

ANTHONY G. BROWN
Attorney General



CANDACE McLAREN LANHAM
Chief of Staff

CAROLYN QUATTROCKI
Deputy Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

FACSIMILE NO.
(410) 576-6475

WRITER'S DIRECT DIAL NO.
(410) 576-6435

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TO: The Honorable William C. Smith, Jr., Chair, Judicial Proceedings Committee

FROM: Jer Welter, Assistant Attorney General

RE: SB 54 - Criminal Law - Unnatural or Perverted Sexual Practice - Repeal (SUPPORT)

The Attorney General urges the Judicial Proceedings Committee to report favorably on Senate Bill 54. Senate Bill 54 repeals Criminal Law § 3-322, the statute prohibiting “unnatural and perverted sexual practice,” a misdemeanor punishable by up to ten years in prison.

Criminal Law § 3-322, as written, has been interpreted to prohibit all sexual activity other than vaginal intercourse, including: 1) oral sex; 2) anal sex; and 3) penetration of the genitals or anus with an object. *See DiBartolomeo v. State*, 61 Md. App. 302 (1985); *Schochet v. State*, 320 Md. 714, 730 (1990). As written, it does not differentiate between the sexual acts of consenting adults and sexual acts performed without consent. And by the same provision, it prohibits any of these activities between a person and an animal. The statute is a product of historical anti-LGBT animus that deemed anything other than heterosexual vaginal intercourse a crime equivalent to bestiality.

For over thirty years, the statute has been unenforceable as written. In 1990, the Court of Appeals adopted a narrowing interpretation of Criminal Law § 3-322 to save it from being invalidated as unconstitutional. *Schochet v. State*, 320 Md. 714 (1990). To avoid doubts about the constitutionality of § 3-322, the Court held that it did not “encompass consensual, noncommercial, heterosexual activity between adults in the privacy of the home.” *Id.* at 730. *Schochet*'s holding was subsequently extended by consent decree to cover all private, non-commercial activity between consenting adults, regardless of sexual orientation.

Nevertheless, the continued existence of § 3-322 in the Code, as written, demeans the dignity of LGBT Marylanders and is inconsistent with modern sensibilities. It is also

unnecessary. Non-consensual, commercial, or public sexual acts, and sexual acts committed against animals, are all prohibited elsewhere in the criminal code:

- Sections 3-303 and 3-304 (first and second degree rape) prohibit these activities without consent where done by force or threat of force.¹ Section 3-319.1 makes it clear that proof of physical resistance is not required to prove force or threat of force in the context of sexual offenses.
- Section 3-304 (second-degree rape) also prohibits oral sex, anal sex, and penetration with an object where the victim is mentally incapacitated, cognitively impaired, or physically helpless, and where the victim is under 14 and the perpetrator is more than 4 years older than the victim.
- Other statutes prohibit these same activities: 1) where the victim is 14 or 15 years old and the perpetrator is over 21 years old (§ 3-307); 2) where the victim is 14 or 15 years old and the perpetrator is at least four years older than the victim (§ 3-308); and 3) where the victim is under 18 and the perpetrator is a “person of authority” at the victim’s school (§ 3-308). In addition, the sexual abuse of a minor statute (§ 3-602) prohibits all of these acts where the victim is a minor and the perpetrator is a family or household member. Section 3-315 prohibits a “continuing course of conduct” involving three or more non-consensual incidents of these acts over a period of 90 days or more where the victim is under 14 years old.²
- Commercial acts of oral sex, anal sex, and penetration with an object are prohibited by § 11-303.
- Performing sexual acts in public is prohibited by § 11-107.
- Finally, sexual acts committed against an animal are prohibited by § 10-606.

In summary, non-consensual, non-private, and commercial acts covered by § 3-322 are prohibited elsewhere in the criminal code. Continuing use of the statute in prosecutions is fraught with practical problems. Particularly in light of the historic use of these types of laws to harass and discriminate against the LGBTQ community, these antiquated statutes should not be permitted to remain on the books. For these same reasons, the legislature

¹ Section 3-303 (first-degree rape) requires proof of one of the following aggravating factors: 1) a deadly weapon; 2) strangulation or serious injury; 3) threat of death or serious injury; 4) aided or abetted by another; or 5) in connection with a 1-3 degree burglary.

² In addition to the statutes above, any non-consensual touching (sexual or otherwise) could be prosecuted as a second-degree assault, which carries a maximum penalty of 10 years’ incarceration.

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previously repealed the prohibition on sodomy, and this statute should likewise be repealed.

It should also be noted that Senate Bill 54 ensures that persons previously convicted of unnatural and perverted practice based on non-consensual sex acts will not be permitted to expunge their convictions or avoid the sex offender registry, allowing the responsible repeal of this antiquated statute.

The Attorney General supports Senate Bill 54, and requests a favorable report.

cc: Senator Clarence K. Lam and Members of the Committee