

The Workgroup Studying Language and Statutes Relating to Sexual Assault (Assembly Bill 214 [2021 Legislative Session])

July 2022

Joint Standing Interim Judiciary Committee

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TABLE OF CONTENTS

Workgroup description and background	2
Participants.....	3
Nevada Sexual Assault Statutes	4
Understanding the Complexities of Sexual Violence	5
Sexual Assault State Laws Evaluation	6
Conduct: Penetrative Crimes	7
Conduct: Non-Penetrative Sexual Contact.....	7
Use of Force:	8
Consent:.....	8
Consent: Special Considerations.....	9
Recommendations	9

WORKGROUP DESCRIPTION AND BACKGROUND

During the 2021 Nevada Legislative Session, [Assembly Bill 214](#) was passed requiring the Advisory Commission on the Administration of Justice (now the Joint Standing Interim Judiciary Committee) to conduct a study concerning sexual assault in Nevada and produce a report. The study and report was to include:

- (1) An evaluation of the laws governing sexual assault in Nevada and other states and territories;
- (2) Recommendations and input from attorneys, victims, and any other stakeholders concerning necessary changes to the laws governing sexual assault in Nevada.

Assemblywoman Elaine Marzola is the lead for the Interim Judiciary Committee on matters relating to domestic violence, sexual assault and human trafficking. Assemblywoman Marzola partnered with the Nevada Coalition to End Domestic and Sexual Violence (NCEDSV) to champion this workgroup and guide conversations surrounding sexual assault statutes and bring forward recommendations for the Interim Judiciary Committee to review.

Prior to Assembly Bill 214 passing during the 2021 Legislative Session, NCEDSV had been in conversations with advocates, victim-survivors, and agencies statewide about the current Nevada Revised Statute (NRS) language surrounding sexual assault and related crimes. In the summer of 2020, NCEDSV held a workgroup made up of sexual assault advocates across the state. During the workgroup, participants discussed the downfalls and benefits of the current sexual assault language and what enhanced language could look like for Nevada. Using that conversation as fuel, NCEDSV and previous legislators began pulling in additional collaborators and agencies in the hope of bringing forward legislation on this matter during the 2021 Legislative Session. The passage of Assembly Bill 214 has allowed this work to continue on a larger scale while offering the opportunity for better preparation and inclusion of diverse voices. Continuing this critical conversation and meeting the requirements of AB214, NCEDSV recruited workgroup participants and researched Nevada's and other jurisdictions' sexual assault statute language. This report includes NCEDSV's research and analysis.

PARTICIPANTS

Individuals from broad disciplines across the state were invited to participate in this discussion. To meet the goals of the legislation, collaborators from law enforcement, district attorneys, public defenders, and victim advocacy centers were recruited for this workgroup to ensure that their input was recorded. The following individuals participated in the study:

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Signs of HOPE

NEVADA SEXUAL ASSAULT STATUTES

Over the years, the Nevada State Legislature and many collaborators have worked hard to enhance the definitions surrounding sexual violence in Nevada. Below are the current laws associated with sexual violence and related crimes:

- [NRS 200.364 Sexual Assault Definitions](#)
- [NRS 200.366 Sexual Assault: Definition; Penalties; Exclusions](#)
- [NRS 200.368 Statutory Sexual Seduction; Penalties](#)
- [NRS 200.373 Sexual Assault of Spouse by Spouse](#)
- [NRS 200.400 Batter with Intent to Commit a Crime \(Sexual Assault\) – Definition; penalties.](#)
- [NRS 201.210 Open or Gross Lewdness; Penalty.](#)
- [NRS 201.220 Indecent or Obscene Exposure; Penalty.](#)
- [NRS 201.230 Lewdness with Child Under 16 Years; Penalties.](#)
- [NRS 201.465 Sexual Conduct with Arrestee or Detainee by Law Enforcement Officer Prohibited; Penalty.](#)
- [NRS 201.470 – NRS 201.550 Sexual Conduct with Pupils and Students.](#)
- [NRS 207.193 Coercion: Hearing to determine whether sexually motivated.](#)

There are many laws relating to sexual violence in current state statute; however, if a victim-survivor were to look up sexual assault in Nevada law, they would find that our sexual assault statute (NRS 200.366) only includes a definition of penetration. NRS 200.366 states that sexual assault is defined by subjecting another person to sexual penetration. NRS 200.364 defines sexual penetration as: “cunnilingus, fellatio, or any intrusion, however slight, of any part of a person’s body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including sexual intercourse in its ordinary meaning.”¹

From a victim-survivor lens, they often do not know that other laws, such as open and gross lewdness, or indecent and obscene exposure, cover other acts of sexual violence. Victim-advocates across the state routinely hear from victim-survivors that they did not know they could report their sexual assault even though it did not meet the definition of

¹ Nevada State Legislature. NRS 200.364 Definitions. Retrieved from: <https://www.leg.state.nv.us/nrs/nrs-200.html#NRS200Sec364>

penetration. Sexual assault affects all genders and communities, and only recognizing penetration in our state statute is limiting and excludes male victim-survivors, gender non-conforming victim-survivors and victim-survivors from the LGBTQIA+ community.

Additionally, the NRS language surrounding consent is narrow. Consent is not specifically named in our state statute and rather is included in the definition of sexual assault. NRS 200.366 states that sexual assault occurs when penetration happens “against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of the perpetrator’s conduct.”² Clearly outlining and defining the key factors of consent will empower victim-survivors and create clear standards that perpetrators are held to.

UNDERSTANDING THE COMPLEXITIES OF SEXUAL VIOLENCE

Sexual violence is complex and every victim-survivor’s experience is unique and personal. There is no way to capture each individual’s experience in statute, but we have a duty to make our state language as victim-centered and trauma-informed as possible. “The disconnect between the law and the dynamics of rape and sexual assault can play a crucial role in individual victims’ perception of whether or not they were the victims of a crime, and whether they believe they will receive some measure of justice in the legal system.”³ Knowing that sexual violence is one of the most underreported violent crimes, enhancing our state statutes may encourage more victim-survivors to report their assault and provide an opportunity to hold perpetrators accountable through the criminal justice system.

Sexual violence and assault is far more than penetrative rape and is not limited to, but can include:

- Unwanted touching and/or contact;
- Unwanted fondling and/or groping;
- Sexual harassment;
- Forced masturbation;
- Forced touching of another;
- Exposing one’s genitals or naked body to another without consent;

² Nevada State Legislature. NRS 200.366 Sexual Assault: Definitions; penalties, exclusions. Retrieved from: <https://www.leg.state.nv.us/nrs/nrs-200.html#NRS200Sec366>

³ AEquitas and the Women’s Law Project. Rape and Sexual Assault Analyses and Laws: Part II. Retrieved from: [Rape-and-Sexual-Assault-Analyses-and-Laws-10.10.19.pdf](https://www.aequitas.org/wp-content/uploads/2019/10/Rape-and-Sexual-Assault-Analyses-and-Laws-10.10.19.pdf).

- Forcing another to watch pornography or sexual acts without their consent;
- Watching someone in a private act without their knowledge or permission;
- Unwanted removal of clothing;
- Dissemination of one’s private photos or videos; and,
- Rape/penetration by genitals, mouth, digits or foreign objects.

One benefit of enhancing definitions of sexual assault includes allowing victim-survivors opportunities for recourse if their assault doesn’t meet the limiting definition of penetration. Another is that by adding additional language, we can then add appropriate penalties to enhance degrees of sexual violence that will hold perpetrators accountable and offer early intervention which may prevent future acts of violence. Currently there is no easy way to intervene against inappropriate sexual behaviors. Many times, inappropriate actions are displayed by youth and young adults. With no proper intervention and redirection, they think of these acts and behaviors as acceptable. They may then go on to become serial sexual violence perpetrators and commit further and more harmful acts. ⁴

SEXUAL ASSAULT STATE LAWS EVALUATION

Sexual violence statutes across the nation vary wildly, but all aim to hold perpetrators accountable and offer criminal justice interventions for the victim-survivor. “Although some jurisdictions’ laws have evolved to incorporate our ever-expanding knowledge of rape and sexual assault and offender behaviors, in other jurisdictions, the laws remain sadly outdated in either language or content.” ⁵ AEquitas, a nonprofit organization committed to improving access to and the quality of justice in gender-based violence, conducted a study reviewing sex crime statutes in all 50 states, the District of Columbia, the U.S. Territories, federal jurisdictions and the Uniform Code of Military Justice (a total of 58 jurisdictions). The analyses revealed that the language used across jurisdictions varied widely. With the vast differences in language used, the review set out to analyze the individual elements of each statute and their definitions in order to be able to adequately compare statutes. Jurisdictions were analyzed and grouped together based on:

- The range of covered conduct;

⁴ Basile, Kathleen C. et al. 2016. Centers for Disease Control and Prevention. STOP SV: A Technical Package to Prevent Sexual Violence. Retrieved from: <https://www.cdc.gov/violenceprevention/pdf/SV-Prevention-Technical-Package.pdf>

⁵ AEquitas and the Women’s Law Project. Rape and Sexual Assault Analyses and Laws: Part II. Retrieved from: <https://www.aequitas.org/wp-content/uploads/2019/10/Rape-and-Sexual-Assault-Analyses-and-Laws-10.10.19.pdf>.

- Penetrative crimes
- Contact/non-penetrative crimes
- The use of force; and
- The definition of consent; and the victim's ability to consent (intoxication, age, mental capacity);

Below are the key summary points of the findings from the analyses of 58 jurisdictions:

CONDUCT: PENETRATIVE CRIMES

- Crimes that include forced penile penetration are the most seriously graded sex crimes in all jurisdictions.
- Each jurisdiction has a definition that defines penetration, although the wording varies from jurisdiction to jurisdiction. Common terminology may include: rape, sexual assault, sexual abuse, or sexual battery.
- Most jurisdictions have language that recognizes that any intrusion/penetration, however slight, meets the requirements of penetration.
- AEquitas found that there is persistent confusion among victim-survivors over what constitutes legal penetration, and they often do not report if their experience was not full penial penetration of the vagina as they mistakenly believe that their assault is not legally relevant.

CONDUCT: NON-PENETRATIVE SEXUAL CONTACT

- Across jurisdictions, sexual contact crimes involve direct or indirect touching or fondling of sexual or other intimate parts of a person.
- In some jurisdictions that define sexual contact, acts such as urinating, defecating, or ejaculating on a person are included.
- Of the states that define sexual conduct, many define it broadly.
- In 20 jurisdictions, sexual contact without consent and without force is recognized as a crime more frequently than sexual penetration without consent and without force or coercion.
- Sexual contact is typically charged as misdemeanors, but can rise to the level of a felony under circumstances such as when the crime is committed with actual or threatened force, or when the victim-survivor is incapable of consent due to physical or mental incapacitation.

- States that do not define sexual contact charge the exposure of genitals through indecent exposure crimes.
 - Indecent exposure crimes are usually categorized as moral crimes rather than as sex offenses.
 - Indecent exposure is a common method often used by perpetrators of child sexual assault to groom their victim-survivors.

USE OF FORCE:

- Jurisdictions vary widely in how they define and interpret force. However, how force is defined is crucial in order to determine the criminality of conduct.
- Some jurisdictions, Nevada included, overlap concepts of force and consent. This is not best practice as the use of force generally pertains to the perpetrator's conduct, and the issue of consent pertains to victim's conduct.
 - Additionally, the absence of force in a situation may preclude a charge if the circumstances of the assault do not satisfy other requirements under the statute. Most commonly it is then used as an attack of the victim-survivor's credibility.
- There are significant variations in how force is defined, but the three common definitions used are actual physical violence, threatened physical violence, and threatened force against third parties.
- Four jurisdictions (Idaho, Nebraska, West Virginia and the Virgin Islands) require resistance by some degree to prove the element of force. Nine jurisdictions (Alabama, Maine, Michigan, Montana, New Jersey, Ohio, Pennsylvania, and Guam) have clear language that no resistance is required.

CONSENT:

- Statutory definitions of consent generally identify two factors:
 - Whether the individual freely consented; and,
 - Whether the individual has the capacity to consent.
- The definition of consent is critical in determining whether the sexual conduct is criminal.
- A victim-survivor's consent to the conduct is defined by the specific circumstances surrounding the act.
- Freely given consent is categorized by giving permission, positive cooperation, free will and the knowledge of the nature of the act.

CONSENT: SPECIAL CONSIDERATIONS

- Consent includes variables such as age, mental capacity, physical capacity, unconsciousness, and/or drug/alcohol impairment.
 - All jurisdictions include language around providing special protection for victim-survivors with a developmental disability or mental incapacity due to an injury, condition, or disability and not because of intoxication.
 - Significantly though, in all jurisdictions, an individual with a developmental disability will not automatically be rendered incapable of giving consent.
- Age-related sex crimes fall into two categories: Per se age of consent laws and statutory sexual assault laws.
 - Per se laws prohibit any sexual contact with any child under the defined age. This is regardless of the age of the offender or whether the child consented.
 - Statutory sexual assault laws define the assault by the age of the perpetrator and the victim-survivor and a specified age difference between the two.
 - The majority of jurisdictions have a version of statutory sexual assault laws.
- The most common age of consent throughout the jurisdictions is 16 years of age.
- While statutory sexual seduction is intended to criminalize the exploitation of children, perpetrators of statutory sexual seduction are often graded less severely than other types of sexual assault. This is currently in practice in Nevada, as referenced above in the section [Nevada Sexual Assault Statutes](#).

RECOMMENDATIONS FROM WORKGROUP

Throughout this study, victim advocates, public defenders, district attorneys, and law enforcement all discussed the benefits and downfalls of Nevada's current sexual assault language. Each discipline and expertise bringing a unique perspective. At the end of the final workgroup, public defenders, district attorneys, and law enforcement chose not to submit final recommendations surrounding changing or enhancing Nevada's sexual assault language. Despite these recommendations coming directly from victim advocates, workgroup participants have agreed to engage in further conversations as specific language is drafted for Nevada.

The following recommendations come from victim advocates across the state and do not reflect any viewpoints or desires on behalf of public defenders, district attorney's or law enforcement:

- NRS Chapter 200 should clearly define consent, including specific language around freely given consent and the individual's capacity to consent (age, disability, intoxication) with specific language that developmental disabilities will not automatically render an individual incapable of giving consent.
- NRS should expand the definition of sexual assault to include penetration/rape and non-penetrative sexual contact.
 - It is important to categorize non-penetrative sexual contact as a sex crime.
 - The distinction between the two is a victim-centered and trauma-informed approach that will ensure that our definitions of sexual violence are inclusive of all victim-survivors including males and those within the LGBTQIA+ community.
 - This recommendation comes with the understanding that penalties will have to be differentiated amongst penetrative vs. non-penetrative conduct and that the requirements around sex offender registry will have to be re-visited.
- NRS Chapter 200 should clearly define what use of force means and should follow best practices of differentiating between actual physical violence, threatened physical violence, and threatened force against third parties.