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

FROM: Jer Welter, Assistant Attorney General
Deputy Division Chief for Legal Affairs, Criminal Appeals Division,
Office of the Attorney General

RE: SB 129 – Criminal Law - Sexual Crimes - Repeal of Spousal Defense (Support)

The Attorney General urges the Judicial Proceedings Committee to issue a favorable report on Senate Bill 129. Senate Bill 129 repeals Criminal Law Article § 3-318, which currently provides that, with exceptions, a person cannot be charged for rape or sexual assault of his or her legal spouse.

Under current law, a person can subject his or her spouse to non-consensual "sexual contact," and the person's marriage to the victim is a complete defense to liability for the sexual assault. Likewise, a person can have vaginal intercourse or engage in a "sexual act" with his or her spouse when the spouse is substantially cognitively impaired, mentally incapacitated, or physically helpless—and thus the spouse is incapable of giving consent—and, again, there can be no prosecution.

This so-called "spousal defense" is a relic of the common law. *See Lane v. State*, 348 Md. 272, 279–92 (1997) (tracing history of "marital exemption" from rape law). Such "spousal defense" laws stem from the archaic, 18th-century belief that "marriage constitutes a blanket consent to sexual intercourse by the wife, which she may revoke only by dissolving the marriage."[1] That belief is now rightly rejected in modern society.

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[1] *Criminal responsibility of husband for rape, or assault to commit rape, on wife*, 24 A.L.R. 4th 105 (1983).

This bill letter is a statement of the Office of Attorney General's policy position on the referenced pending legislation. For a legal or constitutional analysis of the bill, Members of the House and Senate should consult with the Counsel to the General Assembly, Sandy Brantley. She can be reached at 410-946-5600 or sbrantley@oag.state.md.us

In prior years, concerns have been expressed that a repeal of the "spousal defense" might result in a husband being prosecuted for touching his wife without asking permission first. These concerns are unfounded. The law in Maryland is clear that, in order for the State to prove 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). Instead, there must be evidence of: 1) an express denial of consent; 2) "verbal or physical resistance" by the victim; or 3) a "reasonable fear of resisting" on the part of the victim, caused by "some additional or aggravating conduct" by the perpetrator. *Id*. at 424, 466. Moreover, the definition of "sexual contact" specifically excludes "common expression[s] of familial or friendly affection." Md. Code, Crim. Law § 3-301(e)(2)(i). If the "spousal defense" were repealed, then the State would have to prove, as in any other case involving non-consensual sexual contact, that the husband in the above hypothetical touched his wife's "genital, anal, or other intimate area," and that his wife expressly denied consent, resisted the contact, or the circumstances established that a reasonable person in the wife's position would have been afraid to resist the contact. The mere absence of express permission would not be enough—just as mere lack of permission is not enough to prove a sexual offense in cases where the perpetrator is not married to the victim.

It is past time for Maryland law to recognize that people do not sacrifice their bodily autonomy when they marry. A marital relationship with the victim should never be a defense to rape or sexual assault. The Attorney General urges the Committee to report Senate Bill 129 favorably without amendments.

cc: Members of the Committee