

LEGISLATIVE COUNCIL

1st April 2008

CRIMINAL LAW CONSOLIDATION (RAPE AND SEXUAL OFFENCES) AMENDMENT BILL

The Hon. A. BRESSINGTON: I am not sure that this bill does women justice in these modern times. For decades now, women have fought for equality in the workplace and other frontiers, and this bill now says to women that they will be protected from all choices they make which may put them in a risky situation. The bill says to men that they had better beware of exploring any kind of sexual interaction with women, because they will be entirely unprotected against allegations of rape and sexual assault. Perhaps a more fitting title for this bill would be the 'contractual sex bill' because, from where I stand, this bill makes one-night stands and casual sexual relationships a high risk activity for men in general.

Perhaps this parliament could devise a contract which men could carry around in their pocket, next to their condoms. There could be a waiver should a man meet up with a woman who has had a couple of drinks before they engage in sexual intercourse.

The contract may contain the name and address of the women, with her driver's licence number, so that the man can see that the signatures match, clauses that state that the woman has or has not been drinking or taking any form of drugs—licit or illicit—and that she consents to foreplay; whether the woman is married or single; has any dependants, and that she has accompanied the man to wherever it is that they are intending to have sex.

As the interaction continues, perhaps the man will interrupt the moment and then ask her to sign the second part of the contract which states that she is ready, willing and able to move on from foreplay and that she is capable of determining that she wishes to continue to have sexual relations with the man, with the date and time recorded. I can see no way that a man who is accused of raping a female will be able to defend himself with this legislation—legislation, I might add, that can carry a sentence of life imprisonment.

I understand that rape is difficult to prove now, but I wonder whether this is the case because of poor investigative processors and poor forensic practices, rather than the need for the state to invade our bedrooms or even the back seat of our cars. Surely it would make more sense simply to ensure that, when a woman cries rape, the impending investigation is thorough and forensic evidence is collected to collaborate it. Perhaps if women did not feel so intimidated about coming forward and could rely on the judicial processes, then the government would not see the need for this rape and sexual assault bill being necessary.

Of course, to achieve the desired outcome for justice for rape victims, we would need to ensure that those responsible for interviewing a rape victim and investigating the allegations are well trained and empathetic in this sensitive area. Women could be educated as to their rights to report rape and be guaranteed that the judicial system will support their needs, and that all this could be done in a reasonable time frame.

We know that many women fear reporting rape and appearing in court because of the cross-examination they are subjected to, and perhaps it is those very techniques employed by the legal profession that need to be tempered in some way.

I have consulted widely on this bill with women of all persuasions. It was interesting that, when I met up with a police officer whose daughter had been raped, the police officer herself urged her daughter not to proceed, not to report the rape and not to proceed through the system because she knew that she would be crucified. This bill will do little to build confidence with the system by women who have been violated, because it does little to address their basic fears of the system. What this bill does is make men who are sexually active targets of false allegations, for many reasons.

The truth is that women should be expected to take some responsibility for the settings to which they expose themselves. They should also be expected to take some level of responsibility for the messages they send whilst drinking or taking drugs and partying. For these women, who do exist (whether or not some females like to admit it), this bill will be the ticket they need to be able to take revenge on a man who, for whatever reason after sex, is not interested in a long-term relationship, or for women who feel ashamed, guilty or rejected the next day when he does not call her back. The statistics show that 65 per cent of alleged rape cases are false accusations.

I am the mother of four boys: two are married; one is a single young man who is currently sowing his wild oats; and the other is a six year old. As a mother, I fear for them every day because of the minefield that is being laid; a minefield that, once the legislative agenda is complete, will not allow them to make mistakes, lose their temper, express their anger even verbally, or explore their own sexuality in a normal, healthy manner for fear of being accused of being rapists. I see this happening whilst, at the same time, we have sex education in our schools that promotes our babies to explore their sexuality in ways that, in days gone by, was the rite of passage into adulthood. On the one hand we are saying, 'Don't be ashamed of being curious about sex and exploring that curiosity,' and, on the other, we are placing restrictions and judgments on what is normal male development and curiosity.

I am not referring to rape and sexual assault as normal male development and curiosity, for those who would grab on to this statement to make this mean what it does not. I am talking about young men who rarely marry the first female they have sex with. I am talking about the feminist hysteria that we are currently working our way through, where men can do no right. What is the future of our young men and, for that matter, our young women where they are denied the benefit of balanced legislation that is put in place to protect? They are also denied the experience of making decisions and experiencing the consequences of those decisions.

For example, a girl gets drunk or uses drugs, has sex, regrets it in the morning and can blame the male for taking advantage of her. Not only that, but it is the male's responsibility to be mindful of her consent all the way through having sex. In my day, if a girl acted irresponsibly then she was held responsible for her actions. But not so with this bill.

I put out a press release saying 'Rape laws gone too far', and I received a number of emails, two of which I consider to be quite relevant. One of them is from the California Men's Health Centres, a national coalition of men, and it states:

Dear Mrs Bressington, there is much to say about issues related to your press release, 'Rape laws go too far', but here, for myself and thousands more, just let me say with all sincerity "Thank you", thank you so much.

I have another one from a senior lecturer at the University of Western Sydney in Richmond, which states:

Dear Ann, I was recently shown a copy of a media release you gave regarding proposed new rape laws in SA—thank God there is a voice of sanity somewhere in the SA parliament. I find it difficult to believe that the proposed legislation has got this far—it suggests something unhealthy about SA...[We hope you] prosper in the world of politics—we desperately need people such as you—

as political representatives. So, there is quite a bit of discontent within the community and also within the profession about this bill. Just to elaborate on the feminist hysteria I referred to, I would like to read an article by Carey Roberts, entitled 'The Intellectual Perversion of the VAWA (Violence Against Women Activists) Mafia'. Carey Roberts is an analyst and commentator on political correctness. His best-known work was an expose on Marxism and radical feminism. Mr Roberts' work has been cited on the Rush Limbaugh show. Besides serving as a regular contributor to NewsWithViews.com, he has published many articles in the *Washington Times*. Previously, he served on active duty in the army, was a professor of psychology and was a citizen-lobbyist in the US Congress. Mr Roberts writes:

When Professor Suzanne Steinmetz published the results of her survey on domestic violence, no one had prepared her for the firestorm that would ensue. You see, feminists take it as an article of faith that only husbands abuse their wives, so when Steinmetz revealed that women are often as violent as their husbands, the feminists started a whispering campaign designed to block her promotion at the University of Delaware. When that didn't work they phoned in a bomb threat at her daughter's wedding. Cowed by the threats, Steinmetz soon suspended her pioneering research.

Erin Pizzey of England had impeccable credentials. She was the founder of the first abuse shelter for women and a few years later published *Prone to Violence*, a book that revealed that these women are often as physically aggressive as their mates. That provoked threats of violence by women who said that women can never be violent, and Pizzey was forced to seek police protection as she travelled around to promote her book. She was met by jeering protesters with placards that read 'All Men are Bastards'.

Dr Lynette Feder planned to do a study to find out whether batterer intervention programs worked, but the Broward County, Florida, district attorney tried to block the study, claiming that everyone already knew such programs worked. Interestingly, other researchers later found such programs were often ineffective.

Claudia Ann Dias is an attorney who has been featured on *20/20* and *Oprah* for her work on family violence. She was awarded a 10 year contract by the Sacramento County Jail to counsel men arrested for partner violence but, since partner abuse is often mutual, Dias found herself discussing the problem of female aggression. Six months later her contract was abruptly cancelled.

Men have also been besieged by the VAWA mafia, a loosely organised cabal that takes its name from the federal Violence Against Women Act. Dr Murray Straus, of the University of New Hampshire, is the pre-eminent American researcher in the area of family violence, and his work points to the politically incorrect conclusion that wives are equally likely to abuse. The VAWA mafia has accused Dr Straus of being a wife-beater and of sexually exploiting his students. The unfounded claim was so outrageous that his accuser later apologised, but one of his students was recently warned that she would never be able to find a job if she did her graduate work with him.

There are another two pages of examples where the violence-against-women activist groups have hijacked statistics regarding violence against women, but my point is that women are capable of falsely accusing men. This bill contains no provisions whatsoever to protect the rights of men who may be falsely accused.

This rape and sexual assault bill is an affront to women who have worked hard to prove they are independent, capable and able. As I said, it will do little to further protect innocent victims of rape who have to go through the investigative process being made to feel as though they are lying, and then through a trial that allows them, the victims, to be placed on trial rather than the perpetrator. Is this bill an extension of the feminist hysteria? If it is, perhaps it is time to stop following destructive global trends that fracture our society and that seem intended to turn men against women and women against men.

It was not so long ago that the Hon. Dennis Hood expressed his dissatisfaction with the system that fails to protect victims of sexual assault, and his emotions of anger and frustration—after seeing a victim put through the process only to have the perpetrator get a slap on the wrist—were well noted. These are the issues that I see as being a failure of the system, and making men easy targets is simply not the answer.

In her speech the Hon. Sandra Kanck mentioned that in her experience seven out of 10 women are the victim of rape and sexual assault. Perhaps this is her experience, but I have seen women who have put themselves in situations where rape and sexual assault were actually inevitable. I know that it is politically incorrect in these times of 'men can do no right' to suggest that some women may, in fact, contribute to their own demise, but we are talking about real life here with human behaviour that is often affected by outside influences in our modern society. Women do need to be more careful than in days gone by; of course, if, as a woman, I put myself in a situation where I am drinking and taking drugs with men then I must be expected to take 50 per cent of the responsibility for what eventuates.

For example, what if a man is also under the influence and is so drunk that he does not know what he is doing or, for that matter, does not remember what he did? Can he also cry rape next morning when he wakes to find a strange woman in his bed? I read

that this bill also requires the man to give his identity and, if he chooses an alias (for whatever reason), that is also a basis for rape. Would that also be the case in reverse? Say, for example, a man picks up a woman in a nightclub and has sex with her and then she demands payment for that sex. Does he have the right to claim rape because he was unaware that he was engaging with a prostitute? Would his cry of rape be taken seriously by investigators, or as seriously as they would a woman crying rape?

When we, as women, rightly moved for quality and independence we failed to recognise exactly what we have achieved. As an emancipated woman I sometimes think that the feminist movement forgot what they were hoping to achieve, and that in this process the pendulum has swung way too far the other way. Yes, there are women in terrible situations who do need support and systems in place to meet their needs; however, in the words of George Santayana, an American philosopher, 'Fanaticism consists of redoubling your efforts when you have forgotten your original goal'. He also made the famous statement that 'Those who refuse to learn from history are condemned to repeat it', and we have seen so many times in the past what has happened when one group of people is deemed to be more superior or advanced than another—we have seen heresy, communism, racism, witch hunts and, of course, let us not forget the Holocaust.

Over time men have literally become responsible for all the hardships of women who, for whatever reason, are unable to assert themselves. Is this because they are suppressed and oppressed or is it because, God forbid, that some women do not want to be dominant or out there? They are often judged as being suppressed and oppressed when, in fact, they are quite content to be a stay-at-home mother and wife. We need to get back to basics and understand that rape and sexual assault is the behaviour of a minority of men—and a sick minority at that—and women who are violated by these animals need a system that will support them and help them get the justice they need and deserve.

I do not believe this bill will achieve that and, with false allegations being such a prominent factor of modern times where the courts do not treat false allegations as perjury, this bill will snowball the already overwhelming practice of lying in court for spite and revenge. Judge Bryant stated that 25 per cent of allegations of sexual abuse made in the Family Court are false. Why? Because there are no consequences for lying in a court of no-fault.

This bill makes men guilty until proven innocent, and the penalty may well cost innocent men their lives. For those who are guilty of rape and sexual assault, let this be a matter for improvement to the system, but I do not believe that further legislative change is necessary.

The Hon. R.D. LAWSON: I have a question arising out of an article by the respected criminal lawyer from the University of Adelaide, Associate Professor Ian Leader-Elliott. In his article in the *Independent Weekly* he points out that the government initially accepted the recommendation of Ms Liesl Chapman that the common law rule that a defendant who believes quite unreasonably that a rape victim has consented to sexual penetration cannot be convicted of the offence. He points out that the government initially accepted that recommendation, but last year produced a bill which restored the unreasonable mistake defence provided by common law.

In a third version of the bill the government has once again changed its mind, and the position now under the bill in this council is that a defendant can rely on an unreasonable mistake to defeat a charge of rape. Professor Leader-Elliott points out that Australia, Queensland, Tasmania and Western Australia never accepted that common law rule. New South Wales abolished the rule last year. He states that in each of those jurisdictions the law requires a mistake about consent to be reasonable before the rape defendant can escape conviction.

He concludes by saying that so far the government has given no reason why South Australia should continue to accept the rule that an unreasonable mistake about consent bars conviction for rape. According to him, the government has given no reason. I now invite the minister to put on the record the reason why South Australia should continue to accept the rule, previously criticised by the government, that an unreasonable mistake about consent bars conviction.

The Hon. P. HOLLOWAY: In that article entitled 'Rape debate: common law and common sense' published in the *Independent Weekly* of 22-28 March 2008 at page 12, Ian Leader-Elliott criticises the government's approach to rape. His main criticism is that the government ignored recommendations of the barrister commissioned by the government to prepare a discussion paper on reform of South Australia's rape and sexual assault laws, Ms Liesl Chapman.

He says that Ms Chapman recommended the abolition of the common law rule that a defendant who believes quite unreasonably that a rape victim has consented to sexual penetration cannot be convicted of the offence, and that Ms Chapman recommended new legislation that would convict defendants who failed to take reasonable steps to find out whether their victim had in fact consented. Ms Chapman made no such recommendations. Indeed, she made no recommendations at all. Her discussion paper canvassed alternative options for reform without recommending any particular one. She called these options 'questions'. She drafted the questions to stimulate thought and provide a framework that respondents used in drafting their submissions. It is hard to imagine how anyone who read her discussion paper could speak of 'recommendations'.

The responses to Ms Chapman's paper were considered with great care by the government. They represented the full spectrum of lay and expert opinion on sexual assault law reform, often strongly held but opposing opinion. The government decided to work with the first of the three alternative approaches to the offence of rape suggested by Ms Chapman. It produced in its second and final bill a definition of rape, a statutory definition of reckless indifference to sexual activity, a definition of consent and what will not constitute consent and an exception to the statutory laws about self-induced intoxication to prevent the drunk's offence being used to deny an awareness of lack of consent to sexual intercourse.

In another related bill the government completed this reform with statutory requirements for directions to juries about consent and about evidence given in sexual cases. To put the record straight, these are Ms Chapman's three questions on this point, in chapter 2 of her review of South Australia's rape and sexual assault law:

2.7 If South Australia retains its current subjective approach to the mental element for rape, should section 278 of the Criminal Law Consolidation Act be amended so as to define reckless indifference as including all or any of the following:

A person is recklessly indifferent if that person:

- (1) realises the possibility that the other person might not be consenting, but proceeds with sexual intercourse regardless;
- (2) does not give any thought as to whether or not the other person is consenting (whether that is due to self-induced intoxication or any other reason);
- (3) does not take reasonable steps in all the circumstances to ascertain that the other person was consenting?

2.8 Should South Australia adopt a subjective / objective approach similar to Canada and the VLRC recommendation, which sets out when a defence of honest mistake is not available, for example, where—

- (a) the belief arose from the accused's self-induced intoxication;
- (b) the accused did not turn his or her mind to whether or not the complainant was consenting; or
- (c) the accused did not take reasonable steps in the circumstances known to him or her at the time to ascertain that the complainant was consenting?

2.9 Should South Australia adopt an objective mental element (similar to the UK and New Zealand provisions)?

Mr Leader-Elliott is right, however, in saying that the new laws would not prevent a jury acquitting a person of rape on the ground that he believed unreasonably but genuinely that the alleged victim consented to sexual intercourse. That has been the law for a very long time.

In New South Wales as recently as April 2007 this common law principle was unanimously affirmed by the New South Wales Court of Criminal Appeal in the case of *South v R*, but as Mr Leader-Elliott says, in late November 2007 the New South Wales Parliament passed a law saying, among other things, that a person knows that another person does not consent to sexual intercourse if he has no reasonable grounds for believing that the other person consents to sexual intercourse. It requires the trier of fact in determining whether a person knows the other does not consent to take into account all the circumstances of the case, including any steps taken by the person to ascertain whether the other person consented, but not including self-induced intoxication. The New South Wales Attorney-General gave this explanation for the amendment:

The present common law is subjective, requiring the crown to prove that the accused knew the complainant was not consenting or was reckless as to whether the complainant was consenting, solely from the point of view of the accused. The

accuser's assertion that he or she had a belief that the other person had consented is difficult to refute, no matter how unreasonable in the circumstances.

The law does not adequately protect victims of sexual assault when the offender has genuine but distorted views about appropriate sexual conduct. The subjective test is outdated. It reflects archaic views about sexual activity. It fails to ensure a reasonable standard of care is taken to ascertain a person is consenting before embarking on potentially damaging behaviour. An objective test is required to ensure the jury applies its common sense regarding current community standards.

Some might think that it is wrong to remove the subjective belief of the offender and criminalise a person who sincerely but unreasonably believes that another is consenting to sex. However, in New South Wales the law has already recognised that an accused person possesses the requisite intent to have non-consensual intercourse, or guilty mind, when they have failed to turn their mind to the issue at all. This has been most eloquently justified by the New South Wales Court of Criminal Appeal when it was stated that:

The criminal law, in its important function of controlling behaviour, should promote standards of acceptable consensual sexual behaviour of the community. Lack of the merest advertence to consent in the case of sexual intercourse is so reckless that it is also the criminal law's business. In this, the law does no more than reflect the community's outrage at the suffering inflicted on victims of sexual violence.

Proposed section 61HA(3) retains recklessness, but offers an additional third limb for what is meant by that element of these offences 'knows that the other person does not consent'. It provides that the person knows that the other person does not consent to the sexual intercourse if the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.

Our bill approaches this in a different way: without denying the possibility that a person's unreasonable belief in consent could also be genuine, it focusses instead on tightening the rules about reckless indifference to consent.

First, as is now the law, the prosecution must prove that the alleged victim did not consent. That done, it must prove that the defendant knew that the alleged victim did not consent or, failing that, that the defendant was recklessly indifferent to whether she consented. That is also the current law. To prove reckless indifference to consent, the prosecution must prove that the defendant was aware of the possibility that she might not be consenting but decided to proceed with the sexual intercourse regardless, or that he was aware of the possibility that she might not be consenting but failed to take reasonable steps to ascertain consent before deciding to proceed, or that he simply did not turn his mind to the question of whether she might not be consenting before deciding to proceed with the sexual intercourse. That is the common law as stated by the High Court in *Banditt*. If the jury is persuaded of any of these states of mind, it must convict the defendant of rape.

In his defence the accused can say that he did not know that the alleged victim was not consenting to sexual intercourse and, moreover, that he thought she was

consenting. He might have come to that belief quite unreasonably but, if the jury thinks his belief is genuine, it must acquit him. That is because, under our system of criminal justice, a person cannot be convicted of a serious crime without proof that he or she had the requisite criminal intent—in this case, that he intended to have sexual intercourse with another person without her consent. This is a fundamental principle that should not be overridden unless there are exceptional circumstances.

One such exceptional circumstance is self-induced intoxication. Our bill says that, despite a person being so intoxicated that he cannot form the requisite criminal intent for rape (that he knew whether or not the other person was consenting), he cannot use self-induced intoxication to deny the ability to form that intent. The government is confident that it has the support of most South Australians in legislating that a person cannot escape a charge of rape by saying he was too drunk to know whether the other person was consenting to sexual intercourse.

A key to the argument presented by Mr Leader-Elliott is that there is no rational distinction between those who make mistakes because they are grossly intoxicated and those who make mistakes even when they are completely sober. Mr Leader-Elliott knows better than that. The common law has always distinguished between the two, and so does the statute law of every Australian jurisdiction except Victoria. That includes South Australia, which devotes a whole general provision to the question. There is nothing new in distinguishing between intoxicated mistakes and sober ones in any context. The former used to be called, pejoratively, 'the drunk's defence'.

That is not to say that the distinction is easy. There is a very large body of legal writing and decisions on the subject over the past 85 years. The moral or ethical feeling common to all (that there is a difference) is almost impossible to explain in a legally principled way. So much was acknowledged recently by the English Court of Criminal Appeal in the decision of *R v Heard* (2007) EWCA Crim. 125. It is no wonder the shadow attorney-general finds the subject as clear as mud. Of course it is. It has been for 85 years and will continue to be. There is no principle to it. Mr Leader-Elliott knows that, too.

Some feminists believe that those having sexual intercourse should be required to behave reasonably, while those who kill or inflict serious harm, for example, should not. They offer no reason for this strange position. They should be required to do so.

Coming back to the position under this government's bill, when the defendant who says that he believed the other person to have consented when, in fact, she did not, in circumstances where one might think that any reasonable person should have been aware of the possibility that she was not consenting, I should point out that a jury will not accept the defendant's assertion at face value. It will test it against all the evidence that is relevant to the defendant's state of mind at the time of the alleged offence.

It will explore, for example, whether the defendant was, in fact, aware of the possibility of lack of consent because, if he was and he proceeded without taking steps to ascertain consent, he is guilty of rape. It will explore whether the defendant even turned his mind to the question of consent because, if he did not before proceeding with the sexual intercourse, he will be guilty of rape. And, in evaluating the evidence supporting the defendant's claim, the jury will act as a collective

'reasonable person', rejecting assertions that the evidence before it renders incredible or far-fetched.

The current law and this bill uphold the possibility that there may indeed be cases of genuinely mistaken, albeit unreasonably held, belief in consent, and that these defendants should not be convicted of the serious crime of rape. But they subject any such claim to intense scrutiny. Juries, and judges trying cases without juries, cannot and will not ignore other explanations for the defendant's behaviour if there is evidence to support them. For this reason, defendants' claims that they believe the other person to be consenting are often (rightly) rejected and sometimes (again, rightly) accepted in defence of the charge. Juries are not easily hoodwinked into believing false assertions of belief in consent.

Finally, I would like to point out that the changes the government has made to its law reform proposal for rape during the passage of these two bills reflect the strength of its commitment to a thorough review of these laws. The government introduced its first bill after consulting widely on the questions asked in Ms Chapman's discussion paper, announcing that it would let this bill lapse between sessions of parliament to allow for further consultation on the reforms proposed in the bill. In response to the consultation on the bill, it made some changes to those reforms and introduced a second bill in the next session of parliament in October 2007, again, deliberately and openly letting the bill lie over to the next sitting to allow a further round of consultation.

Responding to that final round of consultation, the government introduced amendments to the second bill when debates resumed in February 2008. Those amendments were made known to every member of the House of Assembly before they made their speeches on this bill through the standard procedure of filing them in the parliament. The Attorney-General then spoke to and responded to questions about each government amendment when the clause proposed to be amended was dealt with by the Assembly sitting in committee. Again, this is standard practice.

It was simply not true, as Mr Leader-Elliott asserts, that 'not until the shadow attorney-general [Isobel Redmond] had concluded her speech, however, did the Attorney-General produce the government's third attempt to define rape'. Mr Leader-Elliott has concocted a wonderful tale for readers of the *Independent Weekly*. However, the facts speak for themselves and tell a quite different story. This government's review of the rape and sexual assault laws has been a long, thoughtful and highly consultative process, with the government taking great pains to give everyone, whether they are academics like Mr Leader-Elliott, or prosecutors, defence lawyers, judges, sexual assault victim advocates or members of the public, every opportunity to have their say. The government received submissions from Mr Leader-Elliott and gave them careful and expert consideration. It took up some of his suggestions, but not all of them. Z