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OFFICE OF  
SECRETARY OF STATE  
STATE OF WEST VIRGINIA

**WEST VIRGINIA LEGISLATURE**  
**REGULAR SESSION, 1976**



**ENROLLED**  
*Committee Substitute for*  
**SENATE BILL NO. 154**

(By ~~Mr~~ *Miss Hernston, et al*)



PASSED *March 11,* 1976

In Effect *ninety days from* Passage

FILED IN THE OFFICE OF  
SECRETARY OF STATE OF  
WEST VIRGINIA

THIS DATE 3/29/76

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**ENROLLED**  
COMMITTEE SUBSTITUTE  
FOR

**Senate Bill No. 154**

(MISS HERNDON, MR. DARBY and MR. NEELEY, *original sponsors*)

[Passed March 11, 1976; in effect ninety days from passage.]

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AN ACT to repeal sections fifteen and fifteen-a, article two, chapter sixty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to repeal sections thirteen, twenty-eight and twenty-nine, article eight of said chapter sixty-one; to repeal section seven, article nine, chapter sixty-two of said code; and to further amend said chapter sixty-one by adding thereto a new article, designated article eight-b, relating to sexual assault and sexual offenses; defining terms; lack of consent; various degrees of sexual assault; degrees of sexual abuse; sexual misconduct; public indecency; evidence and defenses; and providing criminal penalties for violations.

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

That sections fifteen and fifteen-a, article two, chapter sixty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; that sections thirteen, twenty-eight and twenty-nine, article eight of said chapter sixty-one be repealed; that section seven, article nine, chapter sixty-two of said code be repealed; and that said chapter sixty-one be amended by adding thereto a new article, designated article eight-b, to read as follows:

**ARTICLE 8B. SEXUAL OFFENSES.**

**§61-8B-1. Definition of terms.**

- 1 In this article, unless a different meaning plainly is
- 2 required:

3 (1) "Forcible compulsion" means:

4 (a) Physical force that overcomes such earnest resis-  
5 tance as might reasonably be expected under the cir-  
6 cumstances; or

7 (b) Threat or intimidation, expressed or implied, plac-  
8 ing a person in fear of immediate death or bodily injury  
9 to himself or another person or in fear that he or another  
10 person will be kidnapped.

11 For the purposes of this definition "resistance" includes  
12 physical resistance or any clear communication of the  
13 victim's lack of consent.

14 (2) "Marriage," for the purposes of this article in addi-  
15 tion to its legal meaning, includes persons living together  
16 as man and wife regardless of the legal status of their  
17 relationship.

18 (3) "Mentally defective" means that a person suffers  
19 from a mental disease or defect which renders him in-  
20 capable of appraising the nature of his conduct.

21 (4) "Mentally incapacitated" means that a person is  
22 rendered temporarily incapable of appraising or control-  
23 ling his conduct as a result of the influence of a controlled  
24 or intoxicating substance administered to him without  
25 his consent or as a result of any other act committed  
26 upon him without his consent.

27 (5) "Physically helpless" means that a person is un-  
28 conscious or for any other reason is physically unable to  
29 communicate unwillingness to an act.

30 (6) "Sexual contact" means any touching of the anus or  
31 any part of the sex organs of another person, or the breasts  
32 of a female eleven years old or older, where the victim is  
33 not married to the actor and the touching is done for the  
34 purpose of gratifying the sexual desire of either party.

35 (7) "Sexual intercourse" means any act between per-  
36 sons not married to each other involving penetration,  
37 however slight, of the female sex organ by the male  
38 sex organ or involving contact between the sex organs  
39 of one person and the mouth or anus of another person.

40 (8) "Bodily injury" means substantial physical pain,  
41 illness or any impairment of physical condition.

42 (9) "Serious bodily injury" means bodily injury which  
43 creates a substantial risk of death, which causes serious  
44 and prolonged disfigurement, prolonged impairment of  
45 health, or prolonged loss or impairment of the function of  
46 any bodily organ.

47 (10) "He" includes any human being.

48 (11) "Deadly weapon" means any instrument, device,  
49 or thing capable of inflicting death or serious bodily injury,  
50 and designed or specially adapted for use as a weapon,  
51 or possessed, carried, or used as a weapon.

**§61-8B-2. Lack of consent.**

1 (a) Whether or not specifically stated, it is an element  
2 of every offense defined in this article that the sexual act  
3 was committed without 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 cir-  
8 cumstances in addition to the forcible compulsion or  
9 incapacity to consent in which the victim does not express-  
10 ly or impliedly acquiesce in the actor's conduct.

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

13 (1) Less than sixteen years old; or

14 (2) Mentally defective; or

15 (3) Mentally incapacitated; or

16 (4) Physically helpless.

**§61-8B-3. Sexual assault in the first degree.**

1 (a) A person is guilty of sexual assault in the first  
2 degree when:

3 (1) He engages in sexual intercourse with another per-  
4 son by forcible compulsion; and:

5 (i) He inflicts serious bodily injury upon anyone; or

6 (ii) He employed a deadly weapon in commission of the  
7 crime; or

8 (iii) The victim was not a voluntary social companion of  
9 the actor on the occasion of the crime; or

10 (2) He engages in sexual intercourse with another  
11 person who is incapable of consent because he is physically  
12 helpless; or

13 (3) He, being fourteen years old or more, engages in  
14 sexual intercourse with another person who is incapable  
15 of consent because he is less than eleven years old.

16 (b) Any person who violates the provisions of this  
17 section shall be guilty of a felony, and, upon conviction  
18 thereof shall be imprisoned not less than ten nor more  
19 than twenty years, or fined not more than ten thousand  
20 dollars and imprisoned in the penitentiary not less than  
21 ten nor more than twenty years.

**§61-8B-4. Sexual assault in the second degree.**

1 (a) A person is guilty of sexual assault in the second  
2 degree when:

3 (1) He engages in sexual intercourse with another  
4 person by forcible compulsion; or

5 (2) By forcible compulsion, he causes penetration,  
6 however slight, of the female sex organ or of the anus  
7 of any person, by any inanimate object for the purpose  
8 of gratifying the sexual desire of either party.

9 (b) Any person who violates the provisions of this  
10 section shall be guilty of a felony, and, upon conviction  
11 thereof, shall be imprisoned in the penitentiary not less  
12 than five nor more than ten years, or fined not more than  
13 ten thousand dollars and imprisoned in the penitentiary  
14 not less than five nor more than ten years.

**§61-8B-5. Sexual assault in the third degree.**

1 (a) A person is guilty of sexual assault in the third  
2 degree when:

3 (1) He engages in sexual intercourse with another per-  
4 son who is incapable of consent because he is mentally  
5 defective or mentally incapacitated; or

6 (2) Being sixteen years old or more, he engages in  
7 sexual intercourse with another person who:

8 (i) Is incapable of consent because he is less than six-  
9 teen years old; and

10 (ii) Is at least four years younger than the defendant.

11 (b) Any person who violates the provisions of this  
12 section shall be guilty of a felony, and, upon conviction  
13 thereof, shall be imprisoned in the penitentiary not less  
14 than one year nor more than five years, or fined not  
15 more than ten thousand dollars and imprisoned in the  
16 penitentiary not less than one year nor more than five  
17 years.

**§61-8B-6. Sexual abuse in the first degree.**

1 (a) A person is guilty of sexual abuse in the first de-  
2 gree when:

3 (1) He subjects another person to sexual contact by  
4 forcible compulsion; or

5 (2) He subjects another person to sexual contact who  
6 is incapable of consent because he is physically helpless;  
7 or

8 (3) He, being fourteen years old or more, subjects  
9 another person to sexual contact who is incapable of con-  
10 sent because he is less than eleven years old.

11 (b) Any person who violates the provisions of this  
12 section shall be guilty of a felony, and, upon conviction  
13 thereof, shall be imprisoned in the penitentiary not less  
14 than one year nor more than five years, or fined not more  
15 than ten thousand dollars and imprisoned in the peniten-  
16 tiary not less than one year nor more than five years.

**§61-8B-7. Sexual abuse in the second degree.**

1 (a) A person is guilty of sexual abuse in the second  
2 degree when he subjects another person to sexual contact  
3 who is incapable of consent because he is mentally de-  
4 fective or mentally incapacitated.

5 (b) Any person who violates the provisions of this  
6 section shall be guilty of a misdemeanor, and, upon con-  
7 viction thereof, shall be confined in the county jail not  
8 more than twelve months, or fined not more than five  
9 hundred dollars and confined in the county jail not more  
10 than twelve months.

**§61-8B-8. Sexual abuse in the third degree.**

1 (a) A person is guilty of sexual abuse in the third  
2 degree when he subjects another person to sexual contact

3 without the latter's consent, when such lack of consent  
4 is due to the victim's incapacity to consent by reason  
5 of being less than sixteen years.

6 (b) In any prosecution under this section it is a de-  
7 fense that:

8 (1) The defendant was less than sixteen years old; or

9 (2) The defendant was less than four years older than  
10 the victim.

11 (c) Any person who violates the provisions of this  
12 section shall be guilty of a misdemeanor, and, upon con-  
13 viction thereof, shall be confined in the county jail not  
14 more than ninety days, or fined not more than five hun-  
15 dred dollars and confined in the county jail not more  
16 than ninety days.

**§61-8B-9. Sexual misconduct.**

1 (a) A person is guilty of sexual misconduct when he  
2 engages in sexual intercourse with another person with-  
3 out the latter's consent or engages in sexual intercourse  
4 with another person knowing that such other person  
5 mistakenly supposes that he is a third person.

6 (b) Any person who violates the provisions of this  
7 section shall be guilty of a misdemeanor, and, upon con-  
8 viction thereof, shall be confined in the county jail not  
9 more than twelve months, or fined not more than five  
10 hundred dollars and confined in the county jail not more  
11 than twelve months.

**§61-8B-10. Indecent exposure.**

1 (a) A person is guilty of indecent exposure when he  
2 intentionally exposes his sex organs or anus under cir-  
3 cumstances in which he knows his conduct is likely to  
4 cause affront or alarm.

5 (b) Any person who violates the provisions of this  
6 section shall be guilty of a misdemeanor, and, upon con-  
7 viction thereof, shall be confined in the county jail not  
8 more than ninety days, or fined not more than two hun-  
9 dred fifty dollars and confined in the county jail not more  
10 than ninety days.

**§61-8B-11. Public indecency.**

1 (a) A person is guilty of public indecency when, know-  
2 ing his conduct is likely to be observed by others who  
3 would be affronted or alarmed:

4 (1) He engages in any overt act of sexual gratification;  
5 or

6 (2) He intentionally exposes the private or intimate  
7 parts of his body or the body of another person.

8 (b) Any person who violates the provisions of this  
9 section shall be guilty of a misdemeanor, and, upon con-  
10 viction thereof, shall be fined not more than two hundred  
11 fifty dollars.

**§61-8B-12. Sexual offenses—Evidence.**

1 (a) In any prosecution under this article in which the  
2 victim's lack of consent is based solely on his incapacity to  
3 consent because he was below a critical age, evidence of  
4 specific instances of the victim's sexual conduct, opinion  
5 evidence of the victim's sexual conduct and reputation  
6 evidence of the victim's sexual conduct shall not be ad-  
7 missible. In any other prosecution under this article,  
8 evidence of specific instances of the victim's prior sexual  
9 conduct with the defendant shall be admissible on the  
10 issue of consent: *Provided*, That such evidence heard first  
11 out of the presence of the jury is found by the judge to  
12 be relevant.

13 (b) In any prosecution under this article evidence of  
14 specific instances of the victim's sexual conduct with  
15 persons other than the defendant, opinion evidence of the  
16 victim's sexual conduct and reputation evidence of the  
17 victim's sexual conduct shall not be admissible: *Provided*,  
18 That such evidence shall be admissible solely for the  
19 purpose of impeaching credibility, if the victim first  
20 makes his previous sexual conduct an issue in the trial  
21 by introducing evidence with respect thereto.

**§61-8B-13. Sexual offenses—A defense.**

1 (a) In any prosecution under this article in which the  
2 victim's lack of consent is based solely on his incapacity  
3 to consent because he was below a critical age, mentally  
4 defective, mentally incapacitated or physically helpless,  
5 it is an affirmative defense that the defendant at the time

6 he engaged in the conduct constituting the offense did  
7 not know of the facts or conditions responsible for such  
8 incapacity to consent, unless the defendant is reckless in  
9 failing to know such facts or conditions.  
10 (b) The affirmative defense provided in subsection (a)  
11 of this section shall not be available in any prosecution  
12 under subsection (a) (3), section three and under sub-  
13 section (a) (3), section six of this article.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

James L. Davis  
Chairman Senate Committee

Clarence L. Christensen, Jr.  
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Jo Seccor, Jr.  
Clerk of the Senate

Carl Blankenship  
Clerk of the House

W. J. E. [Signature]  
President of the Senate

Lewis F. McManus  
Speaker House of Delegates

The within approved this the 26th  
day of March, 1976

Arva Prange, Jr.  
Governor



PRESENTED TO THE  
GOVERNOR

Date 3/22/76

Time 11:40a.m.