

# Senate Bill 566

Sponsored by Senator GELSER; Senator PATTERSON (Pre-session filed.)

## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Removes term "mentally defective" from statutes defining sexual offenses. Provides that person is incapable of consenting to sexual act if person is incapable of appraising nature of person's conduct. Directs trier of fact to consider certain criteria when determining whether victim had capability of appraising nature of victim's conduct.

Declares emergency, effective on passage.

## A BILL FOR AN ACT

1  
2 Relating to consent; creating new provisions; amending ORS 137.765, 144.635, 163.305, 163.315,  
3 163.325, 163.375, 163.405, 163.411 and 163.427; and declaring an emergency.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 163.305 is amended to read:

6 163.305. As used in chapter 743, Oregon Laws 1971, unless the context requires otherwise:

7 (1) "Forcible compulsion" means to compel by:

8 (a) Physical force; or

9 (b) A threat, express or implied, that places a person in fear of immediate or future death or  
10 physical injury to self or another person, or in fear that the person or another person will imme-  
11 diately or in the future be kidnapped.

12 [(2) "*Mentally defective*" means that a person suffers from a qualifying mental disorder that renders  
13 the person incapable of appraising the nature of the conduct of the person.]

14 [(3)] (2) "Mentally incapacitated" means that a person is rendered incapable of appraising or  
15 controlling the conduct of the person at the time of the alleged offense.

16 [(4)] (3) "Oral or anal sexual intercourse" means sexual conduct between persons consisting of  
17 contact between the sex organs of one person and the mouth or anus of another.

18 [(5)] (4) "Physically helpless" means that a person is unconscious or for any other reason is  
19 physically unable to communicate unwillingness to an act.

20 [(6)] (5) "Sexual contact" means any touching of the sexual or other intimate parts of a person  
21 or causing such person to touch the sexual or other intimate parts of the actor for the purpose of  
22 arousing or gratifying the sexual desire of either party.

23 [(7)] (6) "Sexual intercourse" has its ordinary meaning and occurs upon any penetration, how-  
24 ever slight; emission is not required.

25 **SECTION 2.** ORS 163.315 is amended to read:

26 163.315. (1) A person is considered incapable of consenting to a sexual act if the person is:

27 (a) Under 18 years of age;

28 (b) [*Mentally defective*] **Incapable of appraising the nature of the person's conduct;**

29 (c) Mentally incapacitated; or

30 (d) Physically helpless.

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 (2) A lack of verbal or physical resistance does not, by itself, constitute consent but may be  
 2 considered by the trier of fact along with all other relevant evidence.

3 (3) **When determining whether a person is incapable of appraising the nature of the**  
 4 **person’s conduct, the trier of fact shall consider:**

5 (a) **The person’s ability to understand the nature of the conduct;**

6 (b) **The person’s ability to understand the right to choose whether and how to engage in**  
 7 **conduct, including the right to revoke a prior decision to engage in conduct; and**

8 (c) **The person’s ability to communicate a decision to engage in conduct.**

9 **SECTION 3.** ORS 163.325 is amended to read:

10 163.325. (1) In any prosecution under ORS 163.355 to 163.445 in which the criminality of conduct  
 11 depends on a child’s being under the age of 16, it is no defense that the defendant did not know the  
 12 child’s age or that the defendant reasonably believed the child to be older than the age of 16.

13 (2) When criminality depends on the child’s being under a specified age other than 16, it is an  
 14 affirmative defense for the defendant to prove that the defendant reasonably believed the child to  
 15 be above the specified age at the time of the alleged offense.

16 (3) In any prosecution under ORS 163.355 to 163.445 in which the victim’s lack of consent is  
 17 based solely upon the incapacity of the victim to consent because the victim is [*mentally defective,*]  
 18 mentally incapacitated, [*or*] physically helpless **or incapable of appraising the nature of the**  
 19 **victim’s conduct**, it is an affirmative defense for the defendant to prove that at the time of the al-  
 20 leged offense the defendant did not know of the facts or conditions responsible for the victim’s in-  
 21 capacity to consent.

22 **SECTION 4.** ORS 163.375 is amended to read:

23 163.375. (1) A person who has sexual intercourse with another person commits the crime of rape  
 24 in the first degree if:

25 (a) The victim is subjected to forcible compulsion by the person;

26 (b) The victim is under 12 years of age;

27 (c) The victim is under 16 years of age and is the person’s sibling, of the whole or half blood,  
 28 the person’s child or the person’s spouse’s child; or

29 (d) The victim is incapable of consent by reason of [*mental defect,*] mental incapacitation, [*or*]  
 30 physical helplessness **or incapability of appraising the nature of the victim’s conduct.**

31 (2) Rape in the first degree is a Class A felony.

32 **SECTION 5.** ORS 163.405 is amended to read:

33 163.405. (1) A person who engages in oral or anal sexual intercourse with another person or  
 34 causes another to engage in oral or anal sexual intercourse commits the crime of sodomy in the first  
 35 degree if:

36 (a) The victim is subjected to forcible compulsion by the actor;

37 (b) The victim is under 12 years of age;

38 (c) The victim is under 16 years of age and is the actor’s brother or sister, of the whole or half  
 39 blood, the son or daughter of the actor or the son or daughter of the actor’s spouse; or

40 (d) The victim is incapable of consent by reason of [*mental defect,*] mental incapacitation, [*or*]  
 41 physical helplessness **or incapability of appraising the nature of the victim’s conduct.**

42 (2) Sodomy in the first degree is a Class A felony.

43 **SECTION 6.** ORS 163.411 is amended to read:

44 163.411. (1) Except as permitted under ORS 163.412, a person commits the crime of unlawful  
 45 sexual penetration in the first degree if the person penetrates the vagina, anus or penis of another

1 with any object other than the penis or mouth of the actor and:

2 (a) The victim is subjected to forcible compulsion;

3 (b) The victim is under 12 years of age; or

4 (c) The victim is incapable of consent by reason of [*mental defect*,] mental incapacitation, [*or*]  
5 physical helplessness **or incapability of appraising the nature of the victim's conduct.**

6 (2) Unlawful sexual penetration in the first degree is a Class A felony.

7 **SECTION 7.** ORS 163.427 is amended to read:

8 163.427. (1) A person commits the crime of sexual abuse in the first degree when that person:

9 (a) Subjects another person to sexual contact and:

10 (A) The victim is less than 14 years of age;

11 (B) The victim is subjected to forcible compulsion by the actor; or

12 (C) The victim is incapable of consent by reason of being [*mentally defective*,] mentally incapac-  
13 itated, [*or*] physically helpless **or incapable of appraising the nature of the victim's conduct;** or

14 (b) Intentionally causes a person under 18 years of age to touch or contact the mouth, anus or  
15 sex organs of an animal for the purpose of arousing or gratifying the sexual desire of a person.

16 (2) Sexual abuse in the first degree is a Class B felony.

17 **SECTION 8.** ORS 137.765 is amended to read:

18 137.765. (1) As used in this section:

19 (a) "History of sexual assault" means that a person has engaged in unlawful sexual conduct that:

20 (A) Was not committed as part of the same criminal episode as the crime for which the person  
21 is currently being sentenced; and

22 (B) Seriously endangered the life or safety of another person or involved a victim under 12 years  
23 of age.

24 (b) "Sexually violent dangerous offender" means a person who has psychopathic personality  
25 features, sexually deviant arousal patterns or interests and a history of sexual assault and presents  
26 a substantial probability of committing a crime listed in subsection (3) of this section.

27 (2) Notwithstanding ORS 161.605, when a person is convicted of a crime listed in subsection (3)  
28 of this section, in addition to any sentence of imprisonment required by law, a court shall impose  
29 a period of post-prison supervision that extends for the life of the person if:

30 (a) The person was 18 years of age or older at the time the person committed the crime; and

31 (b) The person is a sexually violent dangerous offender.

32 (3) The crimes to which subsection (2) of this section applies are:

33 (a) Rape in the first degree and sodomy in the first degree if the victim was:

34 (A) Subjected to forcible compulsion by the person;

35 (B) Under 12 years of age; or

36 (C) Incapable of consent by reason of [*mental defect*,] mental incapacitation, [*or*] physical  
37 helplessness **or incapability of appraising the nature of the victim's conduct;**

38 (b) Unlawful sexual penetration in the first degree; and

39 (c) An attempt to commit a crime listed in paragraph (a) or (b) of this subsection.

40 **SECTION 9.** ORS 144.635 is amended to read:

41 144.635. (1) As used in this section and ORS 144.637:

42 (a) "History of sexual assault" means that a person has engaged in unlawful sexual conduct that:

43 (A) Is not related to the crime for which the person is currently on parole or post-prison  
44 supervision; and

45 (B) Seriously endangered the life or safety of another person or involved a victim under 12 years

1 of age.

2 (b) "Sexually violent dangerous offender" means a person who has psychopathic personality  
3 features, sexually deviant arousal patterns or interests and a history of sexual assault, and who the  
4 State Board of Parole and Post-Prison Supervision or local supervisory authority finds presents a  
5 substantial probability of committing an offense listed in subsection (3) of this section.

6 (2) When a person is released from custody after serving a sentence of incarceration as a result  
7 of conviction for an offense listed in subsection (3) of this section, the board or local supervisory  
8 authority shall subject the person to intensive supervision for the full period of the person's parole  
9 or post-prison supervision if:

10 (a) The person was 18 years of age or older at the time the person committed the offense; and

11 (b) The board or local supervisory authority finds that the person is a sexually violent danger-  
12 ous offender.

13 (3) The crimes to which subsection (2) of this section applies are:

14 (a) Rape in the first degree and sodomy in the first degree if the victim was:

15 (A) Subjected to forcible compulsion by the person;

16 (B) Under 12 years of age; or

17 (C) Incapable of consent by reason of [*mental defect*,] mental incapacitation, [*or*] physical  
18 helplessness **or incapability of appraising the nature of the victim's conduct;**

19 (b) Unlawful sexual penetration in the first degree; and

20 (c) An attempt to commit a crime listed in paragraph (a) or (b) of this subsection.

21 **SECTION 10. The amendments to ORS 137.765, 144.635, 163.305, 163.315, 163.325, 163.375,**  
22 **163.405, 163.411 and 163.427 by sections 1 to 9 of this 2021 Act apply to conduct occurring on**  
23 **or after the effective date of this 2021 Act.**

24 **SECTION 11. This 2021 Act being necessary for the immediate preservation of the public**  
25 **peace, health and safety, an emergency is declared to exist, and this 2021 Act takes effect**  
26 **on its passage.**

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