

# West Virginia Laws on Sexual Assault and Abuse

This module is designed to build service providers' basic understanding of the following: what behaviors under state law would be considered sexual assault and sexual abuse; how sex offense charges are filed; the state's statute of limitations on sex offenses; and when reports to law enforcement can and should be made.

## Key Points

- Sexual assault and sexual abuse are the two major classifications of sex offenses in West Virginia. Sexual abuse occurs when a person subjects another person to sexual contact without their consent, and that lack of consent is due to physical force, threat or intimidation. Sexual assault is sexual intercourse or sexual intrusion without consent.
- Two sources for West Virginia laws pertaining to sex offenses are the *West Virginia Criminal Code* and the *West Virginia Protocol for Responding to Victims of Sexual Assault*.
- Law enforcement officers make the initial determination of what charges to file against a suspect. However, at the time an indictment is sought, the prosecuting attorney makes the decision as to what criminal charge(s) should be brought in connection with a case.
- There is no statute of limitations on sexual assault offenses and first degree sexual abuse. There is a one year statute of limitations for 2nd and 3rd degree sexual abuse.
- Adult victims can have a forensic medical exam conducted within 96 hours whether or not they choose to report to law enforcement. If the victim is a child or an incapacitated adult, the crime must be reported to law enforcement and the West Virginia Department of Health and Human Resources by the health care provider.<sup>1</sup>
- The key factor in determining if a sexual act is criminal is whether or not there was consent. Proving lack of consent is the greatest challenge in sexual assault cases because there may be no evidence other than that which shows that sexual contact did take place.

*Unless the user of this information is an attorney, the information should not be used to provide legal advice.*

## B3. West Virginia Laws on Sexual Assault and Abuse

### Purpose

In the event that a client discloses sexual victimization, service providers need to have a basic understanding of what behaviors under West Virginia law would be considered sexual assault and sexual abuse. This knowledge will enable them to better assist and refer victims for services, as well as identify situations that activate their legal responsibilities under the state's mandatory reporting requirements. (See *Sexual Violence 101. Mandatory Reporting*.)

*Note that unless the user of this information is an attorney, the information in this module*

*should not be used to provide legal advice.*

## **Objectives**

Those who complete this module will be able to:

- Locate and describe West Virginia laws pertaining to sex offenses;
- Explain how sex offense charges are filed;
- Identify the state's statute of limitations on sex offenses;
- Identify when reports to law enforcement can and should be made; and
- Identify how consent is the key factor in sexual offenses.

## **Preparation**

- Review this module online or Sex Crimes—Definitions and WV Laws, of the West Virginia Protocol for Responding to Victims of Sexual Assault, through <http://www.fris.org>.<sup>2</sup> **The laws in this print version were current as of 2010.**

## **Part 1: CORE KNOWLEDGE**

### **What is the difference between sexual abuse and sexual assault?**

West Virginia laws are very specific about sexual abuse and sexual assault.<sup>3</sup> Sexual acts which are prohibited by law in a jurisdiction are called sex offenses or sex crimes. The key element of these sex offenses is the lack of consent to the sexual activity. Sexual abuse is intentional touching of a sexual nature. Sexual assault involves sexual penetration—oral, anal or vaginal.

**Sexual abuse** occurs when a person subjects another person to sexual contact without their consent, and that lack of consent is due to physical force, threat or intimidation. According to West Virginia law, there are three (3) levels of sexual abuse:

- **1st Degree:** Sexual contact without the victim's consent due to forcible compulsion, the victim is physically helpless, or the victim is younger than age 12 and the perpetrator is age 14 or older.
- **2nd Degree:** Sexual contact with someone who is mentally defective or mentally incapacitated.
- **3rd Degree:** Sexual contact with a victim under age 16 without their consent.

**Sexual assault** is sexual intercourse or sexual intrusion without consent. According to West Virginia law, there are three (3) levels of sexual assault:

- **1st Degree:** The perpetrator inflicts serious bodily injury, uses a deadly weapon, or the perpetrator is over age 14 and the victim is younger than twelve years old and is not married to that person.
- **2nd Degree:** Sexual intercourse or intrusion without consent and lack of consent is due to

forcible compulsion or physical helplessness.

- **3rd Degree:** Sexual intercourse or intrusion with someone who is mentally defective or mentally incapacitated, or when someone age 16 or older assaults someone less than 16 who is at least 4 years younger than the perpetrator and not married to him/her.

### **Definition of Terms: WV Sexual Abuse and Sexual Assault Laws**

Drawn from *WVC§61-8B*

- **Forcible compulsion:** (a) physical force that overcomes such earnest resistance as might reasonably be expected, under the circumstances; (b) threat or intimidation, expressed or implied, placing a person in fear of immediate death or bodily injury to him/herself or another person or in fear that he/she or another person will be kidnapped; or (c) fear by a person under 16 years of age caused by intimidation, expressed or implied, by another person who is at least four (4) years older than the victim. For the purpose of this definition, "**resistance**" includes physical resistance or any clear communication of the victim's lack of consent.
- **Married:** for the purpose of this article, in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship.
- **Mentally defective:** a person suffers from a mental disease or defect which renders that person incapable of appraising the nature of his/her conduct.
- **Mentally incapacitated:** a person is rendered temporarily incapable of appraising or controlling his/her conduct, as a result of the influence of a controlled or intoxicating substance administered to that person without his/her consent or a result of any other act committed upon that person without his/her consent.
- **Physically helpless:** a person is unconscious or for any reason is physically unable to communicate unwillingness to an act.
- **Sexual contact:** intentional touching, either directly or through clothing, of the anus/any part of the sex organs of another person, or the breast of a female or intentional touching of any part of another person's body by the actor's sex organs, where the victim is not married to the actor and the touching is done to gratify the sexual desire of either party.
- **Sexual intercourse:** any act between persons not married to each other involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person.
- **Sexual intrusion:** any act between persons not married to each other involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party.
- **Bodily injury:** substantial physical pain, illness or any impairment of physical condition.
- **Serious bodily injury:** bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.

- **Deadly weapon:** any instrument, device or thing capable of inflicting death or serious bodily injury and designed or adapted for use as a weapon or possessed, carried or used as a weapon.

Sexual abuse and sexual assault are the main categories of sex offenses in the *West Virginia Code*. Additional offenses, including incest, are described in other sections of the *West Virginia Code* ([www.legis.state.wv.us](http://www.legis.state.wv.us)) and in the Sex Crimes section of the *West Virginia Protocol for Responding to Victims of Sexual Assault* ([www.fris.org](http://www.fris.org)).

**FYI**—Some legal terms used in state sex offense laws—“mentally defective” for example—show a lack of sensitivity to victims with disabilities. While these terms would not be our choice of language, they currently define the law and influence charging decisions nonetheless. First responders are urged to avoid use of legal terms such as “mentally defective” in their interactions with victims, as their use could increase a victim’s reluctance to seek assistance with safety, healing and justice. (See *Disabilities 101. Person First Language*.)

Test your understanding of state law using the definitions above. Although the criminal justice system determines whether disclosed acts of sexual violence are offenses under state law, it is helpful for all service providers to be aware of general differences in what each offense entails.

1. *A man slipped a drug into your drink without your knowledge, you passed out, and he had sexual contact with you without your consent. Which crime do you think has been committed?*
2. *If someone has sexual contact with a person with a cognitive disability who does not have the capacity to give consent, what crime do you think has been committed?*
- 3a. *If a 17-year-old male has sexual intercourse with an 11-year-old girl who uses a wheelchair, what crime do you think has been committed?*
- 3b. *Does the fact that the girl uses a wheelchair affect this classification?*

Answers: 1) Sexual abuse in the 2nd degree; 2) Sexual abuse in the 2nd degree; 3a.) Sexual assault in the 1st degree; and 3b.) No. However, note that in any of these scenarios a prosecutor may decide on a lesser or different charge (see questions that follow).

### **How are suspects charged with sexual assault or sexual abuse?**

With criminal offenses such as sexual assault and first degree sexual abuse, the county prosecuting attorney makes the decision whether or not to prosecute the case and what level of offense is charged. An offense is considered either a misdemeanor or a felony. With a misdemeanor, the lesser charge is punishable by fines and/or up to one year in a county jail. A felony is a more serious charge, punishable by at least one year in prison. A 1st degree sexual abuse offense is a felony, whereas 2nd and 3rd degree sexual abuse are misdemeanors. All degrees of sexual assault are felonies.

Once a crime of sexual abuse or sexual assault is reported to law enforcement, a criminal investigation may begin. Law enforcement officers make the initial determination of what charges to file against a suspect. However, at the time an indictment is sought, the prosecuting attorney makes the decision as to what charge(s) should be brought in connection with a case.

In criminal cases, therefore, once the case is reported to law enforcement, the determination of what charges are made (if any) is not under the victim's control.

**FYI—A statute of limitations** is a law that sets forth the maximum period of time, after certain events, that legal proceedings based on those events may be initiated.<sup>4</sup> There is no statute of limitations for felonies in the West Virginia Code, with the exception of the felony offense of perjury which has a three-year statute of limitations and some felony tax offenses which have statute of limitations. Felonies, with these exceptions, can be charged at any time. There is a one-year statute of limitation for misdemeanors, so 2<sup>nd</sup> and 3<sup>rd</sup> degree sexual abuse must be charged within a year after the offense was committed (*WVC§61-11-9*).

**FYI—There may be many reasons why victims may be reluctant to report sex offenses to law enforcement.** Some of the most common are self-blame, fear of retaliation by perpetrators, fear of rejection by family/friends, and unwillingness to deal with the humiliation, loss of privacy and negativity they perceive would accompany criminal justice system involvement.<sup>5</sup> Victims with disabilities may also be concerned that reporting may lead to a loss of independence or, in cases of caregiver abuse, loss of someone to assist them with their daily needs. (See *Sexual Violence 101. Sexual Victimization of Persons with Disabilities: Prevalence and Risk Factors*.) Regardless of their decision about reporting, victims need to be aware of any available non-legal assistance to help them recover. Whether or not there are criminal charges filed, civil legal remedies may also be available to sexual assault victims. In civil lawsuits, victims typically seek monetary compensation for damages.

### **What evidence is needed to support these charges?**

To charge a suspect with sexual abuse or sexual assault, sufficient evidence that the crime occurred is needed. During a criminal investigation, law enforcement seeks evidence to help reconstruct details about the event(s).<sup>6</sup> Physical evidence on victims' bodies can be collected for approximately 96 hours after the crime occurred—and potentially longer if evidence has not been washed off and/or there are visible physical injuries (e.g., cuts and bruises). (See *Sexual Violence 101. Sexual Assault Forensic Medical Examination*.) Evidence may also be found at the crime scene, on the suspect's body/clothes and at other locations (e.g., at the suspect's home). To support evidentiary findings, investigators also seek statements from victims, suspects and witnesses.

**Evidence on the victims' bodies can be collected whether or not the crime is reported.** Sexual assault victims are encouraged to go to a hospital as soon as possible after the crime occurs to have a forensic medical exam. (See *Sexual Violence 101. Sexual Assault Forensic Medical Examination*.) During this exam, evidence is collected. Adult victims can have this exam conducted whether or not they choose to immediately report the sexual assault to law enforcement. If the victims are children or are adults considered by state law to be "incapacitated," the crime must be reported to the West Virginia Department of Health and Human Resources and law enforcement by the health care provider. (See *Sexual Violence 101. Mandatory Reporting*.) Evidence collected can be stored for up to 18 months. After that 18 month period, victims can still report (since there is no statute of limitations on reporting sexual assault or 1st degree sexual abuse in West Virginia), but any evidence that was collected through the forensic medical exam will have been destroyed.

**FYI—The key factor in determining if a sexual act is criminal is whether or not there was CONSENT.** In West Virginia, a person cannot legally consent to sexual activity if under the age of 16, mentally defective, mentally incapacitated or physically helpless. If a sexual assault involves drugs/alcohol (either voluntarily or involuntarily consumed by the victim), there may be a lack of consent if the victim is incapacitated or physically helpless.

**How do victims “prove” there was no consent if a situation does not fit into one of the above categories?** The burden of proof is on the criminal justice system, not victims. Proving lack of consent is the greatest challenge in sexual assault cases because often there is no evidence other than that which shows that sexual contact did take place. Sometimes, through a forensic medical exam, injuries can be visually documented to show use of force. The medical history can often support the victims’ accounts of the assault or abuse through the written documentation of injuries. (See *Sexual Violence 101. Sexual Assault Forensic Medical Examination.*)

When the criminal justice system is not able to prove the lack of consent, victims may feel a profound lack of validation that others believe the sexual assault or sexual abuse did happen. It is critical, therefore, that service providers offer ongoing support for victims and let them know they are believed, regardless of the outcome of a criminal investigation and prosecution.

**FYI—In West Virginia, certain professionals** (e.g., health care and social services personnel, emergency medical services, religious and school personnel, child care/foster care workers, law enforcement officials, and personnel of nursing home or other residential facilities) are considered **mandatory reporters** in suspected cases of sexual abuse and/or sexual assault against (1) children and (2) adults “who by reason of physical, mental or other infirmity are unable to independently carry on the daily activities of life necessary to sustaining life and reasonable health.”<sup>7</sup> (See *Sexual Violence 101. Mandatory Reporting.*)

### **Test Your Knowledge**

*Refer to the pages in this module as indicated to find the answer to each question.*

1. How does West Virginia law define sexual assault and sexual abuse? See pages B3.2–B3.3.
2. Where can you find information about West Virginia laws pertaining to sex offenses? See page B3.4.
3. When sexual violence is reported, who initially determines what charges, if any, to file against a suspect? What is the prosecuting attorney’s role in determining charges when an indictment is sought? See page B3.4.
4. What are the statutes of limitations in West Virginia on sexual assault and sexual abuse offenses? See page B3.5.
5. Do adult victims need to report the crime to law enforcement in order to have a forensic medical exam conducted? If the victims are children or are adults considered by law to be “incapacitated,” to what agency/agencies does a report need to be made? See page B3.5.
6. What is the key factor in determining if a sexual act is a criminal offense? See page B3.6.

## Part 2: DISCUSSION

### Projected Time for Discussion

1.75 hours

### Planning

- Ensure that the meeting is held at an accessible location. Ask participants prior to the meeting if they need any accommodations—if so, work with them to secure accommodations.
- Select a facilitator for the discussion. The facilitator should have expertise on sexual violence and knowledge of related state law.
- Participants and the facilitator should review *Part 1: Core Knowledge* of this module before the discussion.
- A copy of the law should be available for reference during the discussion. (See the *West Virginia Protocol for Responding to Victims of Sexual Assault* at <http://www.fris.org>.)
- Bring the following supplies and materials to the meeting: flipcharts and colored markers, sufficient copies of participant materials, office supplies (tape, pens, paper, etc.) and a clock/watch to monitor time. Optional items include name badges or table tents.

### Suggested Activities and Questions

1. **Invite participants to identify the discussion ground rules to promote open communication.** Utilize the following principles: (10 minutes)
  - An environment of mutual respect and trust is optimal. Everyone should feel comfortable expressing their opinions and feelings about the various topics. There are no right or wrong answers, only different perspectives.
  - Avoid personalized comments that are negative as they can lead to defensiveness and confrontation among participants and ultimately may shut down dialogue.
  - Be clear about what information discussed during this meeting is confidential and what the expectations are for confidentiality in the context of this partnership.
2. **Briefly summarize state law regarding sexual assault, sexual abuse, statute of limitations and mandatory reporting** and discuss any questions. (5 minutes)
3. In either a small or large group setting, **ask participants to review the following scenarios and consider the questions** that follow. (15 minutes)

### Scenario 1

*While at the grocery store, Jackie stopped to say hello to several boys from school. Jackie is a friendly 16-year-old who has a developmental disability. The boys asked Jackie if she would smoke cigarettes with them in the alley behind the store. She agreed. While in the alley, the boys touched her breasts.*

## Scenario 2

*Bob, who is physically fragile and uses a wheelchair, lives at home with his caretaker son. The son forces Bob to view pornographic films and has sexual contact with him as he helps him bathe and dress/undress.*

## Scenario 3

*A staff member at the residential treatment center where Rita is a patient comes into her room at night and performs oral sex on her. Rita is heavily sedated at the time.*

## Scenario 4

*Fran, who is deaf, is at a party and meets Kevin, who is not deaf but knows sign language. They both are drinking alcohol. After a couple hours, he offers to walk her home. Once inside her apartment, Kevin forces himself on Fran and has sex with her.*

In a **large group discussion**, ask participants to discuss the following questions: (30 minutes)

- a. For each scenario, is the act considered a crime in West Virginia? Why or why not? If it is a criminal act, what is the violation/degree?
- b. What factors made it difficult to decide upon criminality/violation/degree?
- c. What additional information might service providers need to make a determination?
- d. What can staff/volunteers working with victims with disabilities do if they need clarity on how the law might apply to a case? What resources are available?
4. **Ask participants to discuss possible reactions of victims** who find out the act committed against them is not considered a crime in West Virginia or that no charges will be made due to insufficient evidence. Are there reactions that may be specific to persons with disabilities? Discuss how service providers/partnering agencies can respond to these victims in a supportive way. (10 minutes)
5. **Invite participants to share their general experiences of interacting with victims of sexual violence, especially those with disabilities.** To whom did the victims disclose? Did they report, have evidence collected and have subsequent criminal justice involvement? What were the outcomes? Did they seek support services? What services would have been helpful to them? (10 minutes)
6. Most victims do not report their assaults to authorities; many never tell anyone. **If your agency serves persons who may be sexual violence victims who may not have disclosed, in what ways can your agency provide them with information regarding their rights?** (10 minutes)
7. **What training might staff at your agency need to be able to provide support and referral services?** (For assistance in meeting your training needs, visit [www.fris.org](http://www.fris.org).) (5 minutes)
8. **Closing.** Ask participants to write down how the information gained from this discussion will promote change in policies, practices or training programs in each of their agencies and



their next steps in the process of initiating that change. Then facilitate a large group discussion on this topic. (10 minutes)

Project partners welcome the non-commercial use of this module to increase knowledge about serving sexual violence victims with disabilities in any community, and adaptation for use in other states and communities as needed, without the need for permission. We do request that any material used from this toolkit be credited to the West Virginia Sexual Assault Free Environment (WV S.A.F.E.) project, a partnership of the West Virginia Foundation for Rape Information and Services, the Northern West Virginia Center for Independent Living and the West Virginia Department of Health and Human Resources (2010). Questions about the project should be directed to the West Virginia Foundation for Rape Information and Services at [www.fris.org](http://www.fris.org).

Funding was provided by Grant No. 2006-FW-AX-K001 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions and recommendations expressed in this module are those of the authors and do not necessarily reflect the views of the U.S. Department of Justice, Office on Violence Against Women.

<sup>1</sup>Partnering agencies refer to the persons they serve as “clients,” “consumers” and “victims.” For convenience, “victims” and “clients” are primarily used in this module. Also note that the terms “sexual violence” and “sexual assault” are generally used in this module to encompass sexual assault, sexual abuse and other forms of sexual violence.

<sup>2</sup>This and other online documents referenced in this module were available at the links provided at the time the module was written. It is suggested that you check the sites for any updates or changes. If you experience difficulty accessing the documents via the links, another option for locating documents is doing a web search using titles.

<sup>3</sup>West Virginia Code, Chapter 61, Crimes and their Punishment, Article 8B, Sexual Offenses (WVC§61-8B), <http://www.legis.state.wv.us/WVCODE/Code.cfm?chap=61&art=8B#08B>.

<sup>4</sup>Adapted from Wikipedia (web-based encyclopedia), [http://en.wikipedia.org/wiki/Statute\\_of\\_limitations](http://en.wikipedia.org/wiki/Statute_of_limitations).

<sup>5</sup>Adapted from U.S. Department of Justice, *A national protocol for sexual assault medical forensic examinations (adults/adolescents)* (Washington, D.C., 2004), 45, footnote 84, <http://www.ncjrs.gov/pdffiles1/ovw/213827.pdf>.

<sup>6</sup>Adapted from U.S. Department of Justice, 89.

<sup>7</sup>Rape Abuse and Incest National Network, *Mandatory reporting database* (updated December 2008), <http://www.rainn.org/public-policy/legal-resources/mandatory-reporting-database>. This link takes you to two West Virginia charts: one for children and one for persons who are elderly/have disabilities.