



<https://advocatesforsafetyandhealth.org/>

S.4404 (May) / A.5399 (Hunter)

An act to amend the penal law, in relation to establishing incapacity to consent when a person is a witness to or subject of an investigation under certain circumstances

What does S.4404/A.5399 do?

While current law prohibits sexual contact between law enforcement officers and those in their custody, the penal code does not include a similar provision for interactions with law enforcement that occur during the course of an investigation. This bill would amend the existing law (NYPL section 130.05, “Sex offenses; lack of consent”) to ensure that incidents of sexual contact between a law enforcement officer and anyone who is a victim, witness, subject, or person of interest in an investigation would also be prohibited under the penal code. This would not apply in the event of a pre-existing relationship.

Why is this legislation necessary?

The International Association of Chiefs of Police (IACP) has recognized that policing “create[s] opportunities for sexual misconduct” because officers “have power and authority over others” and “engage with vulnerable populations who lack power and are often perceived as less credible”. The law already recognizes this vulnerability by defining sexual contact between law enforcement and persons in their custody as nonconsensual. However, vulnerable people come into contact with law enforcement in contexts outside of custody; particularly during investigations. Ensuring the protection of the law extends beyond just custody is in the spirit of the current law. This is especially critical to protect sex workers and victims of trafficking, who are frequently subjects of undercover raids and investigations, where sexual interaction is the subject of the investigation. The IACP has also noted that “predators select victims based on vulnerabilities and a perceived lack of credibility, and therefore, victimization is often higher among certain populations including ... individuals in prostitution and/or the commercial sex industry.” This bill ensures already marginalized populations are thoroughly protected from police sexual misconduct.

Is there precedent for this policy?

New York law already protects people in custody from sexual contact from a law enforcement officer while in custody or under the supervision of a local probation department. Other states have also recently passed or are considering legislation to cover a wider scope of interactions between law enforcement and people they interact with during the course of duty. Vermont expanded its law enforcement sexual misconduct law in 2023 to include investigations as well as confidential informants; Arizona, Colorado, Kansas, Kentucky, Maine, Maryland, Missouri, and Montana have similarly expansive laws; and Massachusetts legislators are currently considering a similar bill.

Bill Text:

Section 1. Paragraphs (j) and (k) of subdivision 3 of section 130.05 of the penal law, paragraph (j) as added by section 1 of part JJ of chapter 55 of the laws of 2018, and paragraph (k) as added by chapter



<https://advocatesforsafetyandhealth.org/>

503 of the laws of 2024, are amended and a new paragraph (l) is added to read as follows... (l) a witness to or victim of an incident under investigation by a police officer, peace officer or other law enforcement official, or a suspect or person of interest in such an investigation, and the actor is a police officer, peace officer or other law enforcement official who either: (i) is participating in the investigation of such incident; or (ii) knows, or reasonably should know, that at the time of the offense, such person was a witness, victim, suspect, or person of interest in such investigation. Notwithstanding the provisions of this paragraph, a witness to, victim, suspect, or person of interest in an incident under investigation by a police officer, peace officer, or other law enforcement official shall not be deemed incapable of consent where the actor and such witness, victim, suspect, or person of interest had engaged in a sexual relationship prior to the commencement of such investigation. updated 1/21/2026 § 2. Subdivision 4 of section 130.10 of the penal law, as amended by section 2 of part JJ of chapter 55 of the laws of 2018, is amended to read as follows: 4. In any prosecution under this article in which the victim's lack of consent is based solely on [his or her] their incapacity to consent because [he or she] such victim was less than seventeen years old, mentally disabled, a client or patient and the actor is a health care provider, detained or otherwise in custody of law enforcement under the circumstances described in paragraph (j) of subdivision three of section 130.05 of this article, a witness to or subject of an investigation under the circumstances described in paragraph (l) of subdivision three of section 130.05 of this article, or committed to the care and custody or supervision of the state department of corrections and community supervision or a hospital and the actor is an employee, it shall be a defense that the defendant was married to the victim as defined in subdivision four of section 130.00 of this article.