

# Legislative Analysis



## REVISE DEFINITION OF “MENTALLY INCAPACITATED”

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**Senate Bill 236 (S-1) as reported from House committee**

**Sponsor: Sen. Jeff Irwin**

**House Committee: Judiciary**

**Senate Committee: Civil Rights, Judiciary, and Public Safety**

**Complete to 6-21-23**

Analysis available at  
<http://www.legislature.mi.gov>

*(Enacted as Public Act 65 of 2023)*

## SUMMARY:

Senate Bill 236 would amend the definition of the term *mentally incapacitated* as used in Chapter LXXVI (Rape) of the Michigan Penal Code.

Currently, *mentally incapacitated* means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance *administered to that person without his or her consent*, or due to any *other act* committed upon that person without his or her consent.

The bill would delete the italicized words, add a specific reference to alcohol, and remove gendered terminology. Under the bill, *mentally incapacitated* would mean that a person is rendered temporarily incapable of appraising or controlling the person's conduct due to the influence of a narcotic, anesthetic, alcohol, or other substance, or due to any act committed upon that person without the person's consent.

Under the code, mental incapacitation may be an element of the crime of criminal sexual conduct (CSC) in the first, second, third, or fourth degree. By revising the definition of *mentally incapacitated* to include mental incapacitation that is a result of a person's own actions, such as being under the influence of a substance by their own consent, the bill would expand the incidents that may be chargeable as CSC in the first, second, third, or fourth degree.

MCL 750.520a

## BRIEF DISCUSSION:

Senate Bill 236 would close what some believe to be a loophole that discourages victims of sexual assault from reporting an assault if they were high or drunk because of voluntarily consuming drugs or alcohol. Engaging in sexual penetration or sexual contact with a person who is *mentally incapacitated* constitutes criminal sexual conduct. However, as currently defined, the term describes only incidents in which the victim is administered a substance without their consent or subjected to an act without their consent. Victims of sexual assault who voluntarily consumed a drug or alcohol, but who were nevertheless incapable of giving consent due to their level of intoxication, often feel that they will be judged as contributing or even causing the assault and do not report the incident to law enforcement. Under the bill, sexual penetration or sexual contact with a mentally incapacitated individual would be against the law regardless of whether the individual had voluntarily self-administered an intoxicant or consented to an act that rendered them mentally incapacitated, or that had been done without their consent.

It should be noted that sexual assaults where the victim had voluntarily consented to getting drunk or high, or consented to an act that led to a sexual assault, can currently be prosecuted under other provisions of law. A concern was therefore raised regarding how the bill's change in law would impact the ability to mount a defense in incidents between individuals who, by their own actions, were similarly drunk or high.

## **FISCAL IMPACT:**

Senate Bill 236 would have an indeterminate fiscal impact on the state and on local units of government. To the extent provisions of the bill resulted in additional CSC offenses, costs related to state prisons, state probation supervision, local county jails, local probation supervision, and/or courts could be impacted.

Any new felony convictions would result in increased costs related to state prisons and state probation supervision. In fiscal year 2022, the average cost of prison incarceration in a state facility was roughly \$47,900 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$5,000 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue.

Any new misdemeanor convictions would result in increased costs related to county jails and/or local misdemeanor probation supervision. Costs of local incarceration in county jails and local misdemeanor probation supervision, and how those costs are financed, vary by jurisdiction.

The fiscal impact on local court systems would depend on how provisions of the bill affected court caseloads and related administrative costs. It is difficult to project the actual fiscal impact to courts due to variables such as law enforcement practices, prosecutorial practices, judicial discretion, case types, and complexity of cases.

Any increase in penal fine revenue would increase funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

## **POSITIONS:**

The following entities indicated support for the bill:

- Michigan Domestic and Sexual Violence Prevention Treatment Board (6-7-23)
- Michigan Coalition to End Domestic and Sexual Violence (6-14-23)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.