



House Committee on Corrections and Juvenile Justice
February 19, 2024
House Bill 2370
Testimony of the BIDS Legislative Committee
Presented by Jennifer Roth
Opponent

Chairman Owens and Members of the Committee:

We appreciate that people would like more guidance about what consent looks like to distinguish healthy sexual interactions from criminal ones. We don't know if that is the goal of HB 2370, but if it is, HB 2370 would create confusion and ambiguity rather than resolve it.

And the stakes are extremely high: for example, the proposed definitions impact the crimes of rape and aggravated criminal sodomy, which are severity level 1 felonies (the same as second-degree intentional murder) that require lifetime postrelease supervision and lifetime registration after a lengthy prison sentence.

If the goal of HB 2370 is to make it easier to prosecute sex offenses, this language would not do that, either. Adding in definitions like these takes away both the accused's and the prosecution's ability to argue the circumstances and context of what happened. For example, our appellate courts have refused to define or limit "fear" as used in the rape statute, finding it "an inherently subjective concept" because "what renders one person immobilized by fear may not frighten another at all." *State v. Brooks*, 298 Kan. 672, 688 (2014).

For these reasons and others, the BIDS Legislative Committee opposes this bill.

More Questions than Answers

While the proposed statutory definition of consent is likely meant to provide clarity, it raises more questions than it provides answers.

- What are overt actions? Is it an overt action to engage in sexual activity without verbally or physically resisting?
- What is a specific sexual activity? How many times during sexual activity must consent be given?
- What does it mean to withdraw consent? Does "withdrawal of consent" require words or overt acts by an individual indicating revocation of a previously freely given agreement to engage in specific sexual activity, just as consent does?

- What is the difference between not physically resisting resulting from the use or threat of force [*see proposed (2)(A)*] and submission [*see proposed (2)(B)*]?
- What is submission? Does it result from any conduct by the accused of the sex crime?

These are just some of the questions that the language of HB 2370 raises. Furthermore, this language does not appear to be popular. We found a 50-state survey of consent laws here ([RAINN | Rape, Abuse and Incest National Network](#)); a quick review showed that the District of Columbia, Minnesota, and Montana use language closest to that in HB 2370, with a handful of other states having “freely given” or similar language (*exs.* CA, FL, IL, NH, OK, and VT).

Serious Sex Offenses are Already Strict Liability Offenses

The Kansas rape, aggravated criminal sodomy, and sexual battery statutes do not require that the accused knows that sexual activity is happening without consent. In fact, it is not a defense to those offenses that the accused had no knowledge or even reason to know that the sexual activity was non-consensual. Rape is essentially a strict liability crime. *State v. Thomas*, 313 Kan. 660, 663–64 (2021). Because the language in the other two statutes is the same, arguably they are also strict liability offenses.

Consequently, a jury does not have to find that the accused knew that the sexual activity was non-consensual. But if a statutory definition of consent is adopted, then a jury should have to find that the accused knew or should have known, based on the absence of words or overt acts, that the person was not consenting. If this Committee adopts a statutory definition of consent, then it should strike the “it shall not be a defense” language from K.S.A. 21-5503(e) (rape), K.S.A. 21-5504(f) (aggravated criminal sodomy), and K.S.A. 21-5505(d) (sexual battery, aggravated sexual battery).

I plan to elaborate on these points at the bill hearing. Thank you for your time and consideration.

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