# STATE OF NEW YORK

2153--A

2021-2022 Regular Sessions

# IN SENATE

January 20, 2021

Introduced by Sens. MAY, BIAGGI, RAMOS -- read twice and ordered printed, and when printed to be committed to the Committee on Codes -- recommitted to the Committee on Codes in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the penal law, in relation to establishing incapacity to consent when a person is a witness to or subject of an investigation under certain circumstances

**The People of the State of New York, represented in Senate and Assembly, do enact as follows:**

Section 1. Paragraphs (i) and (j) of subdivision 3 of section 130.05 of the penal law, paragraph (i) as amended and paragraph (j) as added by section 1 of part JJ of chapter 55 of the laws of 2018, are amended and a new paragraph (k) is added to read as follows:

(i) a resident or inpatient of a residential facility operated, licensed or certified by (i) the office of mental health; (ii) the office for people with developmental disabilities; or (iii) the office of [~~alcoholism and substance abuse~~] addiction services and supports, and the actor is an employee of the facility not married to such resident or inpatient. For purposes of this paragraph, "employee" means either: an employee of the agency operating the residential facility, who knows or reasonably should know that such person is a resident or inpatient of such facility and who provides direct care services, case management services, medical or other clinical services, habilitative services or direct supervision of the residents in the facility in which the resident resides; or an officer or other employee, consultant, contractor or volunteer of the residential facility, who knows or reasonably should know that the person is a resident of such facility and who is in direct contact with residents or inpatients; provided, however, that the provisions of this paragraph shall only apply to a consultant, contractor or volunteer providing services pursuant to a contractual arrange-

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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ment with the agency operating the residential facility or, in the case of a volunteer, a written agreement with such facility, provided that the person received written notice concerning the provisions of this paragraph; provided further, however, "employee" shall not include a person with a developmental disability who is or was receiving services and is also an employee of a service provider and who has sexual contact with another service recipient who is a consenting adult who has consented to such contact; [~~or~~]

(j) detained or otherwise in the custody of a police officer, peace officer, or other law enforcement official and the actor is a police officer, peace officer or other law enforcement official who either: (i) is detaining or maintaining custody of such person; or (ii) knows, or reasonably should know, that at the time of the offense, such person was detained or in custody[~~.~~]**; or**

**(k) a witness to or victim of an incident under investigation by a police officer, peace officer or other law enforcement official, or a suspect or person of interest in such an investigation, and the actor is a police officer, peace officer or other law enforcement official who either: (i) is participating in the investigation of such incident; or (ii) knows, or reasonably should know, that at the time of the offense, such person was a witness, victim, suspect, or person of interest in such investigation. Notwithstanding the provisions of this paragraph, a witness to, victim, suspect, or person of interest in an incident under investigation by a police officer, peace officer, or other law enforcement official shall not be deemed incapable of consent where the actor and such witness, victim, suspect, or person of interest had engaged in a sexual relationship prior to the commencement of such investigation.**

§ 2. Subdivision 4 of section 130.10 of the penal law, as amended by section 2 of part JJ of chapter 55 of the laws of 2018, is amended to read as follows:

4. In any prosecution under this article in which the victim's lack of consent is based solely on his or her incapacity to consent because he or she was less than seventeen years old, mentally disabled, a client or patient and the actor is a health care provider, detained or otherwise in custody of law enforcement under the circumstances described in paragraph (j) of subdivision three of section 130.05 of this article, **a witness to or subject of an investigation under the circumstances described in paragraph (k) of subdivision three of section 130.05 of this article,** or committed to the care and custody or supervision of the state department of corrections and community supervision or a hospital and the actor is an employee, it shall be a defense that the defendant was married to the victim as defined in subdivision four of section 130.00 of this article.

§ 3. This act shall take effect on the thirtieth day after it shall have become a law.