

# SENATE BILL REPORT

## HB 2465

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As Reported by Senate Committee On:  
Law & Justice, February 20, 2018

**Title:** An act relating to modifying the offense of rape in the third degree.

**Brief Description:** Modifying the offense of rape in the third degree.

**Sponsors:** Representatives Orwall, McCabe, Griffey, Harmsworth and Haler.

**Brief History:** Passed House: 2/08/18, 97-0.

**Committee Activity:** Law & Justice: 2/16/18, 2/20/18 [DP].

### Brief Summary of Bill

- Modifies the proof required for a third degree rape conviction.
- Eliminates the requirement for evidence that the victim clearly expressed their lack of consent by words and conduct.

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### SENATE COMMITTEE ON LAW & JUSTICE

**Majority Report:** Do pass.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Padden, Ranking Member; Angel, Assistant Ranking Member; Darneille, Frockt and Wilson.

**Staff:** Melissa Burke-Cain (786-7755)

**Background:** Rape in the Third Degree. A person commits rape in the third degree when, under circumstances not amounting to rape in the first or second degree, the person engages in sexual intercourse with another person: (1) where the victim did not consent to sexual intercourse with the perpetrator and the lack of consent was clearly expressed by the victim's words or conduct, or (2) where there is threat of substantial unlawful harm to the victim's property rights.

For the crime of third degree rape, consent occurs at the time of the act of sexual intercourse by actual words or conduct indicating a freely given agreement to have sexual intercourse.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

Rape in the third degree is classified as a Class C felony. The maximum sentence for a Class C felony is confinement for five years in a correctional institution, or a \$10,000 fine, or both.

**Summary of Bill:** Rape in the third degree does not require proof that the victim clearly expressed their lack of consent through their words or conduct. A defendant is guilty of rape in the third degree when the evidence shows beyond a reasonable doubt that:

- the defendant engaged in sexual intercourse with a person and the person did not consent to sexual intercourse; or
- the person engaged in sexual intercourse with the defendant because there was a threat of substantial unlawful harm to the person's property rights.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** Ninety days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony:** PRO: This bill eliminates the focus on the victim's reaction to the rape; neurobiology discoveries tell us that in addition to the fight or flight reaction "freeze" is a third common response. Often rapes are not reported because of a concern about whether the victim resisted enough. The freeze reaction is also known as tonic immobility or involuntary paralysis and is a common response to all types of trauma. This bill shifts the burden from proving a lack of consent to proving consent. Many rape survivors blame themselves. The bill is a more narrow change than might first appear on its face because consent will still be a proof issue when victims freeze up in response to the assault. The freeze effect is very prevalent, especially when the victim has had previous trauma in their life. It is very difficult to prove that something did not happen; that is, was the lack of consent shown clearly enough? The trend from other states is to move in the direction of this bill in which the jury decides the consent issue based on a totality of the circumstances. After trials, juries describe confusion about the law, particularly about the proof required to show clear lack of consent. With this bill, it is not necessary for the prosecution to prove the victim said or acted in a way that said, no; instead it takes a case-specific, fact-specific approach. Did the victim consent or not consent based on the totality of the circumstances. Often the perpetrator is someone the victim knows. Although it varies, consent is the issue in a high percentage of rape trials. Every case is a little bit different, so it is hard to generalize about these cases.

CON: Although this bill intends to address the situations where a victim freezes, it also makes it easier for someone to regret a decision, and bring the charge of rape the next day. Rape is a very serious offense with lifetime consequences. Freezing up could be the conduct showing the person was not consenting, but does the person who is committing the crime really know if there is consent or not? In situations involving young people fueled by alcohol or marijuana, it can be difficult to know. The current statute protects the ability of the alleged rapist to defend themselves.

**Persons Testifying:** PRO: Representative Tina Orwall, Prime Sponsor; Priya Walia, Legal Voice; Tom McBride, Washington Association of Prosecuting Attorneys; Jon Tunheim, Thurston County Prosecuting Attorney, Washington Association of Prosecuting Attorneys.

CON: Brad Meryhew, Washington Association of Criminal Defense Lawyers.

**Persons Signed In To Testify But Not Testifying:** No one.