



State of Maryland
Office of the Attorney General

April 4, 2022

TO: The Honorable Luke Clippinger, Chair, Judiciary Committee
FROM: Carrie J. Williams, Assistant Attorney General
RE: Attorney General's Support for SB 33 Only If Amended

The Attorney General urges the Judiciary Committee to report favorably on Senate Bill 33 *only if amended* to conform with House Bill 153.

The Judicial Proceedings Committee voted 6-5 to amend Senate Bill 33 to create an exception to the definition of “sexual contact.” The amendment creates two classes of fourth-degree sexual assault—one where the perpetrator and victim were “engaged in an ongoing consensual sexual relationship” and the other where they were not. For the former category, the amendment places an additional burden on the State. It requires the State to prove that the “sexual contact” was not “physical contact commonly engaged in by two individuals in a sexual relationship, unless one of the individuals has reasonably indicated to the other that further physical contact is unwanted.”

Logistically, this amendment is problematic because it requires the fact-finder to determine what “physical contact [is] commonly engaged in by two individuals in a sexual relationship.” What is considered common physical contact is unique to each relationship. It also asks the fact-finder to decide how a person “reasonably indicates” that physical contact is unwanted. It also creates a question of what constitutes an “ongoing consensual sexual relationship,” particularly in circumstances where the parties were in the process of separating.

More fundamentally, however, this amendment is troubling because it says that the definition of consent depends upon whether the parties have had a sexual relationship. The definition of consent should not change, regardless of the relationship between the parties.

Further, this amendment is unnecessary. The law in Maryland is clear that, in order for the State to prove a lack of consent when the victim is competent and conscious, “mere passivity on the victim’s part” is not enough. *Travis v. State*, 218 Md. App. 410, 424 (2014). There must be evidence of: 1) an express denial of consent; or 2) an implicit denial of consent via resistance or a rational fear of resisting. *Id.* The burden should not be higher for people in sexual relationships.

The Attorney General urges the Judiciary Committee to report favorably on Senate Bill 33 only if the amendments added by the Judicial Proceedings Committee are stricken and the bill conforms with House Bill 153.

cc: Members of the Committee