



**MUNICIPALITY OF ANCHORAGE
ASSEMBLY MEMORANDUM**

No. AM XXX-2021

Meeting Date: Month Day, 2021

1 **From: ACTING MAYOR**

2
3 **Subject: AN ORDINANCE AMENDING ANCHORAGE MUNICIPAL CODE**
4 **TITLE 8 TO UPDATE ABUSE OF A CHILD OR VULNERABLE**
5 **ADULT IN SECTION 8.10.030, HARASSMENT IN SECTION 8.10.110,**
6 **AND CRIMINAL MISCHIEF IN SECTION 8.20.010.**
7

8 This ordinance updates three areas of Anchorage Municipal Code Title 8. The
9 changes to Abuse of a Child or Vulnerable Adult include fixes to the code which will
10 enable the Municipal Prosecutor's Office to prosecute more effectively. The changes
11 to that section also address some concerns raised by the Court of Appeals. The
12 changes to Harassment broaden the variety of behaviors which can be prosecuted
13 under the Municipal Code. The changes to Criminal Mischief lower the level of intent,
14 enabling the Municipal Prosecutor's Office to prosecute more effectively.
15

16 **8.10.030 Abuse of a Child or Vulnerable Adult**
17

18 This ordinance makes several changes to this code. In subsection B. "intentionally,
19 knowingly" is deleted, leaving the required level of intent as "reckless." It should be
20 noted that "reckless" includes the two higher deleted levels of intent. For example, if
21 one is found to have acted intentionally, they have also acted recklessly. This change
22 makes the language of the ordinance cleaner. It also focuses a jury's deliberation on
23 whether a defendant has met the "reckless" standard which would result in a
24 conviction. Experience with jury trials tells us that additional higher levels of intent in
25 code can distract the jury from the lower intent standard upon which they must focus.
26 If a jury is focused on the fact that an act was not intentional, they are more likely to
27 minimize the lower requisite level of intent of recklessness when determining guilt.
28

29 In subsection B. it was previously a crime to negligently cause or permit a child to be
30 physically injured. This ordinance raises the intent level for physical injury to reckless.
31 This change reflects the reality of how cases are assessed by the Prosecutor's Office
32 when it makes charging decisions. Currently the Prosecutor's Office would not screen
33 in a case where a parent was charged with negligently causing or permitting injury. An
34 example would be a parent failing to properly supervise a child playing on a
35 playground who then falls and hurts themselves. This would be negligently permitting
36 injury, yet it would likely not be charged by our office. It should be noted that it
37 remains a crime to negligently allow torture, cruel confinement, or cruel punishment.
38

39 This ordinance deletes subsections D., E., and F. in their entirety. These sections
40 were no doubt added to the code to clearly express disapproval of the parental
41 conduct described in subsection F. while acknowledging the rights of parents to use
42 reasonable parental discipline as described in subsection E. However, over the years
43 this part of the code has proved to be problematic in many ways. The Court of
44 Appeals in Alaska noted some of the issues with the code in *Beagley v.*

1 *Anchorage*, 2015 WL 4599602 (Alaska App. July 29, 2015) (unpublished). Decision
2 attached.

3
4 In that decision the Court of Appeals noted that the ordinance as currently written
5 allows torture if it is part of “reasonable parental discipline.” For example, the code as
6 written states that it is “prima facie unreasonable” to brand a child. But this
7 presumption can be rebutted by proof that the branding was part of “reasonable
8 parental discipline.” The current language of the code, while intending to express
9 disapproval of branding, instead signals to juries, parents, and communities that
10 branding is permissible in the right circumstances.

11
12 Another problem with listing “prima facie unreasonable” acts is that when confronted
13 with such a list, jurors are led to believe that anything not on the list must be prima
14 facie reasonable. For example, a jury might conclude that because scalding is listed
15 as unreasonable, but the ordinance is silent on subjecting children to cold, that forcing
16 a child to take an ice bath is therefore presumptively reasonable.

17
18 The Court of Appeals noted that it is unclear whether the ordinance defines
19 “reasonable parental discipline” by reference to a parent’s subjective reasons for
20 harming the child or by reference to the objective reasonableness of the parent’s
21 decision to harm the child. The factors to be considered in determining “reasonable
22 parental discipline” are listed in subsection E. Some of those factors are objective
23 (e.g. age of the child), while at least one factor, apparent motive of the parent, is
24 subjective. This leads to confusion for jurors as they attempt to determine whether an
25 act was “reasonable parental discipline.”

26
27 The Court of Appeals also noted that it is arguably unconstitutional to require the
28 parent to prove that discipline is reasonable as an affirmative defense as described in
29 subsection D. This ordinance would resolve that issue by removing the affirmative
30 defense language. There is already language from state statute that defendants can
31 use which provides a justification defense. AS 11.81.430(a)(1), which can be used in
32 municipal prosecutions, states:

- 33
34 **(a) The use of force on another person that would otherwise**
35 **constitute an offense is justified under any of the**
36 **following circumstances:**
37 **(1) When and to the extent reasonably necessary and**
38 **appropriate to promote the welfare of the child or**
39 **incompetent person, a parent, guardian, or other**
40 **person entrusted with the care and supervision of a**
41 **child under 18 years of age or an incompetent**
42 **person may use reasonable and appropriate**
43 **nondeadly force on that child or incompetent**
44 **person.**

45
46 There is also a catchall justification defense which can be used for a situation not
47 described above. The relevant part of AS 11.81.320 reads:
48

1 (a) The use of force on another person that would otherwise
2 constitute an offense is justified under any of the
3 following circumstances:

4 (1) When and to the extent reasonably necessary and
5 appropriate to promote the welfare of the child or
6 incompetent person, a parent, guardian, or other
7 person entrusted with the care and supervision of a
8 child under 18 years of age or an incompetent
9 person may use reasonable and appropriate
10 nondeadly force on that child or incompetent
11 person.
12

13 (In *Bird v. Municipality of Anchorage*, 787 P.2d 119, 120 (Alaska Ct. App. 1990)
14 the Court of Appeals noted that AS 11.81.320 is available to defendants in Alaska,
15 even, as in *Bird*, when they are prosecuted under municipal code.)
16

17 **8.10.110 Harassment**

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19 This ordinance updates Harassment by changing the level of intent from “intent to
20 harass or annoy” to “reckless disregard for any harassing or annoying effect.” This
21 shifts the analysis from defendant’s motives to the effect on the victim. As currently
22 written, a defendant can argue that they did not mean to annoy or harass a victim, but
23 instead meant to gratify their own desires, for example. The Municipality has lost at
24 least one jury trial where a defendant argued that when he touched a victim he didn’t
25 intend to harass, as he thought the victim would find it pleasurable. This change
26 would disallow that argument.
27

28 Because technology has changed, the ordinance updates the list of media to include
29 “images” and “videos.”
30

31 The ordinance also makes it a crime to *threaten* to distribute sexual images, a fact
32 pattern currently not a crime under municipal code, but one the Municipal
33 Prosecutor’s Office encounters frequently. Currently abusers can effectively exert
34 control over their victims by threatening to publish sexual images and thereby
35 threatening the victim’s reputation, personal life, and job. This change will untie the
36 Prosecutor’s hands.
37

38 The ordinance makes it a crime to touch a person’s genitals, buttocks, or female
39 breast directly. Currently it is only a crime to do so through clothing. While there are
40 felony-level crimes prosecuted by the state which address direct contact, often these
41 cases are sent to the Municipality to be prosecuted. However, as currently written, the
42 municipality cannot prosecute such contact under the code. This change closes the
43 loophole.
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45 The ordinance prohibits “unwanted” physical contact of the genitals, buttocks, or
46 female breast. Community members should be protected from being touched on the
47 genitals where such behavior is unwanted. Currently a jury must find that the behavior
48 is “offensive.” This language addition allows the jury to convict where the victim did
49 not want to be touched on the genitals, regardless of whether a jury found the

1 behavior "offensive." Again, this change closes the loophole.
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3 **8.20.010 Criminal Mischief**
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5 By deleting "with intent to do so" the ordinance changes the level of intent from
6 intentional to the default level of intent for Municipal crimes found in AMC 8.05.010.B.
7

8 **B. If a provision of law defining an offense does not**
9 **prescribe a culpable mental state, the culpable mental**
10 **state that must be proved with respect to:**

11 **1. Conduct is "knowingly"; and**

12 **2. A circumstance or result is "recklessly."**

13 This lowers the burden on prosecutors. It also brings the level of intent closer to the
14 level of intent for domestic violence injury and fear assaults, which have a reckless
15 standard. Especially in domestic violence situations, the intent may not be to damage
16 property. The intent may be to express rage or increase the level of control over the
17 victim. Nonetheless, property is damaged. The current language allows defendants to
18 argue that they are innocent of the property damage if they had some other intent,
19 such as to exert control over a family member.
20

21 The proposed ordinance has no anticipated economic effects. No summary of
22 economic effects is attached.
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24 **THE ADMINISTRATION RECOMMENDS APPROVAL.**
25

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27 Prepared by: Sarah Stanley, Municipal Prosecutor
28 Approved by: Kathryn R. Vogel, Municipal Attorney
29 Concur: Anna C. Henderson, Municipal Manager
30 Respectfully submitted: Austin Quinn-Davidson, Acting Mayor