is eligibility for credit against a defendant's sentence for electronic monitoring that the defendant engaged in before trial. Sections 6 and 7 of the bill add a number of restrictions on awarding credit for time spent on electronic monitoring while on pretrial release under AS 12.55.027. First, a person convicted of a felony offense against a person, a crime of domestic violence, a drug offense involving delivery to a person under 19 years of age, a burglary in the first degree, or an arson in the first degree may not receive credit against their sentence for time spent on pretrial electronic monitoring *unless* they participated in a residential treatment program while on electronic monitoring. Second, those convicted of a sex offense, as defined in AS 12.63.100, may not receive credit against their sentence for time spent on electronic monitoring or in a treatment program. Thus, persons convicted of sex offenses will now be ineligible for any credit under AS 12.55.027.

**Victim notification**

Finally, the bill adds victims of sex offenses, as defined in AS 12.63.100, to the list of victims with whom the prosecuting attorney must make a reasonable effort to confer before entering into a plea agreement. The prosecuting attorney shall also ask if the victim is in agreement with the proposed plea agreement and record whether the victim is in agreement. The bill also clarifies that the court may reschedule a hearing in order to allow the prosecutor additional time to confer with the victim.

The provisions of the bill will take effect 90 days after signature.

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[25] AS 12.55.155(e).

Except as discussed above, SCS CS HB 14(FIN) presents no significant legal issues or other concerns.

Sincerely,

KEVIN G. CLARKSON
ATTORNEY GENERAL

By:
John B. Skidmore
Deputy Attorney General

cc: Governor's Legislative Office