

**CRIMINAL LAW CONSOLIDATION
(RAPE AND SEXUAL OFFENCES) AMENDMENT BILL**

6 March 2008

The Hon. D.G.E. HOOD: I rise to indicate Family First's position on this bill that will ensure that it is easier to convict on charges of rape and other serious sexual offences. Family First strongly supports the idea that guilty sexual offenders must face the real prospect of conviction and then spend a good deal of time behind bars.

I will raise the issue of false claims of sexual abuse or rape later. False allegations (particularly in Family Court proceedings) should be dealt with swiftly and sharply. First, however, it is clear that many victims of rape and sexual abuse are not currently receiving justice. As outlined by the Hon. Ms Kanck, acquittal rates for this type of offending are much higher than for other major indictable offences. A recent Australian Institute of Criminology report, dated 18 December 2007, notes:

'In 2006, more than 18,000 victim incidents of sexual assault and related offences were recorded by police across Australia. Conservatively, this is estimated to represent only about 30 per cent or less of all victims incidents of sexual offences, as the vast majority of victims do not report to police. Of sexual offence incidences (including rape) which are reported to police, less than 20 per cent result in charges being laid and criminal proceedings being instigated.'

The Hon. Ms Kanck quoted figures that were even lower than those. This is not the end of the matter. Once a case reaches court, sexual assault trials are more likely than not to result in acquittal. Acquittal was the result in more than half the cases brought before the higher courts. An Australian Institute of Criminology publication, entitled *Acquittals in Higher Courts*, dated 16 October 2007, notes:

‘Sexual assault trials are more likely to result in an acquittal than a guilty verdict in the higher courts; this occurs in more than half of the cases brought to the higher courts.’

In the past three years for which we have the records, acquittals in sexual assault cases have been higher than in all other serious offences. In 2003-04, 61 per cent of defendants charged with sexual assault, and pleading not guilty, were acquitted. In 2004-05, the figure was 57 per cent nationally. In 2005-06 (which is the latest data readily available), the figure was some 58 per cent. This compares with figures of approximately 20 per cent for illicit drug acquittals, and homicide acquittals are in the high 30 percentile.

In 2006, of the 150 cases of unlawful sexual intercourse and rape dealt with by the South Australian District Court, 39.3 per cent of cases resulted in imprisonment, whether suspended or actual, and 1.3 per cent of cases were resolved without conviction. Our acquittal rate following trial was 28 per cent, and another 31.4 per cent of cases were not proceeded with following a not guilty plea. A recent further AIS publication, entitled *Juror Attitudes and Biases in Sexual Assault Cases*, makes this point:

Sexual assault has among the highest rates of acquittal and lowest rates of proven guilt compared with other offences. Given that more than 70 per cent of sexual assault incidents are not reported to police and only about one in 10 reported incidents results in a guilty finding, increasing conviction rates for sexual assault is a key issue for the criminal justice system.

Of course, that is exactly what this bill seeks to do. Our current system asks victims of traumatic sexual abuse to jump through a series of hoops to achieve justice. The greatest challenge for victims is to summon the courage to speak to police about the abuser in the first place; the next is to convince police to prosecute; and the final hoop is to secure a conviction.

In clearly defining consent, the bill may make directions to juries all the more simple and make the difficulties faced by victims to achieve an appropriate conviction all the less. I note some disturbing findings from a recent study in 2005, when 210 members of the public were selected as jurors for 18 separate but identical mock trials of rape.

Two juries returned a unanimous not guilty verdict; the other juries did not return a verdict within the time allotted but three-quarters of participants favoured a not guilty verdict. I was astonished when I read the primary reasons given by the mock jurors for entering not guilty pleas, and I will list a few now for the chamber.

The first was that the complainant flirted and danced with the defendant; that is, they believed that there was some degree of encouragement that excused the rape. Secondly, it was said that she did not scream or shout for help, and the mock jurors wondered why not. Thirdly, there was no evidence of injury or medical evidence to support her claim, and it was stated that surely there would be evidence of injury or DNA.

Fourthly, the complainant went back to the party afterwards and did not leave immediately; the mock jury felt that she should have left. Fifthly, the complainant exposed herself and pretended nothing had happened, and it was wondered why she would do such a thing if the rape were genuine. Sixthly, she continued to work with the defendant for two weeks after the incident, and it was suggested by the mock jurors that that was inappropriate. Finally, another reason for the large number of not guilty verdicts given by individual jurors was that the complainant did not report the incident to police for two weeks, and it was suggested that this was an inappropriately long time.

As the report notes, this type of scenario in which sexual assaults occur is, unfortunately for prosecutors, common. Rape is not always committed by strangers. Victims do not always scream for help. Obvious physical injury is

actually uncommon, and the majority of victims do not report the incident to police at all. The reality for many sexual assault victims is that, as long as misinformation about rape and stereotypical beliefs about how a victim would behave exist within the community, the likelihood of convincing a jury that a sexual assault did occur, in the absence of supporting evidence, will remain low. Family First agrees that more needs to be done for victims and, for that reason, it will be supporting the general principles of the bill at the second reading stage.

In essence, the definition of consent has been thoroughly tightened and, in particular, proposed new section 47 will introduce new reckless indifference to consent provisions. A person is recklessly indifferent, and thus subject to the rape provisions, if he is:

- (a) aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility; or
- (b) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent to the act before deciding to proceed; or
- (c) does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act, before deciding to proceed. This provision significantly expands the number of complaints that would fall within the definition of the offence. One strong submission recently received by Family First indicates that the wording is too strong, as follows:

Subsection (c) of this new definition seems to establish a requirement on a participant in an act of sexual intercourse to be continually giving thought throughout the duration of the act to whether or not the other person may have withdrawn consent to the act.

The submission makes a convincing point. However, in the view of Family First, the pendulum has already swung too far in the direction of the accused and, on balance, the new provisions will work to ensure that more victims receive justice. Certainly, Family First believes that consent can be withdrawn and that sexual intercourse should stop if it does.

There are some provisions in this proposed legislation that discuss the possibility of rape within marriage, and I would like to briefly address some of them. Marriage is, indeed, a sacred and time-honoured institution, and members are aware that Family First will always strongly defend marriage. Prior to 1976, the definition of rape in South Australian law was 'having sexual intercourse with a woman, [who is] not one's wife, without her consent'.

Since 1976, the offence of rape can be committed by a spouse. Family First does not argue with that. In this day and age, unfortunately, a large number of people are separated, even though they remain married. Some people, to all intents and purposes, are in fact divorced, although they have not yet reached the point of filing the paperwork for divorce. Non-consensual sex between separated married couples is, rightly, in my view, unlawful and wrong.

Another major change is found in proposed new section 46(3), which provides that consent is not 'free and voluntary' if it occurs when the victim is 'affected by a physical, mental or intellectual condition or impairment such that the person is incapable of freely and voluntarily agreeing or if the person is unable to understand the nature of the activity'.

The scenario put to me was one where we have an elderly married couple, perhaps in their 70s or 80s, who have been married for a long time—perhaps 50 years. They would have been engaged in regular sexual relations since their marriage began. This provision would mean that, if one of them contracted dementia, for example, the other would not be able to continue engaging in

sexual relations with them. Many would argue that continuing sexual relations in this case would be insensitive or may be wrong. But is it really rape, and does it really deserve life imprisonment?

Family First supports the proposition that people who take advantage of another's intoxication with alcohol or a drug are guilty of serious sexual misconduct.

With respect to clause 10, I am concerned about the exemption to incest granted to adopted children. The provision would allow an adoptive parent to legally engage in sexual relations with an adopted child or grandchild once they attain the age of consent. I have concerns about the appropriateness of that exemption.

Family First is also concerned about the epidemic of false claims of sexual abuse made in Family Court proceedings. We will be making further comments about that in the future, but we will not stall this bill by insisting on amendments at the present time.

With those concerns being raised, and with the request for comment on those concerns, Family First will support the second reading of the bill. We reserve our position with respect to several of the provisions, such as clause 10, when it comes to the committee stage, and I reiterate our concern about false allegations. It is something that this bill raises the possibility of, and we will need to explore that issue further during the committee stage in order to finalise our position on the bill.