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**Testimony of Deborah Del Prete Sullivan, Legal Counsel**  
**Office of Chief Public Defender**  
**Judiciary Committee - March 24, 2021**

**H.B. 6648 - An Act Concerning Sexual Assault and the Absence of Consent**

The Office of Chief Public Defender **strongly opposes** *H.B. 6648, An Act Concerning Sexual Assault and the Absence of Consent*. Passage of this bill would violate a defendant's state and federal constitutional rights – both the right to be presumed innocent and the right against self-incrimination. First, the bill shifts the burden of proof such that defendants would be required to prove themselves not guilty. Under our constitutions, however, it is the prosecution that has the burden to prove every element of an offense beyond a reasonable doubt. Further, the bill would require the defendant to show that another person consented to sexual contact or intercourse, and thus would force the defendant to testify and put forth evidence in violation of the right to remain silent / right against self-incrimination. The bill also dilutes the requirement of intent, or *mens rea*, to commit an offense; if a person acting in good faith fails to accurately interpret the “consent” as defined, they may be convicted.

The American Law Institute (ALI) rejected affirmative consent language because such language is too broad to give people clear notice of what conduct is illegal – particularly given the significant penalties and loss of liberty involved in such cases. Thereafter, the American Bar Association (ABA) House of Delegates proposed Resolution 114, which sought the implementation of an affirmative consent standard in sexual assault cases throughout the country and in the courts.<sup>1</sup> The Criminal Justice Section of the ABA, which comprises defense counsel, prosecutors, judges and academic professionals, withdrew prior support for the

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<sup>1</sup> National Association of Criminal Defense Lawyers, NACDL Position on ABA Resolution 114 (NACDL Opposes Affirmative Consent Resolution – ABA Proposal (2019), available at <https://www.nacdl.org/Document/NACDLTakesPositiononABAResolution114>

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Resolution after a much more careful review of it. The Resolution has been tabled indefinitely. Numerous defense bars and groups and the Center for Prosecutor Integrity urged the delegates to reject this Resolution.<sup>2</sup>

In court cases under this legislation, the occurrence of sexual contact or intercourse would be assumed from the outset instead of being subject to evidence presented at trial. And as the National Association of Criminal Defense Lawyers (NACDL) testified in its opposition to Resolution 114, the shifting of the burden to the defendant “essentially renders sexual assault statutes to be strict liability crimes that focus only on the victim and disregard the mental state of the accused.”<sup>3</sup> A defendant would be required to demonstrate that the other person was capable of making an agreement, and that the other person voluntarily and deliberately made an agreement to have sexual contact or intercourse. The bill does not define what constitutes an agreement or how such agreement is communicated, be that orally, written, or otherwise.

Relationships, including sexual relationships, cannot be oversimplified. They do not follow set steps. They evolve in myriad ways over time, and the understandings and permissions of one moment can change in the next. Particularly troubling in the context of such fluidity, this bill would mandate that a person is guilty unless they prove themselves innocent – an unconstitutional inversion of a bedrock principle of American jurisprudence.

The bill, if passed, will have broad consequences and be unconstitutional. The Office of Chief Public Defender strongly urges the Committee not to take any action on this bill.

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<sup>2</sup> See, e.g., Association of Criminal Defense Lawyers of New Jersey, The ACDL-NJ Opposes ABA Resolution 114 (2019), available at <http://www.acdlnj.org/about/acdl-nj-news/theacdl-njopposesabaresolution114>; The Bronx Defenders, The Bronx Defenders Oppose ABA Resolution 114 (2019), available at <https://www.bronxdefenders.org/the-bronx-defenders-oppose-aba-resolution-114/>; Center for Prosecutor Integrity, Center for Prosecutor Integrity Urges AGA Delegates to Reject Flawed Affirmative Consent Resolution (2019), available at <http://www.prosecutorintegrity.org/pr/center-for-prosecutor-integrity-urges-aba-delegates-to-reject-flawed-affirmative-consent-resolution/>; Massachusetts Association of Criminal Defense Lawyers, Letter to Massachusetts Representatives in the ABA House of Delegates (2019), available at <https://macdl.com/oppose-aba-resolution-114/>; National Association of Criminal Defense Lawyers, NACDL Position on ABA Resolution 114 (NACDL Opposes Affirmative Consent Resolution – ABA Proposal (2019), available at <https://www.nacdl.org/Document/NACDLTakesPositiononABAResolution114>; New York State Association of Criminal Defense Lawyers, Updated: NYSACDL Opposes ABA Resolution 114 (2019), available at <https://nysacdl.org/news/news.asp?id=464407>; North Carolina Advocates for Justice, Update: Vote Postponed Indefinitely – NCAJ Strongly Opposes ABA Resolution 114 (2019), available at <https://www.ncaj.com/?pg=NCAJstronglyopposesABAResolution>; Pennsylvania Association of Criminal Defense Lawyers, Statement of Opposition to ABA Resolution 114 (2019);

<sup>3</sup> National Association of Criminal Defense Lawyers, NACDL Position on ABA Resolution 114 (NACDL Opposes Affirmative Consent Resolution – ABA Proposal (2019), available at <https://www.nacdl.org/Document/NACDLTakesPositiononABAResolution114>.