

## HB0078S01 compared with HB0078

~~{deleted text}~~ shows text that was in HB0078 but was deleted in HB0078S01.

inserted text shows text that was not in HB0078 but was inserted into HB0078S01.

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Representative Angela Romero proposes the following substitute bill:

### CONSENT AMENDMENTS

2021 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Angela Romero**

Senate Sponsor: \_\_\_\_\_

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#### LONG TITLE

##### General Description:

This bill creates the offense of sexual conduct without affirmative consent.

##### Highlighted Provisions:

This bill:

- ▶ creates a third degree felony offense of sexual conduct without affirmative consent;
- and
- ▶ amends the Sex and Kidnap Offender Registry to include the offense of sexual conduct without affirmative consent.

##### Money Appropriated in this Bill:

None

##### Other Special Clauses:

~~{None}~~ None

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### Utah Code Sections Affected:

#### AMENDS:

77-41-102, as last amended by Laws of Utah 2020, Chapter 108

#### ENACTS:

76-5-406.1, Utah Code Annotated 1953

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*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section 76-5-406.1 is enacted to read:

**76-5-406.1. Sexual conduct without affirmative consent.**

(1) As used in this section:

(a) "Affirmative consent" means words or ~~overt~~ actions by an individual who is competent to give informed consent indicating a freely given agreement to have sexual conduct at the time of the act.

(b) "Sexual conduct" means:

(i) engaging in sexual intercourse with another individual;

(ii) causing the penetration, however slight, of the genital or anal opening of another individual who is 14 years old or older, by any foreign object, substance, instrument, or device, including a part of the human body other than the mouth or genitals, with intent to cause substantial emotional or bodily pain to the victim or with the intent to arouse or gratify the sexual desire of any individual; or

(iii) engaging in any sexual act with an individual who is 14 years old or older involving the genitals of one individual and the mouth or anus of another individual, regardless of the sex of either participant.

(2) Except as provided in Subsection (3), an individual commits sexual conduct without affirmative consent if the individual intentionally ~~is~~ or knowingly ~~is~~, or recklessly ~~is~~ engages in sexual conduct with another individual without that other individual's affirmative consent.

(3) This section does not apply if, for the same conduct, the individual is guilty of a violation of another provision of this part that is punishable by a higher penalty.

(4) Affirmative consent to one sexual act, or prior consensual sexual activity between or with any individual, does not necessarily constitute affirmative consent to another sexual act.

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(5) Affirmative consent initially given may be withdrawn through words or conduct at any time before or during sexual activity.

(6) A violation of Subsection (2) is a third degree felony, unless committed by an individual under 18 years old, in which case it is a class A misdemeanor.

(7) Nothing in this section alters the requirement in Utah law that the prosecution will bear the burden of proof on all elements of this offense, as provided in Subsection 76-1-501(2).

Section 2. Section **77-41-102** is amended to read:

### **77-41-102. Definitions.**

As used in this chapter:

(1) "Bureau" means the Bureau of Criminal Identification of the Department of Public Safety established in section 53-10-201.

(2) "Business day" means a day on which state offices are open for regular business.

(3) "Certificate of eligibility" means a document issued by the Bureau of Criminal Identification showing that the offender has met the requirements of Section 77-41-112.

(4) "Department" means the Department of Corrections.

(5) "Division" means the Division of Juvenile Justice Services.

(6) "Employed" or "carries on a vocation" includes employment that is full time or part time, whether financially compensated, volunteered, or for the purpose of government or educational benefit.

(7) "Indian Country" means:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, regardless of the issuance of any patent, and includes rights-of-way running through the reservation;

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory, and whether or not within the limits of a state; and

(c) all Indian allotments, including the Indian allotments to which the Indian titles have not been extinguished, including rights-of-way running through the allotments.

(8) "Jurisdiction" means any state, Indian Country, United States Territory, or any property under the jurisdiction of the United States military, Canada, the United Kingdom, Australia, or New Zealand.

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(9) "Kidnap offender" means any individual other than a natural parent of the victim who:

(a) has been convicted in this state of a violation of:

(i) Subsection 76-5-301(1)(c) or (d), kidnapping;

(ii) Section 76-5-301.1, child kidnapping;

(iii) Section 76-5-302, aggravated kidnapping;

(iv) Section 76-5-308, human trafficking for labor and human smuggling;

(v) Section 76-5-308, human smuggling, when the individual smuggled is under 18 years of age;

(vi) Section 76-5-308.5, human trafficking of a child for labor;

(vii) Section 76-5-310, aggravated human trafficking and aggravated human smuggling, on or after May 10, 2011;

(viii) Section 76-5-311, human trafficking of a vulnerable adult for labor; or

(ix) attempting, soliciting, or conspiring to commit any felony offense listed in Subsections (9)(a)(i) through (iii);

(b) has been convicted of any crime, or an attempt, solicitation, or conspiracy to commit a crime in another jurisdiction, including any state, federal, or military court that is substantially equivalent to the offenses listed in Subsection (9)(a) and who is:

(i) a Utah resident; or

(ii) not a Utah resident, but who, in any 12-month period, is in this state for a total of 10 or more days, regardless of whether or not the offender intends to permanently reside in this state;

(c) (i) is required to register as a kidnap offender in any other jurisdiction of original conviction, who is required to register as a kidnap offender by any state, federal, or military court, or who would be required to register as a kidnap offender if residing in the jurisdiction of the conviction regardless of the date of the conviction or any previous registration requirements; and

(ii) in any 12-month period, is in this state for a total of 10 or more days, regardless of whether or not the offender intends to permanently reside in this state;

(d) is a nonresident regularly employed or working in this state, or who is a student in this state, and was convicted of one or more offenses listed in Subsection (9), or any

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substantially equivalent offense in another jurisdiction, or as a result of the conviction, is required to register in the individual's state of residence;

(e) is found not guilty by reason of insanity in this state or in any other jurisdiction of one or more offenses listed in Subsection (9); or

(f) is adjudicated delinquent based on one or more offenses listed in Subsection (9)(a) and who has been committed to the division for secure confinement for that offense and remains in the division's custody 30 days prior to the individual's 21st birthday.

(10) "Natural parent" means a minor's biological or adoptive parent, and includes the minor's noncustodial parent.

(11) "Offender" means a kidnap offender as defined in Subsection (9) or a sex offender as defined in Subsection (17).

(12) "Online identifier" or "Internet identifier":

(a) means any electronic mail, chat, instant messenger, social networking, or similar name used for Internet communication; and

(b) does not include date of birth, social security number, PIN number, or Internet passwords.

(13) "Primary residence" means the location where the offender regularly resides, even if the offender intends to move to another location or return to another location at any future date.

(14) "Register" means to comply with the requirements of this chapter and administrative rules of the department made under this chapter.

(15) "Registration website" means the Sex and Kidnap Offender Notification and Registration website described in Section 77-41-110 and the information on the website.

(16) "Secondary residence" means any real property that the offender owns or has a financial interest in, or any location where, in any 12-month period, the offender stays overnight a total of 10 or more nights when not staying at the offender's primary residence.

(17) "Sex offender" means any individual:

(a) convicted in this state of:

(i) a felony or class A misdemeanor violation of Section 76-4-401, enticing a minor;

(ii) Section 76-5b-202, sexual exploitation of a vulnerable adult, on or after May 10, 2011;

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- (iii) Section 76-5-308, human trafficking for sexual exploitation;
- (iv) Section 76-5-308.5, human trafficking of a child for sexual exploitation;
- (v) Section 76-5-310, aggravated human trafficking for sexual exploitation;
- (vi) Section 76-5-311, human trafficking of a vulnerable adult for sexual exploitation;
- (vii) Section 76-5-401, unlawful sexual activity with a minor, except as provided in Subsection 76-5-401(3)(b) or (c);
- (viii) Section 76-5-401.1, sexual abuse of a minor, except as provided in Subsection 76-5-401.1(3);
- (ix) Section 76-5-401.2, unlawful sexual conduct with a 16 or 17 year old;
- (x) Section 76-5-402, rape;
- (xi) Section 76-5-402.1, rape of a child;
- (xii) Section 76-5-402.2, object rape;
- (xiii) Section 76-5-402.3, object rape of a child;
- (xiv) a felony violation of Section 76-5-403, forcible sodomy;
- (xv) Section 76-5-403.1, sodomy on a child;
- (xvi) Section 76-5-404, forcible sexual abuse;
- (xvii) Section 76-5-404.1, sexual abuse of a child or aggravated sexual abuse of a child;
- (xviii) Section 76-5-405, aggravated sexual assault;
- (xix) Section 76-5-412, custodial sexual relations, when the individual in custody is younger than 18 years of age, if the offense is committed on or after May 10, 2011;
- (xx) Section 76-5b-201, sexual exploitation of a minor;
- (xxi) Section 76-5b-204, sexual extortion or aggravated sexual extortion;
- (xxii) Section 76-7-102, incest;
- (xxiii) Section 76-9-702, lewdness, if the individual has been convicted of the offense four or more times;
- (xxiv) Section 76-9-702.1, sexual battery, if the individual has been convicted of the offense four or more times;
- (xxv) any combination of convictions of Section 76-9-702, lewdness, and of Section 76-9-702.1, sexual battery, that total four or more convictions;
- (xxvi) Section 76-9-702.5, lewdness involving a child;

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(xxvii) a felony or class A misdemeanor violation of Section 76-9-702.7, voyeurism;

(xxviii) Section 76-10-1306, aggravated exploitation of prostitution; [or]

(xxix) Section 76-5-406.1, sexual conduct without affirmative consent:

(A) if the individual has previously been convicted within the 10 years preceding the offense of the same offense or another offense described in Subsection (9) or in this Subsection (17); or

(B) on a first conviction upon written agreement entered into between the prosecution and the defendant and approved by the court; or

~~[(xxix)]~~ (xxx) attempting, soliciting, or conspiring to commit any felony offense listed in this Subsection (17)(a);

(b) who has been convicted of any crime, or an attempt, solicitation, or conspiracy to commit a crime in another jurisdiction, including any state, federal, or military court that is substantially equivalent to the offenses listed in Subsection (17)(a) and who is:

(i) a Utah resident; or

(ii) not a Utah resident, but who, in any 12-month period, is in this state for a total of 10 or more days, regardless of whether the offender intends to permanently reside in this state;

(c) (i) who is required to register as a sex offender in any other jurisdiction of original conviction, who is required to register as a sex offender by any state, federal, or military court, or who would be required to register as a sex offender if residing in the jurisdiction of the original conviction regardless of the date of the conviction or any previous registration requirements; and

(ii) who, in any 12-month period, is in the state for a total of 10 or more days, regardless of whether or not the offender intends to permanently reside in this state;

(d) who is a nonresident regularly employed or working in this state or who is a student in this state and was convicted of one or more offenses listed in Subsection (17)(a), or any substantially equivalent offense in any jurisdiction, or as a result of the conviction, is required to register in the individual's jurisdiction of residence;

(e) who is found not guilty by reason of insanity in this state, or in any other jurisdiction of one or more offenses listed in Subsection (17)(a); or

(f) who is adjudicated delinquent based on one or more offenses listed in Subsection (17)(a) and who has been committed to the division for secure confinement for that offense and

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remains in the division's custody 30 days prior to the individual's 21st birthday.

(18) "Traffic offense" does not include a violation of Title 41, Chapter 6a, Part 5, Driving Under the Influence and Reckless Driving.

(19) "Vehicle" means any motor vehicle, aircraft, or watercraft subject to registration in any jurisdiction.