



**Memo Re: H. 183**  
**Senate Judiciary Committee**  
**Sarah Robinson, Deputy Director**  
**April 29<sup>th</sup>, 2020**

Thank you for your ongoing consideration of H. 183. The purpose of this bill is to modernize the consent statute and to ensure that cases involving sexual assault, where an individual is unable to consent due to significant impairment or other factors, can be adequately addressed through the criminal justice system.

We are supportive of the latest draft of the bill which removes the language that consent should be considered in the context of the “totality of the circumstances”, subject to the Rape Shield statute and other prohibitions. As we have previously stated in testimony, the Rape Shield statute provides some – but imperfect – protection from the use of information that blames victims for their assaults. Examples of this sort of information may include manner of dress, prior sexual behavior and previous reports of sexual assault by the victim.

To bring a charge and then prove it, law enforcement must already consider all relevant circumstances. What constitutes relevancy has been established by statute, rule, and case law. We are concerned that allowing all circumstances to be considered will include those which are irrelevant, as well as include those that may conflict with existing statutes, rules, and case law. Considering the totality of the circumstances may make it easier to overcome the statutory presumption against introducing evidence of a victim’s prior sexual conduct in the Rape Shield statute (13 VSA § 3255(a)(3)). It may also serve to put more weight than it ought to on a victim’s prior consent, which might subsequently be revoked. Allowing the totality of the circumstances to be considered also poses a risk of raising the prosecution’s burden beyond the current standard.

In our initial survey of other states’ consent laws, we could not find any example of state consent or sexual assault statutes which include reference to applying consideration of the “totality of the circumstances” to establish whether a victim consented.

For these reasons we oppose adding the “totality of circumstances” and would appreciate your support.