



March 12, 2021

House Committee on the Judiciary
Vermont General Assembly
115 State Street
Montpelier, VT 05633-5301

Re: *H.183 – an act relating to sexual violence*

Dear House Committee on the Judiciary:

I write on behalf of MadFreedom to request that the House Committee on the Judiciary postpone a vote on H.183 and continue to accept testimony on the bill.

It was only just yesterday that legislative council introduced new language in the bill that was purportedly intended to address concerns raised by MadFreedom in its March 8, 2021 written testimony that expressed opposition to H.183.

As you may recall, MadFreedom opposed H. 183 (Draft 1.2, 2-25-2021) because it diminished the agency and dignity of people with psychiatric and developmental disabilities and was likely unconstitutional because it appeared to establish a threshold psychiatric and developmental impairment as the sole determinant of one's ability to consent to a sexual act.

H.183, Draft 1.2, 2-25-2021 provided as follows:

A person shall be deemed to have acted without consent of the other person where the actor:

(d) knew or reasonably should have known that the other person was mentally incapable of resisting or declining consent to the sexual act or lewd and lascivious conduct due to a psychiatric or developmental disability.

For purposes of H.183, "psychiatric disability" is defined as "an impairment of thought, mood, perception, orientation or memory that limits one of more major life activities but not include intellectual disability." (1 V.S.A. §147).

[POST OFFICE BOX 38 • POULTNEY, VT 05764-0038 • T: (802) 779-0570 • F: (802) 775-5284]

[INFO@MADFREEDOM.ORG • WWW.MADFREEDOM.ORG]

The new language, introduced publicly yesterday in H.183, Draft No. 2.3, now provides

A person shall be deemed to have acted without consent of the other person where the actor:

(d) knew or reasonably should have known that the other person was ~~mentally~~ incapable of ~~resisting or declining consent to~~ consenting to the sexual act or lewd and lascivious conduct due to a psychiatric or developmental disability.

The new language also included a definition of the phrase “incapable of consenting.” In H.183, Draft No. 2.3, “incapable of consenting,” means:

- (A) Incapable of appraising the nature of the conduct at issue; or
- (B) Physically incapable of declining participation in, or communicating unwillingness to engage in the sexual act at issue.

While MadFreedom appreciates the Committee’s attempt to address MadFreedom’s concerns, the proposed amendments do not succeed in doing so.

According to legislative council, the definition of “incapable of consenting” is borrowed from federal law, specifically Title 10 of the United States Code. Title 10 is the Military Justice Act, which was amended in 2016 and did not become effective until 2019. Although I have not conducted an exhaustive search, I was not able to find a single case decided under Title 10 that interpreted the meaning of “incapable of appraising the nature of the conduct at issue.” And even if I were to find such a case, I would question whether Vermont should be guided by jurisprudence decided under the Military Justice Act. By design, the military justice system is separate and different from the civilian justice system.

I was able to find case law from other jurisdictions that interpreted the meaning of the phrase “incapable of appraising the nature of the conduct at issue.”

In *People v. Easley*, 364 N.E.2d 1328 (1977), the New York Court of Appeals, which is New York’s highest court, interpreted a statute that deems someone “mentally defective” if he “suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct.” The court held that appraisal of conduct involves not merely understanding the physiological elements of sex, but includes understanding the “moral quality” of the conduct “in the framework of the societal environment and taboos to which a person will be exposed.” *Id.* at 1332.

The North Dakota Supreme Court in *State v. Mosbrucker* expressly rejected the New York test. Instead, it held a person with a psychiatric or developmental impairment can consent to sex if

they understand the “nature of the sexual act as well as its consequences such as pregnancy and sexually transmitted diseases but not the moral nature of their participating in the act of intercourse. (*State v. Mosbrucker*, 785 N.W. 2d 663 (ND; 2008).

The New Jersey Supreme Court also criticized *People v. Easley*, calling it an expansive view “which is arguably overly protective of mentally-handicapped persons.” The court was concerned that the requirement that a person be able to “appraise” sexual conduct would result in criminalizing consensual sexual activity. The New Jersey Supreme Court observed that the phrase “incapable of appraising” means the inability to understand the conduct as being either morally right or wrong.

Thus, in New Jersey, persons with developmental and psychiatric impairments are capable of consenting to sex if they are able to comprehend the distinctively sexual nature of the conduct and capable of understanding or exercising the right to refuse to engage in such conduct with another.

As you can see, states are not uniform in what one should be capable of understanding to consent legally to sex. This Committee has not engaged in any discussion of what a person should be capable of understanding to consent legally to sex. Therefore, MadFreedom believes it is premature to vote on the recently added amendment which will likely result in criminalizing consensual sex based on a label of psychiatric or developmental disability.

MadFreedom is a human and civil rights advocacy organization whose mission is to secure political power to end the discrimination and oppression of people based on their perceived mental state. MadFreedom envisions a world where every person has the freedom to live their life on their own terms without coercion and with equality under the law.

To realize our vision, we work to repeal laws that codify the second-class citizenship of people based on their perceived mental state. H.183, as written, is such a law. It perpetuates the stereotype that people labeled with psychiatric and developmental disabilities are all the same and are not entitled to agency and free will. This is an antiquated notion that must not be re-codified in Vermont law.

In explaining the amendments to H.183 legislative council said it was the State’s intention to update the language used in current law to refer to people with psychiatric and developmental disabilities to be more “respectful.” There is nothing disrespectful about the language in the current statute. What is disrespectful is not including people directly impacted by the law in discussions about its amendment and the law’s overly paternalistic treatment of people with psychiatric impairments.

Sexuality is an important aspect of the human experience. Sexual expression can help promote mental and physical health, and the needs associated with sexuality do not disappear just because a person has a psychiatric impairment.

What is of central importance in the regulation of sex is consent. Thus, the focus should be on whether one is incapable of consenting for any reason and the legal test should focus on whether one is incapable of consenting for any reason rather than the reason one is incapable of consenting.

In other words, why is it necessary to focus on the reason that one is incapable of consenting rather than on whether the defendant knew or should have known that the other person was incapable of comprehending the distinctively sexual nature of the conduct, incapable of understanding or exercising the right to refuse to engage in such conduct with another, and/or physically incapable of declining participation in, or communicating unwillingness to engage in the sexual act at issue for whatever reason?

MadFreedom urges the Committee to engage in more deliberation about H.183 and to hear from all the groups of people directly impacted by the bill, and not just those who purport to advocate on our behalf.

Thank you for your consideration.

Very truly yours,



Wilda L. White, JD, MBA
Founder