



**Working to end sexual violence in Maryland**

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**Testimony Supporting Senate Bill 33 ONLY if Amended**  
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The Maryland Coalition Against Sexual Assault (MCASA) is a non-profit membership organization that includes the State's seventeen rape crisis centers, law enforcement, mental health and health care providers, attorneys, educators, survivors of sexual violence and other concerned individuals. MCASA includes the Sexual Assault Legal Institute (SALI), a statewide legal services provider for survivors of sexual assault. MCASA represents the unified voice and combined energy of all of its members working to eliminate sexual violence. We urge the Judiciary Committee to report favorably on Senate Bill 33 only if amended.

**Senate Bill 33 – Repeal: Marriage as a Defense to Sex Crimes**

Like many states, Maryland's law was based on the premise that marriage was consent to sex and that, therefore, a man could not rape his wife. Unlike many states, Maryland has not yet firmly rejected that antiquated and fundamentally disrespectful concept. Senate Bill 33 and House Bill 153, as introduced, would repeal marriage as a defense to any sex crime.

The Judiciary Committee and the House of Delegates passed the cross-file to this bill, HB153, without amendment. In the Judicial Proceedings Committee, however, amendments were adopted and are now before this Committee.

**Amendments to SB33 Should be Rejected**

The Judicial Proceedings Committee adopted an amendment to SB33 on a 6-5 vote and then passed the amended bill out of Committee. While MCASA appreciates the work of JPR and the Senate and the need for continued progress of the bill, we respectfully **OPPOSE the amendment to SB33 and strongly urge the Judiciary Committee to reject the Senate language and conform SB33 to HB153.**

**The amendment to SB33 changes the law regarding consent for people in a sexual relationship and creates new barriers to proving lack of consent for sex crimes in these cases.** The amendments are, in essence, "spousal defense lite". There was, apparently, recognition that the law should be the same for married and unmarried couples. However, rather than simply eliminating the spousal defense law, new language was adopted that would change consent just for couples by redefining the meaning of "sexual contact". This amendment would mean people in relationships have less of a right to control their own body and whether they are touched in a sexual manner than people who are single.

The Senate amendment should be thoroughly rejected for these reasons:

**1) Consent is fundamentally a right of an individual person. People should have the same rights to control their own body and who touches it whether or not they are in a relationship.**

As America has become more aware of sexual assault and harassment through the #MeToo movement, **other states have been strengthening definitions of consent.** It is especially remarkable that Maryland would contemplate moving in the opposite direction and adopt language that would make person's relationship status relevant to determinations of consent and what is "sexual contact". This would be a step backwards.

Examples of states that have statutory definitions of consent include the following. Note that each of these have strong support for an individual person's ability to consent (or refuse) sexual activity, including sexual activities that would be "sexual contact" under Maryland law.

**Minnesota:** "**Consent**" means words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean the existence of a prior or current social relationship between the actor and the complainant or that the complainant failed to resist a particular sexual act. Minn. Stat. § 609.341(4).

**District of Columbia:** "'**Consent**'" means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent. D.C. Code § 22-3001(4).

**Washington State:** **Consent** requires that there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact at the time of the act. Wash. Rev. Code Ann. § 9A.44.010(7).

**Illinois:** "**Consent**" means a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent. The manner of dress of the victim at the time of the offense shall not constitute consent. A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct. 720 ILCS 5/11-1.70.

**California:** "**Consent**" is defined to mean positive cooperation in act or attitude pursuant to the exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. California Penal Code § 261.6.

A current or previous dating or marital relationship shall not be sufficient to constitute consent where consent is at issue in a prosecution under [California Penal Code] Section 261, 262, 286, 287, or 289 or former Section 288a.

**2) Maryland has good case law that supports both the principle that a prior relationship is not proof of consent, and that the particular facts of each case must be considered.**

Case law makes it clear that:

While Maryland courts have “specifically reject[ed] any notion that once consensual sex has been shown, any subsequent sexual activity, *ipso facto*, implies consent,” they recognize that “[t]he sensitive question of the relevancy of the victim’s past sexual conduct with the defendant must be decided on an ad hoc basis.” *Testerman v. State*, 61 Md.App. 257, 264 (1985). While specific instances of prior sexual conduct between a complainant and the accused may be relevant to establish a consent defense, the Court of Appeals has required the “[p]referred evidence of past sexual conduct must contain a direct link to the facts at issue in a particular case before it can be admitted.” *White v. State*, 324 Md. 626, 638 (1991). Attorney General Letter of Advice to Senator William C. Smith, Jr., February 25, 2020.

In other words, case law requires consideration of individual facts in each case without presumption that some activities are consensual just by the fact of the relationship between the parties. The amendment would result in “spousal defense light”.

**3) There has not been a full hearing on changing the meaning of “sexual contact” or “consent” for couples.** Consent and the ability to control your own body are important and fundamental to bodily autonomy. The senate amendments were added to a bill to repeal spousal defense. The question of how to define when “sexual contact” is consensual has not been thoroughly vetted. If the definition of “sexual contact” is going to change and, as result, consent for couples is different than for other humans, this issue should have a full hearing.

**4) The language of the amendment is problematic.**

The amendment to SB33 reads as follows:

III) FOR THE PURPOSES OF §3–308(B)(1) OF THIS SUBTITLE ONLY, IN THE CASE OF TWO INDIVIDUALS ENGAGED IN AN **ONGOING CONSENSUAL SEXUAL RELATIONSHIP, 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.**

One wonders what would be an “unreasonable” indication that physical contact is unwanted?

Or how to determine what physical contact is “commonly engaged in” and why commonality matters in this very individual matter? These are serious flaws and should not be included in Maryland’s public policy.

**Reject the Senate Amendment**

**The Maryland State’s Attorneys Association provides this observation:**

*This amendment [to SB33] is contrary to everything we know and teach about consent: Consent means giving permission for all sexual contact that happens. Consent is freely given, of a person’s own free will, and absent of pressure. Consent is agreeing and saying yes throughout the entire act. Being in a sexual relationship does not and cannot mean that one partner can engage in sexual contact without the affirmative consent of their partner.*

**Relationship status does not and should not substitute for consent under our laws.**

**The Maryland Coalition Against Sexual Assault urges the  
Judiciary Committee to report favorably on Senate Bill 33 only if Amended  
to Conform to House Bill 153 as Passed by the House of Delegates**

