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**TO:** The Honorable Luke Clippinger  
Chair, Judiciary Committee

**FROM:** Jer Welter, Assistant Attorney General  
Deputy Division Chief for Legal Affairs, Criminal Appeals Division  
Office of the Attorney General

**RE:** HB 412 – Criminal Law – Sexual Crimes – Consent and Second-Degree  
Rape (Support with Sponsor Amendment Eliminating Deception Provision)

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The Office of Attorney General supports House Bill 412 and urges a favorable report, with the sponsor's amendment offered by Delegate Shetty. This legislation would prescribe pertinent considerations for how "consent" to sexual activity is determined, and would repeal the requirement of "force or threat of force" for second-degree rape, such that second-degree rape would include having vaginal intercourse or committing a "sexual act" (i.e. oral sex, anal sex, or penetration with a body part or object) with a person without the person's consent. (Force or threat of force would remain an element of first-degree rape.)

House Bill 412 would eliminate a longstanding gap in Maryland sexual offense law where currently, there is no criminal offense that simply consists of subjecting a person to sex without the person's consent. Rape in any degree additionally requires either the use or threat of force, or a scenario where consent is legally impossible, i.e. statutory rape/incapacitation. Fourth-degree sex offense includes "sexual contact" without consent, but "sexual contact" is defined as intentional touching of intimate areas of the body, not vaginal intercourse or other penetrative sex acts. *Travis v. State*, 218 Md. App. 410, 464–65 (2014).

The sponsor's amendment strikes "deception" from the bill as filed. With that amendment, the bill's prescribed considerations for how "consent" is determined are consistent with existing state law. See, e.g., *State v. Baby*, 400 Md. 220 (2008) (holding that rape includes

This bill letter is a statement of the Office of Attorney General's policy position on the referenced pending legislation. For a legal or constitutional analysis of the bill, Members of the House and Senate should consult with the Counsel to the General Assembly, Sandy Brantley. She can be reached at 410-946-5600 or sbrantley@oag.state.md.us

the continuation of sex after consent has been withdrawn). We support the sponsor's amendment; while sexual offense laws in some other jurisdictions do address "rape by fraud" or "rape by deception," that topic is a complex one that would appropriately be a subject of separate legislation.

For all of the foregoing reasons, the Office of the Attorney General urges a favorable-with-amendment report on House Bill 412.

cc: Committee Members