

Unfavorable Response to SB758

Criminal Law – Sexual Crimes – Definition of Consent and Repeal of Force

Families Advocating Intelligent Registries (FAIR) seeks rational, constitutional sexual offense laws and policies for persons accused and convicted of sexual offenses. FAIR agrees that a clear and reasonable definition of “consent” should be considered for Maryland’s criminal law. However, we have significant concerns with the definition of Consent proposed in this Bill.

Our primary concern is over the proposed penalty for the offense after removal of the element of force. Under current law, a conviction for 2nd degree rape requires a finding of “force, or threat of force” AND a lack of consent. The potential punishment for violation of Criminal Law Section 3-304(a)(1) is incarceration for up to 20 years. FAIR believes that removal of the “force” element is a critical change of existing law and that the legislature should consider the offense of engaging in a sexual act without consent (without force or threat of force) to be a separate and distinct offense with a lesser potential punishment. This would be consistent with laws in some other States where a sexual offense based on lack of consent alone carries with it a lower potential penalty than a sexual offense where both a lack of consent and force (or threat of force) are required to be established.¹

Second, we understand that some proponents believe that the bill is saved from imposing an “affirmative consent” standard because of its language that consent can be “inferred from words or conduct and is based on the totality of the circumstances.” The suggestion appears to be that to qualify as an “affirmative consent” law or policy, consistent verbal permission and response is required throughout the sexual interaction. We disagree. The bill’s language appears to have been taken largely from “affirmative consent” policies developed for use in U.S. colleges and universities. Although the language of SB758 may appear at first inspection to be straightforward, an independent analysis of affirmative consent policies in support of another state’s legislature points out:

“Affirmative consent is different from simple consent.... Affirmative consent policies mandate ongoing, affirmative consent prior to and during sexual activities. **Such affirmative consent can be expressed verbally or nonverbally.”**² (Emphasis added).

Therefore, the Bill is not saved from “affirmative consent” status because of the addition of proposed Criminal Law Statute 3-301.1(B)(1).

Finally, statutory language analogous to SB758 has been passed by some states, but largely as part of their Education Codes for use in university settings. Violation of these policies may commence a disciplinary action, but University disciplinary action is a far cry from incarceration potential of up to 20 years. In the context of a university policy,

all students would be made aware of the policy, and go through an orientation or training on how to communicate clearly, consistently, and effectively their consent throughout their sexual interactions. The reality in the context of a criminal law statute with potential penalty of up to 20 years in prison presents different and more pressing challenges.

For these reasons, FAIR asks the committee to vote no on SB758.

Sincerely,



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Families Advocating Intelligent Registries

¹ Minnesota – Sexual penetration with no force - Criminal Sexual Conduct in the Fifth Degree – punishable by up to 2 years in prison. Minn. Statute 609.3451, Subdivision 3. Sexual penetration with coercion or force/threat of force - Criminal Sexual Conduct in the Third Degree – punishable by up to 15 years in prison. Minn. Statute 609.344, Subdivision 1.

Wisconsin – Sexual intercourse with no force element - Third Degree Sexual Assault - punishable by up to 10 years in prison. Wisc. Statute 940.225(3)(a). Sexual intercourse with force or threat of force element - Second Degree Sexual Assault - punishable up to 40 years in prison. Wisc. Statute 940.225(2)(a).

² [The Vermont Legislative Research Service \(VLRS\) | Department of Political Science | The University of Vermont \(uvm.edu\)](#), “Affirmative Consent Policies at the Federal, State, and University Levels” (March 27, 2019). The UVM Vermont Legislative Research Service (or VLRS, formerly the Vermont Legislative Research Shop) is a university group, the purpose of which “is to provide objective and factual information to [Vermont] legislators as they deliberate on complex policy issues.”