Recommended Revisions to H. 183 – February 26, 2021

The following recommended revisions were reached based on discussion between Domenica Padula, Chief, Criminal Division, Office of the Attorney General, David Scherr, Assistant Attorney General andCo-Chief, Community Justice Division, and State's Attorney Rory Thibault of Washington County.

Recommendation 1:

(See Pg. 2, Lines 9-10)

Modify Sec. 1. as follows: definition of "consent" should be changed to reflect "knowing or voluntary" in lieu of "knowing and voluntary."

This change will ensure the State bears the appropriate burden based on the context and charging theory of the case. Specifically, the express inclusion of definitions relating to persons who are unconscious or asleep, or those substantially impaired by alcohol/drugs, creates circumstances where either or both standards is contextually appropriate. The concepts of "knowing" and "voluntary" are closely related here, but there is concern that the court may increase the burden on the prosecution or that jurors could be confused by having to find both – particularly critical in a situation where an individual is aware of a sexual act being committed upon him or her, but unable to communicate voluntary agreement through words or actions. The State should have the ability to elect between a sexual assault being committed by either a lack of a "knowing" agreement or a "voluntary" agreement, but requiring both could raise the current burden.

Recommendation 2:

(See Pg. 2, Lines 12-14; Pg. 3, Lines 18-19)

Modify Sec. 1 and Sec. 2 to remove reference to individuals suffering from a psychiatric or developmental disability, or alternative, reconcile the definitions with 13 V.S.A. ch. 28. Specifically, striking the proposed 13 V.S.A. § 3251(10) & (11) definitions and the 13 V.S.A. § 3252(b)(2)(B) language.

Vermont already criminalizes sexual exploitation of vulnerable adults under 13 V.S.A. § 1379, either without consent or on the basis of the whether "the person knows or should know that the vulnerable adult is incapable of resisting, declining, or consenting to the sexual activity due to his or her specific vulnerability or due to fear of retribution or hardship."

13 V.S.A. § 1375(8) defines "vulnerable adult" as any person 18 years of age or older who:

> (A) is a resident of a facility required to be licensed under 33 V.S.A. chapter 71;

(B) is a resident of a psychiatric hospital or a psychiatric unit of a hospital;

(C) has been receiving personal care and services from an agency certified by the Vermont Department of Disabilities, Aging and Independent Living or from a person or organization that offers, provides, or arranges for personal care; or

(D) regardless of residence or whether any type of service is received, is impaired due to brain damage, infirmities of aging, or a physical, mental, or developmental disability that results in some impairment of the individual's ability to:

(i) provide for his or her own care without assistance, including the provision of food, shelter, clothing, health care, supervision, or management of finances; or

(ii) protect himself or herself from abuse, neglect, or exploitation.

As Vermont already has an appropriate statute to address this type of offense, inclusion in the sexual assault statute, with slightly varied definitions and charge language, may create conflict in the law and is, ultimately, unnecessary. In contrast, the analogous federal law does not have a corresponding exploitation of vulnerable adult statute that captures the same conduct. Accordingly, the primary recommendation is to eliminate this portion of H. 183 based on the ability to charge this offense behavior under existing statute.

Recommendation 3:

(See pg. 3, Lines 16-17)

Modify Sec. 2 to add the term "substantial" to the proposed 13 V.S.A. § 3252(b)(2)(A), to wit:

(A) Substantial impairment by alcohol, drugs, or other intoxicants and that condition is known or reasonably should be known by the person; or

This a higher standard than in (b)(1) where the person administers a drug or intoxicant to a victim without knowledge or consent – "impairment" versus "substantial impairment."

Further, the legislature should consider defining the term "incapable of consenting" under 13 V.S.A. § 3251, for example:

A person is "incapable of consenting" when (he/she/they) lacks the cognitive ability to appreciate the sexual conduct in

question or the physical or mental ability to make or to communicate a decision about whether (he/she/they) agrees to the conduct.

To be able to freely make an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question and then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person. However, if the person has the ability to appreciate the conduct and communicate lack of consent, but does not do so out of fear or because of some other external influence counteracting voluntariness, the sexual conduct is not voluntary.

This definition will ensure clarity that "drunk sex" is not illegal, and set forth a clear standard for when substantial impairment by drugs, alcohol or intoxicant rises to the level of an individual becoming incapable of consenting.

Recommendation 4:

(See Pg. 4, Lines 17-19)

Modify Sec. 3 to substitute a generic reference to Vermont's rape shield statute (13 V.S.A. § 3255) in the proposed 13 V.S.A. § 3254(4) in lieu of the specific proposed language, for example:

(4) Consent may not be demonstrated by evidence prohibited under 13 V.S.A. § 3255;

Extant case law precludes use of the evidence referenced, however, if the legislature seeks to specifically incorporate such standard into statute it should be included directly within the "rape shield" statute. This will ensure the prohibited/excluded evidence is listed and maintained in one location and that a conflict is not created between the two statutory sections.

Recommendation 5:

Modify Sec. 5 to include additional personnel on the Intercollegiate Sexual Violence Prevention Council, specifically a Sexual Assault Nurse Examiner (SANE) and a prosecutor from the Office of the Attorney General or the Department of State's Attorneys and Sheriffs.