

ANTHONY G. BROWN
Attorney General



CANDACE McLAREN LANHAM
Chief of Staff

CAROLYN QUATTROCKI
Deputy Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

FACSIMILE NO.
(410) 576-6475

WRITER'S DIRECT DIAL NO.
(410) 576-6435

January 31, 2023

TO: The Honorable Luke Clippinger, Chair, Judiciary Committee
FROM: Jer Welter, Assistant Attorney General
RE: HB 131 - Criminal Law - Unnatural or Perverted Sexual Practice - Repeal
(FAVORABLE)

The Attorney General urges the Judiciary Committee to report favorably on House Bill 131. House Bill 131 repeals Criminal Law § 3-322, the statute prohibiting “unnatural and perverted sexual practice,” a misdemeanor punishable by up to ten years in prison.

Criminal Law § 3-322, as written, does not differentiate between the sexual acts of consenting adults and sexual acts performed without consent. It has been interpreted to prohibit all sexual activity other than vaginal intercourse, including: 1) oral sex (mouth to genitals or mouth to anus); 2) anal sex; and 3) penetration of the genitals or anus with an object. *See DiBartolomeo v. State*, 61 Md. App. 302 (1985); *Schochet v. State*, 320 Md. 714, 730 (1990). It also prohibits any of these activities between a person and an animal.

For thirty years, however, the statute has not been enforceable as written. In 1990, the Court of Appeals interpreted Criminal Law § 3-322 under the doctrine of constitutional avoidance, which states that, where possible, courts should construe statutes to avoid constitutional issues. *Schochet v. State*, 320 Md. 714 (1990). To avoid doubts about the constitutionality of § 3-322, the Court held that it did not “encompass consensual, noncommercial, heterosexual activity between adults in the privacy of the home.” *Id.* at 730.

Non-consensual oral sex, anal sex, and penetration with an object are all prohibited elsewhere in the criminal code. Sections 3-303 and 3-304 (first and second degree rape) prohibit these activities without consent where done by force or threat of force.¹ Section 3-

¹ Section 3-303 (first-degree rape) requires proof of one of the following aggravating factors: 1) a deadly weapon; 2) strangulation or serious injury; 3) threat of death or

319.1 makes it clear that proof of physical resistance is not required to prove force or threat of force in the context of sexual offenses.

Section 3-304 (second-degree rape) also prohibits oral sex, anal sex, and penetration with an object where the victim is mentally incapacitated, cognitively impaired, or physically helpless, and where the victim is under 14 and the perpetrator is more than 4 years older than the victim. Other statutes prohibit these same activities: 1) where the victim is 14 or 15 years old and the perpetrator is over 21 years old (§ 3-307); 2) where the victim is 14 or 15 years old and the perpetrator is at least four years older than the victim (§ 3-308); and 3) where the victim is under 18 and the perpetrator is a “person of authority” at the victim’s school (§ 3-308). The sexual abuse of a minor statute (§ 3-602) prohibits all of these acts where the victim is a minor and the perpetrator is a family or household member. Section 3-315 prohibits a “continuing course of conduct” involving three or more non-consensual incidents of these acts over a period of 90 days or more where the victim is under 14 years old.²

Commercial acts of oral sex, anal sex, and penetration with an object are prohibited by § 11-303. These acts committed upon an animal are prohibited by § 10-606.

In summary, non-consensual and commercial acts covered by § 3-322 are prohibited elsewhere in the criminal code. In light of the historic use of these types of laws to harass and discriminate against the LGBTQ community, these antiquated statutes should not be permitted to remain on the books. For these same reasons, the legislature previously repealed the prohibition on sodomy, and this statute should likewise be repealed.

House Bill 131 ensures that persons convicted of unnatural and perverted practice based on non-consensual sex acts will not be permitted to expunge their convictions or avoid the sex offender registry, allowing the responsible repeal of this antiquated statute. The Attorney General supports House Bill 131, and requests a favorable report.

cc: Members of the Committee

serious injury; 4) aided or abetted by another; or 5) in connection with a 1-3 degree burglary.

² In addition to the statutes above, any non-consensual touching (sexual or otherwise) could be prosecuted as a second-degree assault, which carries a maximum penalty of 10 years’ incarceration.