

AMENDED IN SENATE APRIL 16, 2013

AMENDED IN SENATE FEBRUARY 14, 2013

**SENATE BILL**

**No. 59**

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**Introduced by Senator Evans**

**(Principal coauthors: Senators Hill and Steinberg)**

**(Coauthors: Senators Beall, Block, Cannella, Corbett, De León, DeSaulnier, Fuller, Galgiani, Hancock, Jackson, Lara, Leno, Liu, Pavley, and Wolk)**

**(Coauthors: Assembly Members Brown, Garcia, Maienschein, and Quirk-Silva)**

January 7, 2013

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An act to amend Sections 261, 286, 288a, and 289 of, and to add Section 261.1 to, the Penal Code, relating to crimes, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 59, as amended, Evans. Crimes: sex crimes.

Existing law provides various circumstances that constitute rape, including an act of sexual intercourse accomplished with an individual who is not the spouse of the perpetrator where the individual submits under the belief that the individual committing the act is the victim's spouse, and this belief is induced by artifice, pretense, or concealment practiced by the accused, with the intent to induce the belief. Existing law provides various circumstances that constitute sodomy against an individual's will, oral copulation against an individual's will, and sexual penetration against an individual's will, including an act accomplished with an individual who is not the spouse of the perpetrator where the individual submits under the belief that the individual committing the act is the victim's spouse, and this belief is induced by artifice, pretense,

or concealment practiced by the accused, with the intent to induce the belief.

This bill would instead provide that these types of rape, sodomy, oral copulation, and sexual penetration occur where the individual submits under the belief that the individual committing the act is the victim’s sexual partner. This bill would define sexual partner to include any individual with who the victim has had consensual sexual contact, as defined.

By expanding the definition of a crime, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

This bill would declare that it is to take effect immediately as an urgency statute.

Vote:  $\frac{2}{3}$ . Appropriation: no. Fiscal committee: yes.  
 State-mandated local program: yes.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Section 261 of the Penal Code is amended to
- 2 read:
- 3 261. (a) Rape is an act of sexual intercourse accomplished
- 4 with a person not the spouse of the perpetrator, under any of the
- 5 following circumstances:
- 6 (1) Where a person is incapable, because of a mental disorder
- 7 or developmental or physical disability, of giving legal consent,
- 8 and this is known or reasonably should be known to the person
- 9 committing the act. Notwithstanding the existence of a
- 10 conservatorship pursuant to the provisions of the
- 11 Lanterman-Petris-Short Act (Part 1 (commencing with Section
- 12 5000) of Division 5 of the Welfare and Institutions Code), the
- 13 prosecuting attorney shall prove, as an element of the crime, that
- 14 a mental disorder or developmental or physical disability rendered
- 15 the alleged victim incapable of giving consent.
- 16 (2) Where it is accomplished against a person’s will by means
- 17 of force, violence, duress, menace, or fear of immediate and
- 18 unlawful bodily injury on the person or another.

1 (3) Where a person is prevented from resisting by any  
2 intoxicating or anesthetic substance, or any controlled substance,  
3 and this condition was known, or reasonably should have been  
4 known by the accused.

5 (4) Where a person is at the time unconscious of the nature of  
6 the act, and this is known to the accused. As used in this paragraph,  
7 “unconscious of the nature of the act” means incapable of resisting  
8 because the victim meets ~~any~~ one of the following conditions:

9 (A) Was unconscious or asleep.

10 (B) Was not aware, knowing, perceiving, or cognizant that the  
11 act occurred.

12 (C) Was not aware, knowing, perceiving, or cognizant of the  
13 essential characteristics of the act due to the perpetrator’s fraud in  
14 fact.

15 (D) Was not aware, knowing, perceiving, or cognizant of the  
16 essential characteristics of the act due to the perpetrator’s fraudulent  
17 representation that the sexual penetration served a professional  
18 purpose when it served no professional purpose.

19 (5) Where a person submits under the belief that the person  
20 committing the act is the victim’s sexual partner, as defined in  
21 Section 261.1, and this belief is induced by any artifice, pretense,  
22 or concealment practiced by the accused, with intent to induce the  
23 belief.

24 (6) Where the act is accomplished against the victim’s will by  
25 threatening to retaliate in the future against the victim or any other  
26 person, and there is a reasonable possibility that the perpetrator  
27 will execute the threat. As used in this paragraph, “threatening to  
28 retaliate” means a threat to kidnap or falsely imprison, or to inflict  
29 extreme pain, serious bodily injury, or death.

30 (7) Where the act is accomplished against the victim’s will by  
31 threatening to use the authority of a public official to incarcerate,  
32 arrest, or deport the victim or another, and the victim has a  
33 reasonable belief that the perpetrator is a public official. As used  
34 in this paragraph, “public official” means a person employed by  
35 a governmental agency who has the authority, as part of that  
36 position, to incarcerate, arrest, or deport another. The perpetrator  
37 does not actually have to be a public official.

38 (b) As used in this section, “duress” means a direct or implied  
39 threat of force, violence, danger, or retribution sufficient to coerce  
40 a reasonable person of ordinary susceptibilities to perform an act

1 which otherwise would not have been performed, or acquiesce in  
2 an act to which one otherwise would not have submitted. The total  
3 circumstances, including the age of the victim, and his or her  
4 relationship to the defendant, are factors to consider in appraising  
5 the existence of duress.

6 (c) As used in this section, “menace” means any threat,  
7 declaration, or act which shows an intention to inflict an injury  
8 upon another.

9 SEC. 2. Section 261.1 is added to the Penal Code, to read:

10 261.1. “Sexual partner” means an individual with who the  
11 victim has had consensual sexual contact, including oral copulation,  
12 sodomy, sexual penetration, or the touching of an intimate part of  
13 another person as defined in paragraph (1) of subdivision (g) of  
14 Section 243.4.

15 SEC. 3. Section 286 of the Penal Code is amended to read:

16 286. (a) Sodomy is sexual conduct consisting of contact  
17 between the penis of one person and the anus of another person.  
18 Any sexual penetration, however slight, is sufficient to complete  
19 the crime of sodomy.

20 (b) (1) Except as provided in Section 288, any person who  
21 participates in an act of sodomy with another person who is under  
22 18 years of age shall be punished by imprisonment in the state  
23 prison, or in a county jail for not more than one year.

24 (2) Except as provided in Section 288, any person over the age  
25 of 21 years who participates in an act of sodomy with another  
26 person who is under 16 years of age shall be guilty of a felony.

27 (c) (1) Any person who participates in an act of sodomy with  
28 another person who is under 14 years of age and more than 10  
29 years younger than he or she shall be punished by imprisonment  
30 in the state prison for three, six, or eight years.

31 (2) (A) Any person who commits an act of sodomy when the  
32 act is accomplished against the victim’s will by means of force,  
33 violence, duress, menace, or fear of immediate and unlawful bodily  
34 injury on the victim or another person shall be punished by  
35 imprisonment in the state prison for three, six, or eight years.

36 (B) Any person who commits an act of sodomy with another  
37 person who is under 14 years of age when the act is accomplished  
38 against the victim’s will by means of force, violence, duress,  
39 menace, or fear of immediate and unlawful bodily injury on the

1 victim or another person shall be punished by imprisonment in the  
2 state prison for 9, 11, or 13 years.

3 (C) Any person who commits an act of sodomy with another  
4 person who is a minor 14 years of age or older when the act is  
5 accomplished against the victim's will by means of force, violence,  
6 duress, menace, or fear of immediate and unlawful bodily injury  
7 on the victim or another person shall be punished by imprisonment  
8 in the state prison for 7, 9, or 11 years.

9 (D) This paragraph does not preclude prosecution under Section  
10 269, Section 288.7, or any other provision of law.

11 (3) Any person who commits an act of sodomy where the act  
12 is accomplished against the victim's will by threatening to retaliate  
13 in the future against the victim or any other person, and there is a  
14 reasonable possibility that the perpetrator will execute the threat,  
15 shall be punished by imprisonment in the state prison for three,  
16 six, or eight years.

17 (d) (1) Any person who, while voluntarily acting in concert  
18 with another person, either personally or aiding and abetting that  
19 other person, commits an act of sodomy when the act is  
20 accomplished against the victim's will by means of force or fear  
21 of immediate and unlawful bodily injury on the victim or another  
22 person or where the act is accomplished against the victim's will  
23 by threatening to retaliate in the future against the victim or any  
24 other person, and there is a reasonable possibility that the  
25 perpetrator will execute the threat, shall be punished by  
26 imprisonment in the state prison for five, seven, or nine years.

27 (2) Any person who, while voluntarily acting in concert with  
28 another person, either personally or aiding and abetting that other  
29 person, commits an act of sodomy upon a victim who is under 14  
30 years of age, when the act is accomplished against the victim's  
31 will by means of force or fear of immediate and unlawful bodily  
32 injury on the victim or another person, shall be punished by  
33 imprisonment in the state prison for 10, 12, or 14 years.

34 (3) Any person who, while voluntarily acting in concert with  
35 another person, either personally or aiding and abetting that other  
36 person, commits an act of sodomy upon a victim who is a minor  
37 14 years of age or older, when the act is accomplished against the  
38 victim's will by means of force or fear of immediate and unlawful  
39 bodily injury on the victim or another person, shall be punished  
40 by imprisonment in the state prison for 7, 9, or 11 years.

1 (4) This subdivision does not preclude prosecution under Section  
2 269, Section 288.7, or any other provision of law.

3 (e) Any person who participates in an act of sodomy with any  
4 person of any age while confined in any state prison, as defined  
5 in Section 4504, or in any local detention facility, as defined in  
6 Section 6031.4, shall be punished by imprisonment in the state  
7 prison, or in a county jail for not more than one year.

8 (f) Any person who commits an act of sodomy, and the victim  
9 is at the time unconscious of the nature of the act and this is known  
10 to the person committing the act, shall be punished by  
11 imprisonment in the state prison for three, six, or eight years. As  
12 used in this subdivision, “unconscious of the nature of the act”  
13 means incapable of resisting because the victim meets one of the  
14 following conditions:

15 (1) Was unconscious or asleep.

16 (2) Was not aware, knowing, perceiving, or cognizant that the  
17 act occurred.

18 (3) Was not aware, knowing, perceiving, or cognizant of the  
19 essential characteristics of the act due to the perpetrator’s fraud in  
20 fact.

21 (4) Was not aware, knowing, perceiving, or cognizant of the  
22 essential characteristics of the act due to the perpetrator’s fraudulent  
23 representation that the sexual penetration served a professional  
24 purpose when it served no professional purpose.

25 (g) Except as provided in subdivision (h), a person who commits  
26 an act of sodomy, and the victim is at the time incapable, because  
27 of a mental disorder or developmental or physical disability, of  
28 giving legal consent, and this is known or reasonably should be  
29 known to the person committing the act, shall be punished by  
30 imprisonment in the state prison for three, six, or eight years.  
31 Notwithstanding the existence of a conservatorship pursuant to  
32 the Lanterman-Petris-Short Act (Part 1 (commencing with Section  
33 5000) of Division 5 of the Welfare and Institutions Code), the  
34 prosecuting attorney shall prove, as an element of the crime, that  
35 a mental disorder or developmental or physical disability rendered  
36 the alleged victim incapable of giving consent.

37 (h) Any person who commits an act of sodomy, and the victim  
38 is at the time incapable, because of a mental disorder or  
39 developmental or physical disability, of giving legal consent, and  
40 this is known or reasonably should be known to the person

1 committing the act, and both the defendant and the victim are at  
2 the time confined in a state hospital for the care and treatment of  
3 the mentally disordered or in any other public or private facility  
4 for the care and treatment of the mentally disordered approved by  
5 a county mental health director, shall be punished by imprisonment  
6 in the state prison, or in a county jail for not more than one year.  
7 Notwithstanding the existence of a conservatorship pursuant to  
8 the Lanterman-Petris-Short Act (Part 1 (commencing with Section  
9 5000) of Division 5 of the Welfare and Institutions Code), the  
10 prosecuting attorney shall prove, as an element of the crime, that  
11 a mental disorder or developmental or physical disability rendered  
12 the alleged victim incapable of giving legal consent.

13 (i) Any person who commits an act of sodomy, where the victim  
14 is prevented from resisting by an intoxicating or anesthetic  
15 substance, or any controlled substance, and this condition was  
16 known, or reasonably should have been known by the accused,  
17 shall be punished by imprisonment in the state prison for three,  
18 six, or eight years.

19 (j) Any person who commits an act of sodomy, where the victim  
20 submits under the belief that the person committing the act is the  
21 victim's sexual partner, as defined in Section 261.1, and this belief  
22 is induced by any artifice, pretense, or concealment practiced by  
23 the accused, with intent to induce the belief, shall be punished by  
24 imprisonment in the state prison for three, six, or eight years.

25 (k) Any person who commits an act of sodomy, where the act  
26 is accomplished against the victim's will by threatening to use the  
27 authority of a public official to incarcerate, arrest, or deport the  
28 victim or another, and the victim has a reasonable belief that the  
29 perpetrator is a public official, shall be punished by imprisonment  
30 in the state prison for three, six, or eight years.

31 As used in this subdivision, "public official" means a person  
32 employed by a governmental agency who has the authority, as part  
33 of that position, to incarcerate, arrest, or deport another. The  
34 perpetrator does not actually have to be a public official.

35 (l) As used in subdivisions (c) and (d), "threatening to retaliate"  
36 means a threat to kidnap or falsely imprison, or inflict extreme  
37 pain, serious bodily injury, or death.

38 (m) In addition to any punishment imposed under this section,  
39 the judge may assess a fine not to exceed seventy dollars (\$70)  
40 against any person who violates this section, with the proceeds of

1 this fine to be used in accordance with Section 1463.23. The court,  
2 however, shall take into consideration the defendant's ability to  
3 pay, and no defendant shall be denied probation because of his or  
4 her inability to pay the fine permitted under this subdivision.

5 SEC. 4. Section 288a of the Penal Code is amended to read:

6 288a. (a) Oral copulation is the act of copulating the mouth  
7 of one person with the sexual organ or anus of another person.

8 (b) (1) Except as provided in Section 288, any person who  
9 participates in an act of oral copulation with another person who  
10 is under 18 years of age shall be punished by imprisonment in the  
11 state prison, or in a county jail for a period of not more than one  
12 year.

13 (2) Except as provided in Section 288, any person over the age  
14 of 21 years who participates in an act of oral copulation with  
15 another person who is under 16 years of age is guilty of a felony.

16 (c) (1) Any person who participates in an act of oral copulation  
17 with another person who is under 14 years of age and more than  
18 10 years younger than he or she shall be punished by imprisonment  
19 in the state prison for three, six, or eight years.

20 (2) (A) Any person who commits an act of oral copulation when  
21 the act is accomplished against the victim's will by means of force,  
22 violence, duress, menace, or fear of immediate and unlawful bodily  
23 injury on the victim or another person shall be punished by  
24 imprisonment in the state prison for three, six, or eight years.

25 (B) Any person who commits an act of oral copulation upon a  
26 person who is under 14 years of age, when the act is accomplished  
27 against the victim's will by means of force, violence, duress,  
28 menace, or fear of immediate and unlawful bodily injury on the  
29 victim or another person, shall be punished by imprisonment in  
30 the state prison for 8, 10, or 12 years.

31 (C) Any person who commits an act of oral copulation upon a  
32 minor who is 14 years of age or older, when the act is accomplished  
33 against the victim's will by means of force, violence, duress,  
34 menace, or fear of immediate and unlawful bodily injury on the  
35 victim or another person, shall be punished by imprisonment in  
36 the state prison for 6, 8, or 10 years.

37 (D) This paragraph does not preclude prosecution under Section  
38 269, Section 288.7, or any other provision of law.

39 (3) Any person who commits an act of oral copulation where  
40 the act is accomplished against the victim's will by threatening to

1 retaliate in the future against the victim or any other person, and  
2 there is a reasonable possibility that the perpetrator will execute  
3 the threat, shall be punished by imprisonment in the state prison  
4 for three, six, or eight years.

5 (d) (1) Any person who, while voluntarily acting in concert  
6 with another person, either personally or by aiding and abetting  
7 that other person, commits an act of oral copulation (1) when the  
8 act is accomplished against the victim's will by means of force or  
9 fear of immediate and unlawful bodily injury on the victim or  
10 another person, or (2) where the act is accomplished against the  
11 victim's will by threatening to retaliate in the future against the  
12 victim or any other person, and there is a reasonable possibility  
13 that the perpetrator will execute the threat, or (3) where the victim  
14 is at the time incapable, because of a mental disorder or  
15 developmental or physical disability, of giving legal consent, and  
16 this is known or reasonably should be known to the person  
17 committing the act, shall be punished by imprisonment in the state  
18 prison for five, seven, or nine years. Notwithstanding the  
19 appointment of a conservator with respect to the victim pursuant  
20 to the provisions of the Lanterman-Petris-Short Act (Part 1  
21 (commencing with Section 5000) of Division 5 of the Welfare and  
22 Institutions Code), the prosecuting attorney shall prove, as an  
23 element of the crime described under paragraph (3), that a mental  
24 disorder or developmental or physical disability rendered the  
25 alleged victim incapable of giving legal consent.

26 (2) Any person who, while voluntarily acting in concert with  
27 another person, either personally or aiding and abetting that other  
28 person, commits an act of oral copulation upon a victim who is  
29 under 14 years of age, when the act is accomplished against the  
30 victim's will by means of force or fear of immediate and unlawful  
31 bodily injury on the victim or another person, shall be punished  
32 by imprisonment in the state prison for 10, 12, or 14 years.

33 (3) Any person who, while voluntarily acting in concert with  
34 another person, either personally or aiding and abetting that other  
35 person, commits an act of oral copulation upon a victim who is a  
36 minor 14 years of age or older, when the act is accomplished  
37 against the victim's will by means of force or fear of immediate  
38 and unlawful bodily injury on the victim or another person, shall  
39 be punished by imprisonment in the state prison for 8, 10, or 12  
40 years.

1 (4) This paragraph does not preclude prosecution under Section  
2 269, Section 288.7, or any other provision of law.

3 (e) Any person who participates in an act of oral copulation  
4 while confined in any state prison, as defined in Section 4504 or  
5 in any local detention facility as defined in Section 6031.4, shall  
6 be punished by imprisonment in the state prison, or in a county  
7 jail for a period of not more than one year.

8 (f) Any person who commits an act of oral copulation, and the  
9 victim is at the time unconscious of the nature of the act and this  
10 is known to the person committing the act, shall be punished by  
11 imprisonment in the state prison for a period of three, six, or eight  
12 years. As used in this subdivision, “unconscious of the nature of  
13 the act” means incapable of resisting because the victim meets one  
14 of the following conditions:

15 (1) Was unconscious or asleep.

16 (2) Was not aware, knowing, perceiving, or cognizant that the  
17 act occurred.

18 (3) Was not aware, knowing, perceiving, or cognizant of the  
19 essential characteristics of the act due to the perpetrator’s fraud in  
20 fact.

21 (4) Was not aware, knowing, perceiving, or cognizant of the  
22 essential characteristics of the act due to the perpetrator’s fraudulent  
23 representation that the oral copulation served a professional purpose  
24 when it served no professional purpose.

25 (g) Except as provided in subdivision (h), any person who  
26 commits an act of oral copulation, and the victim is at the time  
27 incapable, because of a mental disorder or developmental or  
28 physical disability, of giving legal consent, and this is known or  
29 reasonably should be known to the person committing the act,  
30 shall be punished by imprisonment in the state prison, for three,  
31 six, or eight years. Notwithstanding the existence of a  
32 conservatorship pursuant to the provisions of the  
33 Lanterman-Petris-Short Act (Part 1 (commencing with Section  
34 5000) of Division 5 of the Welfare and Institutions Code), the  
35 prosecuting attorney shall prove, as an element of the crime, that  
36 a mental disorder or developmental or physical disability rendered  
37 the alleged victim incapable of giving consent.

38 (h) Any person who commits an act of oral copulation, and the  
39 victim is at the time incapable, because of a mental disorder or  
40 developmental or physical disability, of giving legal consent, and

1 this is known or reasonably should be known to the person  
2 committing the act, and both the defendant and the victim are at  
3 the time confined in a state hospital for the care and treatment of  
4 the mentally disordered or in any other public or private facility  
5 for the care and treatment of the mentally disordered approved by  
6 a county mental health director, shall be punished by imprisonment  
7 in the state prison, or in a county jail for a period of not more than  
8 one year. Notwithstanding the existence of a conservatorship  
9 pursuant to the provisions of the Lanterman-Petris-Short Act (Part  
10 1 (commencing with Section 5000) of Division 5 of the Welfare  
11 and Institutions Code), the prosecuting attorney shall prove, as an  
12 element of the crime, that a mental disorder or developmental or  
13 physical disability rendered the alleged victim incapable of giving  
14 legal consent.

15 (i) Any person who commits an act of oral copulation, where  
16 the victim is prevented from resisting by any intoxicating or  
17 anesthetic substance, or any controlled substance, and this condition  
18 was known, or reasonably should have been known by the accused,  
19 shall be punished by imprisonment in the state prison for a period  
20 of three, six, or eight years.

21 (j) Any person who commits an act of oral copulation, where  
22 the victim submits under the belief that the person committing the  
23 act is the victim's sexual partner, as defined in Section 261.1, and  
24 this belief is induced by any artifice, pretense, or concealment  
25 practiced by the accused, with intent to induce the belief, shall be  
26 punished by imprisonment in the state prison for a period of three,  
27 six, or eight years.

28 (k) Any person who commits an act of oral copulation, where  
29 the act is accomplished against the victim's will by threatening to  
30 use the authority of a public official to incarcerate, arrest, or deport  
31 the victim or another, and the victim has a reasonable belief that  
32 the perpetrator is a public official, shall be punished by  
33 imprisonment in the state prison for a period of three, six, or eight  
34 years.

35 As used in this subdivision, "public official" means a person  
36 employed by a governmental agency who has the authority, as part  
37 of that position, to incarcerate, arrest, or deport another. The  
38 perpetrator does not actually have to be a public official.

1 (l) As used in subdivisions (c) and (d), “threatening to retaliate”  
2 means a threat to kidnap or falsely imprison, or to inflict extreme  
3 pain, serious bodily injury, or death.

4 (m) In addition to any punishment imposed under this section,  
5 the judge may assess a fine not to exceed seventy dollars (\$70)  
6 against any person who violates this section, with the proceeds of  
7 this fine to be used in accordance with Section 1463.23. The court  
8 shall, however, take into consideration the defendant’s ability to  
9 pay, and no defendant shall be denied probation because of his or  
10 her inability to pay the fine permitted under this subdivision.

11 SEC. 5. Section 289 of the Penal Code is amended to read:

12 289. (a) (1) (A) Any person who commits an act of sexual  
13 penetration when the act is accomplished against the victim’s will  
14 by means of force, violence, duress, menace, or fear of immediate  
15 and unlawful bodily injury on the victim or another person shall  
16 be punished by imprisonment in the state prison for three, six, or  
17 eight years.

18 (B) Any person who commits an act of sexual penetration upon  
19 a child who is under 14 years of age, when the act is accomplished  
20 against the victim’s will by means of force, violence, duress,  
21 menace, or fear of immediate and unlawful bodily injury on the  
22 victim or another person, shall be punished by imprisonment in  
23 the state prison for 8, 10, or 12 years.

24 (C) Any person who commits an act of sexual penetration upon  
25 a minor who is 14 years of age or older, when the act is  
26 accomplished against the victim’s will by means of force, violence,  
27 duress, menace, or fear of immediate and unlawful bodily injury  
28 on the victim or another person, shall be punished by imprisonment  
29 in the state prison for 6, 8, or 10 years.

30 (D) This paragraph does not preclude prosecution under Section  
31 269, Section 288.7, or any other provision of law.

32 (2) Any person who commits an act of sexual penetration when  
33 the act is accomplished against the victim’s will by threatening to  
34 retaliate in the future against the victim or any other person, and  
35 there is a reasonable possibility that the perpetrator will execute  
36 the threat, shall be punished by imprisonment in the state prison  
37 for three, six, or eight years.

38 (b) Except as provided in subdivision (c), any person who  
39 commits an act of sexual penetration, and the victim is at the time  
40 incapable, because of a mental disorder or developmental or

1 physical disability, of giving legal consent, and this is known or  
2 reasonably should be known to the person committing the act or  
3 causing the act to be committed, shall be punished by imprisonment  
4 in the state prison for three, six, or eight years. Notwithstanding  
5 the appointment of a conservator with respect to the victim pursuant  
6 to the provisions of the Lanterman-Petris-Short Act (Part 1  
7 (commencing with Section 5000) of Division 5 of the Welfare and  
8 Institutions Code), the prosecuting attorney shall prove, as an  
9 element of the crime, that a mental disorder or developmental or  
10 physical disability rendered the alleged victim incapable of giving  
11 legal consent.

12 (c) Any person who commits an act of sexual penetration, and  
13 the victim is at the time incapable, because of a mental disorder  
14 or developmental or physical disability, of giving legal consent,  
15 and this is known or reasonably should be known to the person  
16 committing the act or causing the act to be committed and both  
17 the defendant and the victim are at the time confined in a state  
18 hospital for the care and treatment of the mentally disordered or  
19 in any other public or private facility for the care and treatment of  
20 the mentally disordered approved by a county mental health  
21 director, shall be punished by imprisonment in the state prison, or  
22 in a county jail for a period of not more than one year.  
23 Notwithstanding the existence of a conservatorship pursuant to  
24 the provisions of the Lanterman-Petris-Short Act (Part 1  
25 (commencing with Section 5000) of Division 5 of the Welfare and  
26 Institutions Code), the prosecuting attorney shall prove, as an  
27 element of the crime, that a mental disorder or developmental or  
28 physical disability rendered the alleged victim incapable of giving  
29 legal consent.

30 (d) Any person who commits an act of sexual penetration, and  
31 the victim is at the time unconscious of the nature of the act and  
32 this is known to the person committing the act or causing the act  
33 to be committed, shall be punished by imprisonment in the state  
34 prison for three, six, or eight years. As used in this subdivision,  
35 “unconscious of the nature of the act” means incapable of resisting  
36 because the victim meets one of the following conditions:

- 37 (1) Was unconscious or asleep.
- 38 (2) Was not aware, knowing, perceiving, or cognizant that the  
39 act occurred.

1 (3) Was not aware, knowing, perceiving, or cognizant of the  
2 essential characteristics of the act due to the perpetrator's fraud in  
3 fact.

4 (4) Was not aware, knowing, perceiving, or cognizant of the  
5 essential characteristics of the act due to the perpetrator's fraudulent  
6 representation that the sexual penetration served a professional  
7 purpose when it served no professional purpose.

8 (e) Any person who commits an act of sexual penetration when  
9 the victim is prevented from resisting by any intoxicating or  
10 anesthetic substance, or any controlled substance, and this condition  
11 was known, or reasonably should have been known by the accused,  
12 shall be punished by imprisonment in the state prison for a period  
13 of three, six, or eight years.

14 (f) Any person who commits an act of sexual penetration when  
15 the victim submits under the belief that the person committing the  
16 act or causing the act to be committed is the victim's sexual partner,  
17 as defined in Section 261.1, and this belief is induced by any  
18 artifice, pretense, or concealment practiced by the accused, with  
19 intent to induce the belief, shall be punished by imprisonment in  
20 the state prison for a period of three, six, or eight years.

21 (g) Any person who commits an act of sexual penetration when  
22 the act is accomplished against the victim's will by threatening to  
23 use the authority of a public official to incarcerate, arrest, or deport  
24 the victim or another, and the victim has a reasonable belief that  
25 the perpetrator is a public official, shall be punished by  
26 imprisonment in the state prison for a period of three, six, or eight  
27 years.

28 As used in this subdivision, "public official" means a person  
29 employed by a governmental agency who has the authority, as part  
30 of that position, to incarcerate, arrest, or deport another. The  
31 perpetrator does not actually have to be a public official.

32 (h) Except as provided in Section 288, any person who  
33 participates in an act of sexual penetration with another person  
34 who is under 18 years of age shall be punished by imprisonment  
35 in the state prison or in the county jail for a period of not more  
36 than one year.

37 (i) Except as provided in Section 288, any person over the age  
38 of 21 years who participates in an act of sexual penetration with  
39 another person who is under 16 years of age shall be guilty of a  
40 felony.

1 (j) Any person who participates in an act of sexual penetration  
2 with another person who is under 14 years of age and who is more  
3 than 10 years younger than he or she shall be punished by  
4 imprisonment in the state prison for three, six, or eight years.

5 (k) As used in this section:

6 (1) “Sexual penetration” is the act of causing the penetration,  
7 however slight, of the genital or anal opening of any person or  
8 causing another person to so penetrate the defendant’s or another  
9 person’s genital or anal opening for the purpose of sexual arousal,  
10 gratification, or abuse by any foreign object, substance, instrument,  
11 or device, or by any unknown object.

12 (2) “Foreign object, substance, instrument, or device” shall  
13 include any part of the body, except a sexual organ.

14 (3) “Unknown object” shall include any foreign object,  
15 substance, instrument, or device, or any part of the body, including  
16 a penis, when it is not known whether penetration was by a penis  
17 or by a foreign object, substance, instrument, or device, or by any  
18 other part of the body.

19 (l) As used in subdivision (a), “threatening to retaliate” means  
20 a threat to kidnap or falsely imprison, or inflict extreme pain,  
21 serious bodily injury or death.

22 (m) As used in this section, “victim” includes any person who  
23 the defendant causes to penetrate the genital or anal opening of  
24 the defendant or another person or whose genital or anal opening  
25 is caused to be penetrated by the defendant or another person and  
26 who otherwise qualifies as a victim under the requirements of this  
27 section.

28 SEC. 6. No reimbursement is required by this act pursuant to  
29 Section 6 of Article XIII B of the California Constitution because  
30 the only costs that may be incurred by a local agency or school  
31 district will be incurred because this act creates a new crime or  
32 infraction, eliminates a crime or infraction, or changes the penalty  
33 for a crime or infraction, within the meaning of Section 17556 of  
34 the Government Code, or changes the definition of a crime within  
35 the meaning of Section 6 of Article XIII B of the California  
36 Constitution.

37 SEC. 7. This act is an urgency statute necessary for the  
38 immediate preservation of the public peace, health, or safety within  
39 the meaning of Article IV of the Constitution and shall go into  
40 immediate effect. The facts constituting the necessity are:

1 In order to protect the public safety by minimizing the threat  
2 posed by sexual predators at the earliest possible time, it is  
3 necessary that this act take effect immediately.

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