

ALLOW PROSECUTION FOR CRIMINAL SEXUAL CONDUCT IF SPOUSE IS MENTALLY INCAPACITATED

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House Bill 4202 as reported from committee
Sponsor: Rep. Laurie Pohutsky
Committee: Criminal Justice
Complete to 4-18-23

Analysis available at
<http://www.legislature.mi.gov>

(Enacted as Public Act 77 of 2023)

BRIEF SUMMARY: House Bill 4202 would amend the Michigan Penal Code to eliminate a provision that prohibits prosecuting an individual for committing criminal sexual conduct against their spouse if the charge is based solely on the spouse's being legally incapacitated at the time of the incident.

FISCAL IMPACT: The bill could have an indeterminate impact on the judiciary, corrections, and penal fines. (See *Fiscal Information*, below, for a detailed discussion.)

THE APPARENT PROBLEM:

All 50 states have criminalized marital rape since the early 1990s. However, Michigan's law contains a loophole. Absent other factors, such as the use of force or violence, an individual cannot be prosecuted for criminal sexual conduct based solely on the fact that the individual's spouse was mentally incapacitated—for instance, by being drugged or given a substance without their consent that made them incapable of controlling their own conduct (e.g., consenting to sex). Drugging or otherwise incapacitating one's spouse for the purpose of engaging in a sexual act is a form of intimate partner abuse. As with any incident of domestic violence, children are often present. About 18% of women survivors of marital rape report that their children witnessed the assault.¹ How often marital rape happens, and how many cases involve one spouse drugging the other, is difficult to determine, as it is estimated that fewer than a third of marital and intimate partner rapes are reported to law enforcement. And many survivors say they are turned away as soon as they say it was their spouse who drugged and then raped them. Legislation has been offered to eliminate this loophole in the law.

THE CONTENT OF THE BILL:

House Bill 4202 would eliminate the bar against prosecution for a criminal sexual conduct (CSC) offense involving a legal spouse solely because the spouse was mentally incapacitated.

Under Michigan law, a person can be charged and convicted for CSC in the first through fourth degrees or assault with intent to commit CSC in the first through fourth degrees even if the victim is their legal spouse. However, a person cannot be charged or convicted solely because their legal spouse is under 16 years of age, *mentally incapable*, or *mentally incapacitated*.

Mentally incapable means that a person suffers from a mental disease or defect that renders them temporarily or permanently incapable of appraising the nature of their conduct.

¹ <https://www.psychologytoday.com/us/blog/mind-games/202203/marital-rape-is-criminalized-not-upheld>

Mentally incapacitated means that a person is rendered temporarily incapable of appraising or controlling their conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without their consent or due to any other act committed upon that person without their consent.

The bill would remove “mentally incapacitated” from the provision described above and instead provide that a person cannot be charged or convicted for a CSC offense solely because their legal spouse is under 16 years of age or mentally incapable.

MCL 750.520l

BACKGROUND:

The bill is identical to House Bill 4699 of the 2021-22 legislative session, which was passed by the House of Representatives.

FISCAL INFORMATION:

House Bill 4202 would have an indeterminate fiscal impact on the state and on local units of government.

To the extent that its provisions result in an increase in felony convictions, the bill would result in increased costs related to state prisons and state probation supervision. In fiscal year 2022, the average cost of prison incarceration in a state facility was roughly \$47,900 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$5,000 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue.

Any fiscal impact on local court systems would depend on how provisions of the bill affected court caseloads and related administrative costs. It is difficult to project the actual fiscal impact to courts due to variables such as law enforcement practices, prosecutorial practices, judicial discretion, case types, and complexity of cases.

Any increase in penal fine revenue would increase funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

ARGUMENTS:

For:

Marital rape is a crime. But an individual who uses drugs, alcohol, or other substances to render a spouse incapable of consenting to sex or protecting themselves from unwanted sex may get a slap on the wrist or nothing at all. Because these assaults are committed when a wife or husband may be unconscious or under the influence of drugs or alcohol, the only clue may be an unexplained injury or, as some have experienced, finding a video that shows them being sexually assaulted when incapacitated. Sexual assaults of any kind are underreported and difficult to prove, and victims are often dismissed. The criminal justice system is even more unresponsive when a spouse commits the assault. House Bill 4202 would close the existing loophole in the marital law and bring marital rape in line with other domestic and intimate

partner violence protections. As of 2022, Michigan was one of 17 states still providing such a loophole from prosecution under a marital rape law. Eliminating the loophole could go far in giving the same protections and access to justice to married women and men as are afforded to others experiencing domestic and intimate partner assaults.

The bill retains the current exemptions from prosecution for marital rape based solely on having a spouse who is under 16 or mentally incapable.

Against:

No arguments against the bill were raised in House committee.

POSITIONS:

A representative of the Michigan Coalition to End Domestic and Sexual Violence testified in support of the bill. (3-14-23)

The following entities indicated support for the bill:

- Department of the Attorney General (3-14-23)
- Michigan National Organization for Women (3-21-22)
- Michigan Poverty Law Program (3-14-23)
- Michigan Junior League (3-14-23)
- Prosecuting Attorneys Association of Michigan (PAAM) (3-14-23)
- ACLU of Michigan (3-13-23)

The Criminal Defense Attorneys of Michigan indicated a neutral position on the bill. (3-14-23)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.