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135<sup>th</sup> General Assembly

## Bill Analysis

[Click here for S.B. 109's Fiscal Note](#)

**Version:** As Reported by House Criminal Justice

**Primary Sponsor:** Sen. Hackett

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## SUMMARY

### Sex offenses

- Expands the offense of sexual battery by prohibiting the following:
  - Engaging in “sexual activity” (“sexual contact” or “sexual conduct,” as defined in continuing law) rather than just sexual conduct under existing law, with another, not the spouse of the offender, under specified circumstances;
  - Causing another, not the spouse of the offender, to engage in sexual activity with the offender; or causing two or more other persons to engage in sexual activity, under specified circumstances;
  - Adding to those specified circumstances that the offender is a licensed medical professional, the other person, or one of the other persons, is a patient of the offender, and the sexual activity occurs in the course of medical treatment.
- If the sexual battery offender is a licensed medical professional, requires the following:
  - The prosecuting attorney handling the case to send written notice of the indictment or charge to the regulatory board or agency with administrative authority to suspend or revoke the medical professional’s professional license, certification, registration, or authorization;
  - The court, upon conviction of the offender, to transmit a certified copy of the judgment entry of conviction to the regulatory board or agency with administrative

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\* This analysis was prepared before the report of the House Criminal Justice Committee appeared in the House Journal. Note that the legislative history may be incomplete.

- authority to suspend or revoke the medical professional's professional license, certification, registration, or authorization.
- Modifies the offense of sexual imposition by repealing most of the circumstances under which sexual imposition is committed and including those circumstances in committing the expanded offense of sexual battery.
  - Expands the circumstances under which rape is committed by providing that the offender knows that the other person's judgment or control is substantially impaired as a result of the influence of any drug administered to the other person with consent for the purpose of medical or dental examination, treatment, or surgery.
  - Classifies an offender under the Sex Offender Registration and Notification (SORN) Law if convicted of the expanded sexual battery as follows:
    - If the sexual activity involved is sexual contact, as a Tier II sex offender/child-victim offender who must verify registration information every 180 days after the initial registration date, for 25 years for an adult offender or for 20 years for a juvenile offender;
    - If the sexual activity involved is sexual conduct, as a Tier III sex offender/child-victim offender who must verify registration information every 90 days after the initial registration date, for life.
  - For any offense for which sentence is being imposed, if the offender previously has been convicted of the expanded offense of sexual battery if the sexual activity involved is sexual conduct, and also of a sexually violent predator specification, requires the court to impose upon the offender a term of life imprisonment without parole.
  - By reason of the bill's expansion of the offenses of sexual battery and rape, makes conforming changes in the laws pertaining to the following:
    - Childhood sexual abuse;
    - Children conceived as a result of rape or sexual battery;
    - Consent to adoption not required;
    - Declaration of paternity;
    - Standing to bring paternity action.

## **Failure to report a crime**

- Expands the offense of failure to report a crime by prohibiting any person who knows that a licensed medical professional has committed a sex offense against the medical professional's patient from failing to report such knowledge to law enforcement authorities within a certain period of time.
- Grants civil or criminal immunity generally to a person as a result of making a report as described in the preceding dot point so long as the person is acting in good faith without fraud or malice.

- Provides that the physician-patient relationship or physician assistant-patient relationship is not a ground for excluding evidence against the medical professional in any judicial proceeding resulting from such report regarding the person's knowledge of, or reasonable cause to suspect, the medical professional's commission of a sex offense.

### **Notice of conviction sent to licensing board**

- Requires the prosecutor to notify the State Medical Board of the conviction of, or plea of guilty to, a felony or specified type of misdemeanor of any person licensed or authorized to practice as dietitians, anesthesiology assistants, respiratory care professionals, acupuncturists, radiology assistants, and genetic counselors.

### **Public Records Law**

- Excludes from the definition of "public records" the license or certificate application or renewal responses and supporting documentation submitted to the State Medical Board regarding an applicant's, or a license holder's, inability to practice according to acceptable and prevailing standards of care by reason of a medical condition.

### **Medical Board regulation of health professionals**

- Authorizes the Medical Board to recommend a license be suspended without a prior hearing if the Board receives verifiable information that a licensee has been charged with a felony and the conduct charged constitutes a disciplinary violation under Ohio law.
- Adds circumstances under which a licensee will be subject to an automatic license suspension, including regarding human trafficking and if a license to practice a health profession in another state is suspended or revoked.
- Generally shortens to 30 days (from 60) the time in which health care facilities, licensees, and professional associations must report various conduct to the Board.
- Requires health care facilities to report to the Board investigations regarding criminal conduct or sexual misconduct against Board licensees.
- Requires licensees and certain professional associations that have reasonable cause to suspect that a licensee of the Board has committed or participated in criminal conduct or sexual misconduct to report that information to the Board.
- Requires Board licensees to report to the Board criminal charges regarding criminal conduct, sexual misconduct, or any conduct involving the use of a motor vehicle while under the influence of alcohol or drugs.
- Authorizes the Board to require licensees who are subject to probationary orders related to sexual misconduct or patient harm to provide a written disclosure to each patient, or the patient's guardian or a key third party.
- Makes other changes regarding Board disciplinary investigations, confidentiality, and case reporting.

## Unauthorized intimate examinations

- Prohibits registered nurses, advanced practice registered nurses, physician assistants, physicians, medical residents, or students from performing an intimate examination on an anesthetized or unconscious patient except under limited circumstances.
- Authorizes the appropriate licensing board to take disciplinary action if the provider violates the prohibition on intimate examinations.

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## TABLE OF CONTENTS

|                                                                            |    |
|----------------------------------------------------------------------------|----|
| Sex offenses .....                                                         | 5  |
| Background – Sex Offenses Law definitions .....                            | 5  |
| Sexual battery .....                                                       | 5  |
| Prohibitions .....                                                         | 5  |
| Penalty.....                                                               | 7  |
| Notices of indictment or conviction of licensed medical professional ..... | 7  |
| Definitions .....                                                          | 8  |
| Sexual imposition .....                                                    | 9  |
| Prohibitions .....                                                         | 9  |
| Penalty.....                                                               | 9  |
| Rape .....                                                                 | 10 |
| SORN Law .....                                                             | 11 |
| Sentencing of sexually violent predator .....                              | 12 |
| Conforming changes in other laws .....                                     | 12 |
| Childhood sexual abuse.....                                                | 12 |
| Children conceived as a result of rape or sexual battery.....              | 13 |
| Consent to adoption not required .....                                     | 13 |
| Declaration of paternity .....                                             | 13 |
| Standing to bring paternity action .....                                   | 14 |
| Failure to report a crime .....                                            | 14 |
| Notice of conviction sent to licensing board .....                         | 15 |
| Public Records Law .....                                                   | 15 |
| Medical Board regulation of health care professionals.....                 | 16 |
| Investigations of alleged violations.....                                  | 16 |
| Investigation supervision.....                                             | 16 |
| Confidential investigatory information .....                               | 16 |
| Board case reports.....                                                    | 16 |
| Status updates .....                                                       | 17 |
| License suspension with prior hearing.....                                 | 17 |

|                                                                                          |    |
|------------------------------------------------------------------------------------------|----|
| Automatic license suspension .....                                                       | 17 |
| Criminal conduct and sexual misconduct reporting to the Board .....                      | 18 |
| By health care facilities.....                                                           | 18 |
| By licensees and professional associations .....                                         | 18 |
| Self-reporting.....                                                                      | 19 |
| Professional association membership suspension.....                                      | 19 |
| Confidentiality .....                                                                    | 19 |
| Patient notice of probationary orders related to sexual misconduct or patient harm ..... | 20 |
| Situations that require disclosure .....                                                 | 20 |
| When disclosure is not required .....                                                    | 21 |
| Board website.....                                                                       | 21 |
| Unauthorized intimate examinations.....                                                  | 21 |
| Intimate examinations .....                                                              | 21 |
| Informed consent.....                                                                    | 22 |
| Enforcement .....                                                                        | 23 |

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## DETAILED ANALYSIS

### Sex offenses

#### Background – Sex Offenses Law definitions

The Sex Offenses Law defines the following terms relevant to the bill:<sup>1</sup>

“Sexual conduct” means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

“Sexual contact” means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

“Sexual activity” means sexual conduct or sexual contact, or both.

### Sexual battery

#### Prohibitions

The bill modifies the offense of sexual battery under current law by expanding the prohibitions to apply to any person engaging in *sexual activity* (sexual conduct or sexual

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<sup>1</sup> R.C. 2907.01(A), (B), and (C).

contact), instead of just sexual conduct under current law, with another, not the spouse of the offender; *causing another, not the spouse of the offender, to engage in sexual activity with the offender; or causing two or more other persons to engage in sexual activity* when any of the following apply:<sup>2</sup>

1. The offender knowingly coerces the other person, *or one of the other persons*, to submit by any means that would prevent resistance by a person of ordinary resolution.
2. The offender knows that the other person's, *or one of the other person's*, ability to appraise the nature of or control the other person's own conduct is substantially impaired.
3. The offender knows that the other person, *or one of the other persons*, submits because the other person is unaware that the act is being committed.
4. The offender knows that the other person, *or one of the other persons*, submits because the other person mistakenly identifies the offender as the other person's spouse.
5. The offender is the other person's, *or one of the other person's*, natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person.
6. The other person, *or one of the other persons*, is in custody of law or a patient in a hospital or other institution, and the offender has supervisory or disciplinary authority over the other person.
7. The offender is a teacher, administrator, coach, or other person in authority employed by or serving in a school for which the State Board of Education prescribes minimum standards, the other person, *or one of the other persons*, is enrolled in or attends that school, and the offender is not enrolled in and does not attend that school.
8. The other person, *or one of the other persons*, is a minor, the offender is a teacher, administrator, coach, or other person in authority employed by or serving in an institution of higher education, and the other person is enrolled in or attends that institution.
9. The other person, *or one of the other persons*, is a minor, and the offender is the other person's athletic or other type of coach, is the other person's instructor, is the leader of a scouting troop of which the other person is a member, or is a person with temporary or occasional disciplinary control over the other person.
10. The offender is a mental health professional, the other person, *or one of the other persons*, is a mental health client or patient of the offender, and the offender induces the other person to submit by falsely representing to the other person that the sexual activity is necessary for mental health treatment purposes.

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<sup>2</sup> R.C. 2907.03(A).

11. The offender is a “licensed medical professional,” the other person, *or one of the other persons*, is a patient of the offender, and the sexual activity occurs in the course of “medical treatment.” (See “**Definitions.**”)
12. The other person, *or one of the other persons*, is confined in a detention facility, and the offender is an employee of that detention facility.
13. The other person, *or one of the other persons*, is a minor, the offender is a cleric, and the other person is a member of, or attends, the church or congregation served by the cleric.
14. The other person, *or one of the other persons*, is a minor, the offender is a peace officer, and the offender is more than two years older than the other person.

The bill makes a conforming change in the division references above.<sup>3</sup>

## Penalty

The following are the penalties for sexual battery under the bill and current law:<sup>4</sup>

- The bill modifies current law by providing that, except as described in the following dot point, if the sexual activity involved is sexual conduct with another, not the spouse of the offender; *causing another, not the spouse of the offender, to engage in sexual conduct with the offender; or causing two or more other persons to engage in sexual conduct*, sexual battery is a third degree felony. Current law has the same penalty but only if the sexual conduct is with another, not the offender’s spouse.
- Generally, under the bill, if the other person, *or one of the other persons*, is 13 or over and less than 18, sexual battery is a second degree felony, and the court must impose upon the offender a mandatory prison term equal to one of the definite prison terms prescribed in the Felony Sentencing Law for a second degree felony. Under current law, if the other person is less than 13, sexual battery is a second degree felony, and the court must impose upon the offender a mandatory prison term equal to one of the definite prison terms prescribed in the Felony Sentencing Law for a second degree felony.
- Under the bill, if the sexual activity involved is sexual contact, sexual battery is a fifth degree felony. But if the other person, or one of the other persons, is less than 18, sexual battery is a felony of the fourth degree. Current law, which does not cover sexual battery by means of sexual contact, has no comparable penalty.

## Notices of indictment or conviction of licensed medical professional

The bill requires that if a licensed medical professional is indicted or charged and bound over to the court of common pleas for trial for an alleged violation of the prohibition described

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<sup>3</sup> R.C. 2950.151(A)(1)(f).

<sup>4</sup> R.C. 2907.03(B)(1) and (2).

above in (11) under “**Prohibitions**,” the prosecuting attorney handling the case must send written notice of the indictment or the charge and bind over to the regulatory or licensing board or agency, if any, that has the administrative authority to suspend or revoke the licensed medical professional’s professional license, certification, registration, or authorization.<sup>5</sup> This provision is similar to, and an expansion of, current law’s provision pertaining to a mental health professional who is indicted or charged and bound over to the court of common pleas for an alleged violation of the prohibition described above in (10) under “**Prohibitions**.”<sup>6</sup>

The bill also requires that if a licensed medical professional is convicted of or pleads guilty to a violation of the prohibition described above in (11) under “**Prohibitions**,” the court must transmit a certified copy of the judgment entry of conviction to the regulatory or licensing board or agency, if any, that has the administrative authority to suspend or revoke the licensed medical professional’s professional license, certification, registration, or authorization.<sup>7</sup> This provision is similar to, and an expansion of, current law’s provision pertaining to a mental health professional who is convicted of or pleads guilty to a violation of the prohibition described above in (10) under “**Prohibitions**.”<sup>8</sup>

## Definitions

For purposes of the sexual battery prohibitions discussed above, specifically (11) under “**Prohibitions**,” “medical treatment” means in-person medical services provided by a licensed medical professional under the legal authority conferred by a license or certificate, including in-person examination, consultation, health care, treatment, procedure, surgery, or other in-person procedures.<sup>9</sup>

For purposes of the Sex Offenses Law, “licensed medical professional” means any of the following medical professionals:<sup>10</sup>

- A physician assistant licensed by the State Medical Board;
- A physician authorized by the State Medical Board to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery;
- A massage therapist licensed by the State Medical Board.

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<sup>5</sup> R.C. 2907.17.

<sup>6</sup> R.C. 2907.17.

<sup>7</sup> R.C. 2907.18.

<sup>8</sup> R.C. 2907.18.

<sup>9</sup> R.C. 2907.03(C)(5).

<sup>10</sup> R.C. 2907.01(S).



## Sexual imposition

### Prohibitions

Current law prohibits any person from having “sexual contact” with another, not the spouse of the offender; causing another, not the spouse of the offender, to have sexual contact with the offender; or causing two or more other persons to have sexual contact when any of the following applies:<sup>11</sup>

1. The offender knows that the sexual contact is offensive to the other person, or one of the other persons, or is reckless in that regard.
2. The offender knows that the other person’s, or one of the other person’s, ability to appraise the nature of or control the offender’s or touching person’s conduct is substantially impaired.
3. The offender knows that the other person, or one of the other persons, submits because of being unaware of the sexual contact.
4. The other person, or one of the other persons, is 13 or older but less than 16, whether or not the offender knows the age of such person, and the offender is at least 18 and four or more years older than such other person.
5. The offender is a mental health professional, the other person or one of the other persons is a mental health client or patient of the offender, and the offender induces the other person who is the client or patient to submit by falsely representing to the other person who is the client or patient that the sexual contact is necessary for mental health treatment purposes.

The bill retains the prohibition described in (1) above as the offense of sexual imposition.

It eliminates the prohibitions described in (2), (3), (4), and (5) above as the offense of sexual imposition. Under the bill, the eliminated prohibitions described in (2), (3), and (5) above are included in the expanded prohibitions in sexual battery as described in (2), (3), and (10) above in “**Prohibitions**” under “**Sexual battery.**”

### Penalty

The penalties for sexual imposition under current law and under the bill are as follows:

- Under current law, generally, sexual imposition (a violation of the prohibitions described in (1) through (5) above) is a third degree misdemeanor. If the offender previously has been convicted of or pleaded guilty to sexual imposition, rape, sexual battery, unlawful sexual conduct with a minor, gross sexual imposition, or the former offense of felonious sexual penetration, sexual imposition is a first degree misdemeanor. If the offender previously has been convicted of or pleaded guilty to three or more offenses described

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<sup>11</sup> R.C. 2907.06(A).

in this paragraph, or of any combination of those offenses, sexual imposition is a first degree misdemeanor and, notwithstanding the range of jail terms prescribed in the Misdemeanor Sentencing Law, the court may impose on the offender a definite jail term of not more than one year.<sup>12</sup>

- Under the bill, sexual imposition (a violation of the prohibition described in (1) above) has the same penalty as in the preceding dot point. Due to the elimination of the sexual imposition prohibitions described in (2) through (5) above and the inclusion of the prohibitions in (2), (3), and (5) above as the expanded offense of sexual battery (see (2), (3), and (10) in “**Prohibitions**” under “**Sexual battery**”), the penalty for a violation of those prohibitions (as the expanded offense of sexual battery) is a fifth degree felony. But if the other person, or one of the other persons, is less than 18, the violation as sexual battery is a fourth degree felony.<sup>13</sup>

## Rape

The bill expands the offense of rape by prohibiting any person from engaging in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when the offender knows that the judgment or control of the other person is substantially impaired as a result of the influence of any drug or intoxicant administered to the other person with the other person’s consent for the purpose of any kind of medical or dental examination, treatment, or surgery (hereafter “offender’s knowledge of victim’s impaired judgment due to any drug administered for medical treatment”).<sup>14</sup>

The current rape law prohibits any person from engaging in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender when any of the following applies:<sup>15</sup>

- For the purpose of preventing resistance, the offender substantially impairs the other person’s judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.
- The other person is less than 13, whether or not the offender knows the age of the other person.
- The other person’s ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person’s ability to resist or consent is

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<sup>12</sup> R.C. 2907.06(C).

<sup>13</sup> R.C. 2907.03(B)(2) and 2907.06(C).

<sup>14</sup> R.C. 2907.02(A)(1)(d).

<sup>15</sup> R.C. 2907.02(A)(1)(a), (b), and (c).

substantially impaired because of a mental or physical condition or because of advanced age.

### **SORN Law**

Under the Sex Offender Registration and Notification (SORN) Law (R.C. Chapter 2950), offenders who are convicted of or plead guilty to a “sexually oriented offense” (as defined relevant to the bill to include the expanded offenses of rape and sexual battery and the modified offense of sexual imposition) and are sentenced to a prison term, a term of imprisonment, or any other type of confinement must register their residence, school, institution of higher education, and place of employment addresses, report changes in addresses, and periodically verify addresses with the sheriff in each respective county.<sup>16</sup> The SORN Law classifies three levels of registration: Tier I sex offender/child-victim offender; Tier II sex offender/child-victim offender; and Tier III sex offender/child-victim offender.<sup>17</sup> Each Tier has different address verification requirements from the other Tiers. A Tier I offender must verify current addresses once every year on the anniversary of the initial registration date, for 15 years for an adult offender or for 10 years for a juvenile offender.<sup>18</sup> A Tier II offender must verify current addresses every 180 days after the initial registration date, for 25 years for an adult offender or for 20 years for a juvenile offender.<sup>19</sup> A Tier III offender must verify current addresses every 90 days from the first registration date and until the offender’s death.<sup>20</sup>

The SORN Law also generally requires that notice be given to certain individuals and entities in a specified geographical notification area of specified information regarding a Tier III sex offender/child victim offender.<sup>21</sup>

The bill classifies an offender convicted of the expanded offense of sexual battery if the sexual activity involved is sexual contact as a Tier II sex offender/child-victim offender.<sup>22</sup> It classifies an offender convicted of the expanded offense of rape or sexual battery, if the sexual activity involved in sexual battery is sexual conduct, as a Tier III sex offender/child-victim offender.<sup>23</sup> Thus, these classified Tier II and Tier III sex offender/child-victim offenders are subject to the registration, applicable address verification, and applicable community notification requirements described above.

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<sup>16</sup> R.C. 2950.04, not in the bill.

<sup>17</sup> R.C. 2950.031, not in the bill.

<sup>18</sup> R.C. 2950.06(B)(1) and 2950.07(B)(3), not in the bill.

<sup>19</sup> R.C. 2950.06(B)(2) and 2950.07(B)(2), not in the bill.

<sup>20</sup> R.C. 2950.06(B)(3) and 2950.07(B)(1), not in the bill.

<sup>21</sup> R.C. 2950.11(F)(1)(a), not in the bill.

<sup>22</sup> R.C. 2950.01(F)(1)(c).

<sup>23</sup> R.C. 2950.01(G)(1)(a).

## Sentencing of sexually violent predator

Generally, under continuing law, for any offense for which the sentence is being imposed, if the offender previously has been convicted of or pleaded guilty to a “violent sex offense” and also to a “sexually violent predator specification” that was included in the indictment, count in the indictment, or information charging that offense, the court must impose upon the offender a term of life imprisonment without parole.<sup>24</sup> Relevant to the bill, “sexually violent predator specification” means a specification, as described in continuing law, that charges that a person charged with a “violent sex offense,” is a sexually violent predator.<sup>25</sup> For purposes of the sentencing of sexually violent predators, the bill expands the definition of “violent sex offense” to include the expanded offense of rape or the expanded offense of sexual battery if the sexual activity involved is sexual conduct.<sup>26</sup> In effect, under the bill, for any offense for which the sentence is being imposed, if the offender previously has been convicted of or pleaded guilty to the expanded offense of rape or sexual battery, if the sexual activity involved in sexual battery is sexual conduct, and also to a sexually violent predator specification that was included in the indictment, count in the indictment, or information charging that offense, the court must impose upon the offender a term of life imprisonment without parole.

## Conforming changes in other laws

By reason of the bill’s expansion of the offenses of sexual battery and rape as described above under “**Sexual battery**” and “**Rape**,” the bill makes conforming changes in related laws described below. The references to “rape” and “sexual battery” in those laws mean the offenses of rape and sexual battery, both as expanded by the bill.

### Childhood sexual abuse

For purposes of the statute of limitations for childhood sexual abuse, the bill modifies the definition of “childhood sexual abuse,” as relevant to the bill, to mean any conduct that constitutes any of the following offenses, if the victim is at the time of the offense a child under 18 or a child with a developmental disability or physical impairment under 21:<sup>27</sup>

- The offense of rape.
- The offense of sexual battery.<sup>28</sup> Under current law, only certain specified circumstances of committing sexual battery are within the definition of “childhood sexual abuse.”<sup>29</sup>
- The offense of gross sexual imposition or sexual imposition if the actor is a “licensed medical professional,” the victim is a patient of the actor, and the sexual contact occurs

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<sup>24</sup> R.C. 2971.03(A)(4), not in the bill.

<sup>25</sup> R.C. 2971.01(I).

<sup>26</sup> R.C. 2971.01(L)(1).

<sup>27</sup> R.C. 2305.111(A)(1)(a).

<sup>28</sup> R.C. 2305.111(A)(1)(a) and 2907.03(A)(1) to (14) in the bill.

<sup>29</sup> R.C. 2305.111(A)(1)(a) and 2907.03(A)(1) and (A)(5) to (12) under current law.

in the course of “medical treatment.”<sup>30</sup> (See “**Definitions**,” above.) Current law specifies the offense of gross sexual imposition or sexual imposition committed under specified circumstances in which the offender is in some position of authority over the child.<sup>31</sup> Note that the reference to sexual imposition does not appear to be applicable because the specified circumstances are already included in the expanded offense of sexual battery under the preceding dot point.

### **Children conceived as a result of rape or sexual battery**

The bill modifies current law by providing that the parent, or a relative of the parent, of a child who was conceived as the result of the parent’s commission of rape or of sexual battery *if the sexual activity involved is sexual conduct*, cannot inherit the real or personal property or inheritance of the child or the child’s lineal descendants as provided in the Statute of Descent and Distribution.<sup>32</sup>

### **Consent to adoption not required**

The bill modifies current law by providing that consent to adoption is not required of the father, putative father, or mother of a minor if the minor is conceived as the result of the commission of rape or of sexual battery *if the sexual activity involved is sexual conduct*, or a similar offense in another state, by the father, putative father, or mother, and the father, putative father, or mother is convicted of or pleads guilty to the commission of that offense.<sup>33</sup>

### **Declaration of paternity**

Under current law, generally, a person who is the victim of rape or sexual battery for which a child was conceived as a result may bring an action to declare the person who was convicted of or pleaded guilty to the offense to be the parent of the child conceived as a result of rape or sexual battery committed by the other person.<sup>34</sup>

For purposes of the laws pertaining to the declaration of paternity, the bill’s definition of “rape” includes the bill’s expanded offense of rape or similar law of another state.<sup>35</sup> The bill’s definition of “sexual battery” includes the expanded offense of sexual battery *if the sexual activity involved is sexual conduct*.<sup>36</sup>

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<sup>30</sup> R.C. 2305.111(A)(1)(b)(vii).

<sup>31</sup> R.C. 2305.111(A)(1)(b)(i) to (ix).

<sup>32</sup> R.C. 2105.062.

<sup>33</sup> R.C. 3107.07(F).

<sup>34</sup> R.C. 3109.501(A), not in the bill.

<sup>35</sup> R.C. 2907.02(A)(1)(d) and 3109.50(B).

<sup>36</sup> R.C. 2907.03(A) and 3109.50(C).

## Standing to bring paternity action

Under current law, a man alleged or alleging himself to be the child's father is not eligible to file an action to determine the existence or nonexistence of the father and child relationship if the man was convicted of or pleaded guilty to rape or sexual battery, the victim of the rape or sexual battery was the child's mother, and the child was conceived as a result of the rape or sexual battery.<sup>37</sup>

For purposes of the above law, the bill's definition of "rape" includes the expanded offense of rape, or similar law of another state.<sup>38</sup> The bill's definition of "sexual battery" includes the expanded offense of sexual battery, *if the sexual activity involved is sexual conduct*, or similar law of another state.<sup>39</sup>

## Failure to report a crime

The bill expands the offense of failure to report a crime by prohibiting any person who knows that a licensed medical professional has committed an offense under the Sex Offenses Law (R.C. Chapter 2907), a violation of a municipal ordinance that is substantially equivalent to such offense, or a substantially equivalent criminal offense in another jurisdiction, against a patient of the medical professional, from failing to report such knowledge to law enforcement authorities within 30 days of obtaining the knowledge.<sup>40</sup> A violation of the prohibition is a fourth degree misdemeanor.<sup>41</sup>

The bill further provides that except for a self-report or participation in the offense or violation being reported, any person who makes a report within the 30-day period specified in the preceding paragraph or any person who participates in a judicial proceeding that results from such report is immune from civil or criminal liability that otherwise might be incurred or imposed as a result of making that report or participating in that proceeding so long as the person is acting in good faith without fraud or malice.<sup>42</sup>

The physician-patient relationship or physician assistant-patient relationship is not a ground for excluding evidence regarding the person's knowledge of a licensed medical professional's commission of an offense or violation reported as described in the second preceding paragraph, against that medical professional in any judicial proceeding resulting from such report.<sup>43</sup>

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<sup>37</sup> R.C. 3111.04(A)(2).

<sup>38</sup> R.C. 2907.02(A)(1)(d) and 3111.04(E)(2).

<sup>39</sup> R.C. 2907.03(A) and 3111.04(E)(3).

<sup>40</sup> R.C. 2921.22(F)(1).

<sup>41</sup> R.C. 2921.22(J).

<sup>42</sup> R.C. 2921.22(F)(2).

<sup>43</sup> R.C. 2921.22(F)(3).

The bill defines “licensed medical professional” as having the same meaning as in “**Definitions**,” above.<sup>44</sup>

### **Notice of conviction sent to licensing board**

The bill requires the prosecutor in any case against dietitians, anesthesiology assistants, respiratory care professionals, acupuncturists, radiology assistants, and genetic counselors to notify the State Medical Board, on forms provided by the Board, of any of the following regarding the person:<sup>45</sup>

- A plea of guilty to, or a conviction of, a felony, or a court order dismissing a felony charge on technical or procedural grounds;
- A plea of guilty to, or a conviction of, a misdemeanor committed in the course of practice or in the course of business, or a court order dismissing such a misdemeanor charge on technical or procedural grounds;
- A plea of guilty to, or a conviction of, a misdemeanor involving moral turpitude, or a court order dismissing such a charge on technical or procedural grounds.

The above report must include the name and address of the person, the nature of the offense, and certified copies of court entries in the action.<sup>46</sup>

Current law requires the prosecutor to give the above described report regarding persons licensed, certified, registered, or otherwise authorized to practice under the Controlled Substances Law, or by the State Dental Board, the State Board of Nursing, the State Board of Pharmacy, the State Chiropractic Board, the Veterinary Medical State Licensing Board, or the State Medical Board with respect to physician assistants, and physicians and limited practitioners.<sup>47</sup>

### **Public Records Law**

The Public Records Law defines “public record” as records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for profit entity operating the alternative school pursuant to applicable law.<sup>48</sup> Specified types of records are excepted from the definition of “public record.”<sup>49</sup> The bill expands these exceptions to include license or certificate application or renewal responses and supporting documentation submitted to the State Medical Board regarding an applicant’s, or a

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<sup>44</sup> R.C. 2921.22(F)(4).

<sup>45</sup> R.C. 2929.42(A).

<sup>46</sup> R.C. 2929.42(B).

<sup>47</sup> R.C. 2929.42(A).

<sup>48</sup> R.C. 149.43(A)(1).

<sup>49</sup> R.C. 149.43(A)(1)(a) to (oo).

license or certificate holder's, inability to practice according to acceptable and prevailing standards of care by reason of a medical condition.<sup>50</sup>

## **Medical Board regulation of health care professionals**

Under current law maintained by the bill, the State Medical Board licenses and regulates physicians (R.C. Chapter 4731), as well as physician assistants, dietitians, anesthesiologist assistants, respiratory care professionals, acupuncturists, radiologist assistants, and genetic counselors (R.C. Chapters 4730, 4759, 4760, 4761, 4762, 4774, and 4778, respectively). As described below, the bill makes parallel changes for each of those health care professionals pertaining to Board investigations, summary license suspensions, criminal conduct and sexual misconduct reporting, and patient notice of probationary orders.

### **Investigations of alleged violations**

#### **Investigation supervision**

The bill adds that a majority of the Board may vote to add a consumer member of the Board in the supervision of any part of an alleged violation of the Revised Code chapters listed above. If the Board so votes, the Board president must designate the consumer member. A majority vote of the Board may vote to rescind authorization for consumer member participation in investigations.

The bill's changes are in addition to law maintained by the bill that requires investigations to be supervised by the supervising member elected by the Board and the Board secretary. The Board president also continues to be able to designate another member to supervise an investigation in place of the supervising member.<sup>51</sup>

#### **Confidential investigatory information**

The bill maintains existing law concerning the confidentiality of reports, complaints, and investigatory information. It adds that persons are prohibited from knowingly accessing, using, or disclosing confidential investigatory information in a manner prohibited by law.<sup>52</sup> Violation of this provision is a first degree misdemeanor.<sup>53</sup>

#### **Board case reports**

Current law requires the Board to prepare quarterly reports documenting the disposition of cases in the preceding three months. In addition to the information that must be included in the reports under current law, the bill requires inclusion of whether witnesses were

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<sup>50</sup> R.C. 149.43(A)(1)(pp).

<sup>51</sup> R.C. 4730.26(C), 4731.22(F)(2), 4759.05(B)(2), 4760.14(B), 4761.03(E)(2), 4762.14(B), 4774.14(B), and 4778.18(B).

<sup>52</sup> R.C. 4730.26(F), 4731.22(F)(5), 4759.05(B)(5), 4760.14(E), 4761.03(E)(5), 4762.14(E), 4774.14(E), and 4778.18(E).

<sup>53</sup> R.C. 4730.99(C), 4731.99(G), 4759.99, 4760.99(C), 4761.99, 4762.99(C), 4774.99(C), and 4778.99.



interviewed and whether the individual against whom the complaint is directed is the subject of any pending complaints.<sup>54</sup>

### **Status updates**

The bill authorizes the Board to provide a status update regarding an investigation to a complainant on request if the Board verifies the complainant's identity.<sup>55</sup>

### **License suspension with prior hearing**

Current law identifies a circumstance when it may be recommended that the Board suspend a license without a prior hearing. There must be clear and convincing evidence that a disciplinary violation has occurred, and the individual's continued practice must present a danger of immediate and serious harm to the public. The bill adds another circumstance when a license may be suspended without a hearing: if the Board receives verifiable information that a licensee has been charged in any state or federal court with a crime classified as a felony under the charging court's law and the conduct charged constitutes a disciplinary violation under Ohio law.<sup>56</sup>

### **Automatic license suspension**

The bill adds trafficking in persons to the list of offenses in current law that subject a licensee to an automatic license suspension and suspension of the individual's practice in Ohio. The automatic suspension offenses in current law that are maintained by the bill are aggravated murder, murder, voluntary manslaughter, felonious assault, kidnapping, rape or sexual battery (both as expanded by the bill), gross sexual imposition, aggravated arson, aggravated robbery, or aggravated burglary.<sup>57</sup>

The bill also adds that an automatic suspension occurs if a licensee's license or certificate to practice a health care occupation or provide health care services is suspended, revoked, or surrendered or relinquished in lieu of discipline by a health care professional regulatory agency in Ohio or another state. The automatic suspension begins immediately on entry of the order by the regulatory agency and lasts for 90 days to permit the Board to investigate. Continued practice during the automatic suspension is considered practicing without a license.

The bill requires the Board to notify the individual subject to the automatic suspension by certified mail or in person. If the individual subject to the suspension does not timely request an adjudication in accordance with the Administrative Procedure Act, the Board is not required

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<sup>54</sup> R.C. 4730.26(H), 4731.22(F)(6), 4759.05(B)(6), 4760.14(G), 4761.03(E)(6), 4762.14(G), 4774.14(G), and 4778.18(G).

<sup>55</sup> R.C. 4730.26(I), 4731.22(F)(7), 4759.05(B)(7), 4760.14(H), 4761.03(E)(7), 4762.14(H), 4774.14(H), and 4778.18(H).

<sup>56</sup> R.C. 4730.25(G)(1)(b), 4731.22(G)(1), 4759.07(H)(1)(b), 4760.13(H)(1)(b), 4761.09(H)(1)(b), 4762.13(H)(1)(b), 4774.13(H)(1)(b), and 4778.14(H)(1)(b).

<sup>57</sup> R.C. 4730.25(I), 4731.22(I), 4759.07(M), 4760.13(J), 4761.09(L), 4762.13(J), 4774.13(J), and 4778.14(J).

to hold a hearing and may adopt, by vote of at least six Board members, a final order of the Board's findings. The final order may impose sanctions identified under existing law.<sup>58</sup>

### **Criminal conduct and sexual misconduct reporting to the Board**

The bill makes several changes regarding reports that must be made to the Board by third parties, specifically regarding criminal conduct and sexual misconduct. The bill defines criminal conduct as any conduct that would constitute a felony, a misdemeanor committed in the course of medical practice, an offense of violence, or a sexually oriented offense, as defined under "**SORN Law**" (above), regardless of whether a criminal charge has been filed or the location in this state where the conduct occurred. Sexual misconduct means conduct that exploits the licensee-patient relationship in a sexual way, whether verbal or physical, and may include the expression of thoughts, feelings, or gestures that are sexual or that reasonably may be construed by a patient as sexual. Sexual misconduct includes sexual impropriety, sexual contact, and sexual interaction as defined by the Board in rules.<sup>59</sup>

#### **By health care facilities**

Current law requires health care facilities that take disciplinary action against a licensee of the Board to report that information to the Board. The bill shortens the time for such a report to be made from 60 days to 30 days.<sup>60</sup> It also adds that a health care facility is required to report to the Board *investigations* regarding criminal conduct or sexual misconduct against Board licensees. Those reports are required within 30 days of beginning such an investigation. The report must include the name of the licensee being investigated and a summary of the underlying facts.<sup>61</sup> A person who violates this provision is guilty of a fourth degree misdemeanor, unless the offender has previously been convicted of the same violation. In that case, it is a first degree misdemeanor.<sup>62</sup>

#### **By licensees and professional associations**

Current law requires licensed individuals and professional associations of such individuals who believe there has been a violation of the Medical Board Law or related rules to report that information to the Board. The bill adds that if a licensee or professional association has reasonable cause to suspect, based on facts that would cause a reasonable person in a similar position to suspect, that a licensee of the Board has committed or participated in

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<sup>58</sup> R.C. 4731.22(Q).

<sup>59</sup> R.C. 4731.224(A).

<sup>60</sup> R.C. 4730.32(B)(1), 4731.224(B)(1), 4760.16(B)(1), 4761.14(B)(1), 4762.16(B)(1), and 4774.16(B)(1). In the case of dietitians and genetic counselors, the bill adds this reporting requirement for health care facilities, thus making the dietitian and genetic counselor law parallel to current law for physicians and other practitioners the State Medical Board regulates. R.C. 4759.14(B)(1) and 4778.171(B)(1).

<sup>61</sup> R.C. 4730.32(B)(2), 4731.224(B)(2), 4759.14(B)(2), 4760.16(B)(2), 4761.14(B)(2), 4762.16(B)(2), 4774.16(B)(2), and 4778.171(B)(1).

<sup>62</sup> R.C. 4730.99(B)(2), 4731.99(E)(2), 4759.99, 4760.99(B)(2), 4761.99, 4762.99(B)(2), 4774.99(B)(2), and 4778.99.

criminal conduct or sexual misconduct, that information must be reported to the Board within 30 days. The requirement does not apply to a professional association or society whose staff interacts with members of the association or society only in advocacy, governance, or educational capacities and whose staff do not regularly interact with members in practice settings.<sup>63</sup> A person who violates this provision is guilty of a fourth degree misdemeanor, unless the offender has previously been convicted of the same violation. In that case, it is a first degree misdemeanor.<sup>64</sup>

### **Self-reporting**

The bill provides that, in addition to the self-reporting of criminal *offenses* that is required under current law for license renewal, Board licensees must report to the Board criminal *charges* regarding criminal conduct, sexual misconduct, or any conduct involving the use of a motor vehicle while under the influence of alcohol or drugs. The report must be made within 30 days of the criminal charge being filed.<sup>65</sup>

### **Professional association membership suspension**

The bill shortens the time period in which a professional association or society of practitioners that suspends a licensee's membership for ethical or malpractice reasons must notify the Board. Under the bill, the notice must be within 30 days of the final decision, as opposed to 60 days under current law.<sup>66</sup>

### **Confidentiality**

Current law requires the reports described above to be held in confidence and not subject to discovery or introduction into evidence in a civil action related to the matters reported. Current law also specifies the Board may use the information only to investigate or as evidence for a disciplinary hearing or related trial or appeal. It authorizes Board disclosure to health care facility committees involved in credentialing or recredentialing a licensee. The bill eliminates all of these provisions and instead provides that the reports described above are confidential as otherwise provided under existing law of the Board.<sup>67</sup>

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<sup>63</sup> R.C. 4730.32(C)(3), 4731.224(C)(3), 4759.07(B)(2), 4760.16(C)(3), 4761.14(C), 4762.16(C)(3), 4774.16(C)(3), and 4778.171(B)(2).

<sup>64</sup> R.C. 4730.99(B)(2), 4731.99(E)(2), 4759.99, 4760.99(B)(2), 4761.99, 4762.99(B)(2), 4774.99(B)(2), and 4778.99.

<sup>65</sup> R.C. 4730.32(C)(4), 4731.224(C)(4), 4759.07(B)(3), 4760.16(C)(4), 4761.14(D), 4762.16(C)(4), 4774.16(C)(4), and 4778.171(B)(3).

<sup>66</sup> R.C. 4730.32(D), 4731.224(D), 4760.16(D), 4762.16(D), and 4774.16(D). (This provision does not exist under current law for dietitians, respiratory care professionals, or genetic counselors.)

<sup>67</sup> R.C. 4730.32(G) (referring to the confidentiality provisions in R.C. 4730.26(F)), 4731.224 (referring to confidentiality provisions in R.C. 4731.22(F)(5)), 4760.16(G) (referring to confidentiality provisions in R.C. 4760.14), 4762.16(G) (referring to confidentiality provisions in R.C. 4762.14), 4774.16(G) (referring to confidentiality provisions in R.C. 4774.14). (This provision does not exist under current law for dietitians, respiratory care professionals, or genetic counselors.)

The bill also specifies that making the reports to the Board described above, or making the reports to law enforcement as described in “**Failure to report a crime**” (above), does not constitute willfully betraying a professional confidence for purposes of the Board disciplinary authority.<sup>68</sup>

### **Patient notice of probationary orders related to sexual misconduct or patient harm**

The bill authorizes the Board to require Board licensees<sup>69</sup> who are subject to certain probationary orders to provide a written disclosure to each patient, or the patient’s guardian or a key third party, of all of the following:<sup>70</sup>

1. The practitioner’s probation status;
2. The total length of the probation;
3. The probation end date;
4. Practice restrictions on the practitioner;
5. The Board’s telephone number;
6. An explanation of how the patient can find additional information regarding the probation on the practitioner’s profile page on the Board’s website.

The disclosure, if required by the Board, must be provided before the patient’s first visit following the probationary order. The patient, or the patient’s guardian or a key third party, must sign the disclosure, and the practitioner must maintain a signed copy in the patient’s medical record.

For purposes of the written disclosure, key third party is defined by the bill as an individual closely involved in a patient’s decision-making regarding health care services, including a patient’s spouse or partner, parents, children, siblings, or guardians. An individual’s status as a key third party ceases upon termination of a practitioner-patient relationship or termination of the relationship between a patient and the individual.<sup>71</sup>

### **Situations that require disclosure**

The written disclosure may be required by the Board in the following circumstances:

- A final order of the Board or a consent agreement establishing the commission of sexual misconduct with a patient or key third party, drug or alcohol abuse resulting in patient

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<sup>68</sup> R.C. 4731.22(B)(4).

<sup>69</sup> An LSC technical amendment is needed to remove mention of oriental medicine practitioners from the bill, as those practitioners are not regulated by the State Medical Board, effective April 12, 2021 (see R.C. 4762.011, not in the bill).

<sup>70</sup> R.C. 4731.2210(B).

<sup>71</sup> R.C. 4731.2210(A)(1).

harm or impairing safe practice, criminal conviction resulting in harm to patient health, or inappropriate prescribing resulting in patient harm;

- A statement of issues alleged that the practitioner committed any of the acts described above and, notwithstanding a lack of admission of guilt, a consent agreement ratified by the Board includes express acknowledgement that patient disclosure would serve to protect the public interest.<sup>72</sup>

### **When disclosure is not required**

The bill provides that the patient disclosure is not required in the following circumstances:

- The patient is unconscious or otherwise cannot comprehend and sign the disclosure and a guardian or key third party is unavailable;
- The direct patient interaction occurs in an emergency department or otherwise as an immediate result of a medical emergency;
- The practitioner does not have a direct treatment relationship with the patient and does not have direct contact or direct communication with the patient.<sup>73</sup>

### **Board website**

The bill requires the Board to provide on its website, the following information regarding practitioners on probation and practicing under probationary status:

- Formal action documents detailing the citation, reports and recommendations, Board order, and consent agreement;
- The length of probation and end date;
- Practice restrictions on the practitioner.<sup>74</sup>

The bill also requires the Board to provide on its website a sample probation disclosure letter to be used by practitioners to comply with the bill's requirements.<sup>75</sup>

## **Unauthorized intimate examinations**

### **Intimate examinations**

The bill prohibits a registered nurse (RN), an advanced practice registered nurse (APRN), physician assistant (PA), physician, medical resident, or student actively pursuing education to become an RN, APRN, PA, or physician from performing, or authorizing another to perform, an

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<sup>72</sup> R.C. 4731.2210(C).

<sup>73</sup> R.C. 4731.2210(D).

<sup>74</sup> R.C. 4731.2210(E).

<sup>75</sup> R.C. 4731.2210(F).

intimate examination on an anesthetized or unconscious patient.<sup>76</sup> Intimate examination is defined as a pelvic, prostate, or rectal examination.<sup>77</sup>

The bill permits an intimate examination on an anesthetized or unconscious patient in only the following circumstances:<sup>78</sup>

- The intimate examination is within the scope of care for the surgical procedure or diagnostic examination being performed;
- The patient or the patient's legal representative gives specific, informed consent for the intimate examination;
- The intimate examination is required for diagnostic purposes or treatment; or
- If an RN or APRN, the intimate examination must be conducted by a sexual assault nurse examiner for the purpose of collecting evidence and documenting injuries.

## **Informed consent**

To obtain informed consent to perform an intimate examination on an anesthetized or unconscious patient as authorized by the bill, the provider must do the following:<sup>79</sup>

- Provide the patient or their legal representative with an informed consent form;
- Provide the patient or their legal representative with a meaningful opportunity to ask questions about the intimate examination;
- Obtain the signature of the patient or their legal representative on the informed consent form;
- Sign the informed consent form.

The informed consent form may be written or electronic and must: (1) be a separate consent form or a distinct or separate section of a general consent form, (2) contain a heading at the top of the form or section "CONSENT FOR INTIMATE EXAMINATION," (3) specify the nature and purpose of the intimate examination, (4) inform the patient that students may be present if the patient or their legal representative authorizes, (5) allows the patient or legal representative the opportunity to consent to or refuse the intimate examination, and (6) provide opportunity to consent to or refuse a student performing or observing the examination.<sup>80</sup>

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<sup>76</sup> R.C. 4723.93(B), 4730.57(B), and 4731.77(B).

<sup>77</sup> R.C. 4723.93(A), 4730.57(A), and 4731.77(A).

<sup>78</sup> R.C. 4723.93(C), 4730.57(C), and 4731.77(C).

<sup>79</sup> R.C. 4723.93(D), 4730.57(D), and 4731.77(D).

<sup>80</sup> R.C. 4723.93(D)(1), 4730.57(D)(1), and 4731.77(D)(1).

## Enforcement

The bill authorizes the appropriate licensing board to take disciplinary action against a provider for violating the provisions prohibiting intimate examinations on unconscious or anesthetized patients. Disciplinary action may include: limiting, revoking, or suspending a license to practice; refusing to issue, renew, or reinstate a license; or reprimanding or placing on probation the license holder.<sup>81</sup>

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## HISTORY

| Action                        | Date     |
|-------------------------------|----------|
| Introduced                    | 04-18-23 |
| Reported, S. Judiciary        | 04-24-24 |
| Passed Senate (32-0)          | 04-24-24 |
| Reported, H. Criminal Justice | --       |

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<sup>81</sup> R.C. 4723.28, 4730.25, and 4731.22.