

# STATE OF NEW YORK

2628

2023-2024 Regular Sessions

## IN SENATE

January 23, 2023

Introduced by Sens. MAY, RAMOS -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

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:

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

5 (i) a resident or inpatient of a residential facility operated,  
6 licensed or certified by (i) the office of mental health; (ii) the  
7 office for people with developmental disabilities; or (iii) the office  
8 of [~~alcoholism and substance abuse~~ addiction services and supports, and  
9 the actor is an employee of the facility not married to such resident or  
10 inpatient. For purposes of this paragraph, "employee" means either: an  
11 employee of the agency operating the residential facility, who knows or  
12 reasonably should know that such person is a resident or inpatient of  
13 such facility and who provides direct care services, case management  
14 services, medical or other clinical services, habilitative services or  
15 direct supervision of the residents in the facility in which the resi-  
16 dent resides; or an officer or other employee, consultant, contractor or  
17 volunteer of the residential facility, who knows or reasonably should  
18 know that the person is a resident of such facility and who is in direct  
19 contact with residents or inpatients; provided, however, that the  
20 provisions of this paragraph shall only apply to a consultant, contrac-  
21 tor or volunteer providing services pursuant to a contractual arrange-  
22 ment with the agency operating the residential facility or, in the case  
23 of a volunteer, a written agreement with such facility, provided that  
24 the person received written notice concerning the provisions of this

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

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1 paragraph; provided further, however, "employee" shall not include a  
2 person with a developmental disability who is or was receiving services  
3 and is also an employee of a service provider and who has sexual contact  
4 with another service recipient who is a consenting adult who has  
5 consented to such contact; ~~or~~

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

12 (k) a witness to or victim of an incident under investigation by a  
13 police officer, peace officer or other law enforcement official, or a  
14 suspect or person of interest in such an investigation, and the actor is  
15 a police officer, peace officer or other law enforcement official who  
16 either: (i) is participating in the investigation of such incident; or  
17 (ii) knows, or reasonably should know, that at the time of the offense,  
18 such person was a witness, victim, suspect, or person of interest in  
19 such investigation. Notwithstanding the provisions of this paragraph, a  
20 witness to, victim, suspect, or person of interest in an incident under  
21 investigation by a police officer, peace officer, or other law enforce-  
22 ment official shall not be deemed incapable of consent where the actor  
23 and such witness, victim, suspect, or person of interest had engaged in  
24 a sexual relationship prior to the commencement of such investigation.

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

28 4. In any prosecution under this article in which the victim's lack of  
29 consent is based solely on his or her incapacity to consent because he  
30 or she was less than seventeen years old, mentally disabled, a client or  
31 patient and the actor is a health care provider, detained or otherwise  
32 in custody of law enforcement under the circumstances described in para-  
33 graph (j) of subdivision three of section 130.05 of this article, a  
34 witness to or subject of an investigation under the circumstances  
35 described in paragraph (k) of subdivision three of section 130.05 of  
36 this article, or committed to the care and custody or supervision of the  
37 state department of corrections and community supervision or a hospital  
38 and the actor is an employee, it shall be a defense that the defendant  
39 was married to the victim as defined in subdivision four of section  
40 130.00 of this article.

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