

COMMITTEE SUBSTITUTE

FOR

**H. B. 4060**

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(BY DELEGATES PERRY, SKAFF, MORGAN AND ELLEM)

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(Originated in the Committee on the Judiciary)  
[January 26, 2012]

A BILL to amend and reenact §61-8B-2 and §61-8B-10 of the Code of West Virginia, 1931, as amended, all relating to prohibiting state and local jail, correctional, probation and parole employees or contractors from engaging in sexual acts with persons who are incarcerated, on probation or parole; prohibiting sexual contact; removing consent of victim as a defense for criminal acts; and establishing criminal penalties.

*Be it enacted by the Legislature of West Virginia:*

That §61-8B-2 and §61-8B-10 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

**ARTICLE 8B. SEXUAL OFFENSES.**

**§61-8B-2. Lack of consent.**

1 (a) Whether or not specifically stated, it is an element of  
2 every offense defined in this article that the sexual act was  
3 committed without the consent of the victim.

4 (b) Lack of consent results from:

5 (1) Forcible compulsion; ~~or~~

6 (2) Incapacity to consent; or

7 (3) If the offense charged is sexual abuse, any  
8 circumstances in addition to the forcible compulsion or  
9 incapacity to consent in which the victim does not expressly  
10 or impliedly acquiesce in the actor's conduct.

11 (c) A person is deemed incapable of consent when such  
12 person is:

13 (1) Less than sixteen years old; ~~or~~

14 (2) Mentally defective; ~~or~~

15 (3) Mentally incapacitated; ~~or~~

16 (4) Physically helpless; or

17 (5) Subject to confinement or supervision by a state or  
18 local government entity when the actor is a person prohibited  
19 from engaging in sexual intercourse, sexual intrusion or  
20 sexual contact pursuant to subsections (a) or (b) of section  
21 ten of this article.

**§61-8B-10. Imposition of sexual acts on persons incarcerated or under supervision; penalties.**

1 (a) Any person employed by the Division of Corrections,  
2 any person working at a correctional facility managed by the  
3 Commissioner of Corrections pursuant to contract or as an  
4 employee of a state agency, any person working at a  
5 correctional facility managed by the Division of Juvenile  
6 Services pursuant to contract or as an employee of a state  
7 agency, any person employed by a jail or by the Regional Jail  
8 and Correctional Facility Authority, any person working at  
9 a facility managed by the Regional Jail and Correctional  
10 Facility Authority or a jail or any person employed by, or  
11 acting pursuant to, the authority of any sheriff, county  
12 commission or court to ensure compliance with the

13 provisions of article eleven-b, chapter sixty-two of this code  
14 who engages in sexual intercourse, ~~or~~ sexual intrusion or  
15 sexual contact with a person who is incarcerated in this state  
16 is guilty of a felony and, upon conviction thereof, shall be  
17 confined in a state correctional facility under the control of  
18 the Commissioner of Corrections for not less than one nor  
19 more than five years or fined not more than \$5,000.

20 (b) Any person employed by the Division of Corrections  
21 as a parole officer or by the West Virginia Supreme Court of  
22 Appeals as an adult or juvenile probation officer who  
23 engages in sexual intercourse, ~~or~~ sexual intrusion or sexual  
24 contact with a person said parole officer or probation officer  
25 is charged as part of his or her employment with supervising,  
26 is guilty of a felony and, upon conviction thereof, shall be  
27 confined in a state correctional facility under the control of  
28 the Commissioner of Corrections for not less than one nor  
29 more than five years or fined not more than \$5,000, or both.

30 (c) The term “incarcerated in this state” for purposes of  
31 this section includes in addition to its usual meaning,

32 offenders serving a sentence under the provisions of article  
33 eleven-b, chapter sixty-two of this code.

34 (d) An authorized pat-down, strip search or other security  
35 related task does not constitute sexual contact pursuant to this  
36 section.