

RAPE LAW REFORM BILL

EXPLANATORY NOTE

THIS Bill reforms the law relating to rape. It amends the Crimes Act 1961, the Evidence Act 1908, and the Summary Proceedings Act 1957 relating to the crime of rape. It is in the form of an omnibus Bill, and it is intended at the appropriate stage to seek authority from Parliament to have the Bill finally enacted as 3 separate amending Acts. *Clauses 2, 6, and 9* are machinery provisions enabling this to be done.

PART I

AMENDMENTS OF CRIMES ACT 1961

Clause 3 defines the term "sexual connection". This is the term used in *clause 4* which reformulates the crime of rape. It should be noted that, in general, the definition is wide enough to apply to male and female offenders and male and female victims. Under the present law, rape can only be committed by a male on a female (although females can be charged as parties to rape).

Paragraph (d) of the proposed definition follows *R v Kaitamaki* [1980] 1 NZLR 59. In that case, the accused became aware that the complainant did not consent after he had penetrated her. However, he continued the act of intercourse. The Court of Appeal held that he was guilty of rape. The definition follows broadly that adopted in New South Wales: see the Crimes (Sexual Assault) Amendment Act 1981 (N.S.W.).

Clause 4 substitutes a new description of the crime of rape. The essential element is sexual connection with another person without that person's consent. However, a number of refinements (some drawn from the present law and some new) are included.

The first of these concerns the state of mind of the accused in respect of the question of consent. In general, under the present law the accused must know that the victim does not consent, or be reckless as to whether the complainant consents or not, for a conviction to be entered. The matter of knowledge is dealt with in *subparagraph (i)* of *paragraph (b)* and is relatively straightforward.

However, while not actually knowing that the complainant does not consent, the accused may proceed with complete indifference. That is covered by *subparagraph (ii)*. It goes beyond the present statutory law but is consistent with case law.

Subparagraph (iii) covers the case where the accused is aware that the complainant may not be consenting, although he does not know that she does not consent.

Subparagraph (iv) is an attempt to take some account of recent developments in the law of recklessness in England. It covers the case where the accused simply did not consider the question of consent where, had he done so, he would have realised that there was no consent.

Subparagraph (v) reverses the rule in *Morgan's case* where it was held that the accused's belief that the complainant was consenting was a good defence however unreasonable his belief was. Under this subparagraph, the belief must be held on reasonable grounds.

Subsection (2) broadly follows paragraphs (b) and (c) of the present section 128 (1).

Subsection (3) includes and expands the present law where the complainant consents because of some mistake as to the identity of the accused or the nature of the act. The present law (*section 128 (d)*) only applies to mistaken identity where the accused impersonates the complainant's husband. Under the Bill, the accused would be guilty of rape if the complainant consented because of a belief that the accused was someone else and the accused was aware of that misapprehension.

In respect of mistakes as to the nature of the act, the present requirement that the consent of the complainant must have been obtained by a false and fraudulent misrepresentation is dropped.

The proposed *subsection (4)* makes it quite clear that consent is not to be implied merely because the complainant offered no physical resistance.

This Bill deletes the provisions in the Crimes Act 1961 which absolved a husband from liability for raping his wife while they are living together.

The proposed *section 128A* repeats the present maximum penalty for rape of 14 years' imprisonment, but *subsection (2)* is new. It makes it clear that a person convicted of rape should always be sentenced to imprisonment unless there are special circumstances justifying some departure from this rule.

Clause 5 deals with procedural matters in the High Court in respect of rape trials. First, only persons listed in the proposed *section 375A (2)* may be present in the Court while the complainant is giving evidence. Secondly, the Judge is given express power to ban publication of a report of the criminal acts that are alleged to have been performed on the complainant.

PART II

AMENDMENTS OF EVIDENCE ACT 1908

Clause 7 is a technical amendment, consequential upon the redefinition of rape to include cases where males as well as females may be the victims.

Clause 8 deals with 2 matters. First, the proposed *section 23A.1* reforms the law relating to corroboration of the complainant's evidence. It makes it clear that the accused may be convicted even where there is no corroboration of the complainant's evidence. That much is the present law. However, it also provides that the Judge is not obliged to give a warning to the jury relating to the absence of corroboration. At present, the Judge is so obliged (by practice if not by law).

Subsection (2) makes it clear that the Judge may address the jury on the subject but if he does so he must avoid the present widely criticised formula that it is unsafe or dangerous to convict on the uncorroborated evidence of the complainant.

Secondly, the proposed *section 23AB* deals with the question of delay by the complainant in first making a complaint of rape. It is sometimes argued that the complainant would have complained at the first opportunity if this were a genuine case. Any delay, therefore, is said to reflect on the complainant's credibility.

Under this section, if any such argument is raised, the Judge may explain to the jury that there could be good reasons why a complainant might delay in making a complaint.

PART III

AMENDMENTS OF SUMMARY PROCEEDINGS ACT 1957

This Part deals with preliminary hearings in rape cases.

Clause 10 and the proposed *section 185B* in *clause 11* provides that all such hearings must be conducted before a District Court Judge, rather than Justices.

The proposed *section 185C* provides that the complainant's evidence must be given in written form unless the complainant wishes to give it orally, or the Judge orders that it be given orally because the written evidence is insufficient or it is otherwise indispensable to the interests of justice that the evidence be given orally. If the complainant does give evidence orally, all persons except those listed in the proposed *subsection (2)* must be excluded from the courtroom.

The proposed *section 185D* empowers the Court to prohibit publication of a report of the criminal acts alleged to have been performed on the complainant.

Hon. Mr McLay

RAPE LAW REFORM

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A BILL INTITULED

An Act to reform the law relating to the crime of rape

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title—This Act may be cited as the Rape Law Reform Act 1984.

PART I

AMENDMENTS OF CRIMES ACT 1961

2. This Part to be read with Crimes Act 1961—This Part of this Act shall be read together with and deemed part of the Crimes Act 1961* (hereafter in this Part referred to as the principal Act). 5

3. Sexual connection defined—The principal Act is hereby amended by inserting, after section 127, the following section: 10
 “127A. For the purposes of sections 128 and 129 of this Act, ‘sexual connection’ means—

“(a) Connection occasioned by the penetration of the vagina or the anus of any person by—

“(i) Any part of the body of any other person; or

“(ii) Any object held or manipulated by any other person,— 15

otherwise than for bona fide medical purposes:

“(b) Connection occasioned by the introduction of any part of the penis of any person into the mouth of any other person:

“(c) Cunnilingus: 20

“(d) The continuation of sexual connection as described in any of the preceding paragraphs of this section.”

4. New sections (relating to rape) substituted in principal Act—The principal Act is hereby amended by repealing section 128, and substituting the following sections: 25

“128. **Rape**—(1) Rape is the act of a person having sexual connection with another person where—

“(a) That other person does not consent to sexual connection; and

“(b) The person charged— 30

“(i) Knows that the other person does not consent; or

“(ii) Is indifferent whether the other person consents or not; or

“(iii) Knows or believes that there is a risk that 35 the other person does not consent; or

“(iv) Fails to turn his mind to the question of consent when, if he were to turn his mind to that question, he would realise that the other person does not consent; or 40

“(v) Believes, without reasonable grounds, that the other person consents.

*R.S. Vol. 1, p. 635

Amendments: 1979, No. 5; 1979, No. 127; 1980, No. 63; 1980, No. 85; 1982, No. 46; 1982, No. 157

“(2) Without limiting the circumstances in which there is no consent to sexual connection, there is no such consent where a person submits to or acquiesces in sexual connection by reason of—

5 “(a) The actual or threatened application of force to that person or to some other person; or

“(b) The fear of the application of force to that person or some other person.

“(3) Without limiting the circumstances in which consent to
10 sexual connection does not constitute consent for the purposes of **subsection (1)** of this section, a person who consents to sexual connection with another person by reason of—

“(a) A mistake as to the identity of that other person; or

“(b) A mistake as to the nature and quality of the act,—
15 does not consent to sexual connection for the purposes of that subsection, and, if the person charged knows of the mistake, he shall be deemed to know that the other person does not consent.

“(4) A person who does not offer actual physical resistance
20 to sexual connection shall not, by reason only of that fact, be regarded for the purposes of **subsection (1)** of this section, as consenting to sexual connection.

“128A. **Penalty for rape**—(1) Every one who commits rape is liable to imprisonment for a term not exceeding 14 years.

25 “(2) Every one who is convicted of rape shall be sentenced to imprisonment unless, having regard to the particular circumstances of the offence or of the offender, the Court is of the opinion that the offender should not be so sentenced.”

5. Special provisions in rape cases—The principal Act is
30 hereby amended by inserting, after section 375 (as substituted by section 4 (1) of the Crimes Amendment Act (No. 2) 1982), the following section:

“375A. (1) For the purpose of this section, ‘rape case’ means proceedings on indictment for any of the following offences:

35 “(a) Rape:

“(b) Attempted rape:

“(c) Assault with intent to commit rape:

“(d) Aiding, abetting, inciting, counselling, or procuring the
40 commission of any offence referred to in **paragraphs (a) to (c)** of this definition:

“(e) Conspiring with any person to commit any such offence.

“(2) While the complainant in a rape case is giving oral evidence (whether in chief or under cross-examination), all persons shall be excluded from the Court other than—

“(a) The accused:

“(b) Any barrister or solicitor engaged in the proceedings:

“(c) Any officer of the Court:

“(d) The member of the Police in charge of the case:

“(e) Any accredited news media reporter: 5

“(f) Any person whose presence is requested by the complainant:

“(g) Any person expressly permitted by the Judge to be present.

“(3) Where in any rape case the Court is of the opinion that 10 the interests of the complainant so require, it may make an order forbidding publication of any report or account giving details of the criminal acts alleged to have been performed on the complainant.

“(4) Nothing in this section shall limit or affect the powers 15 of the Court to exclude any person or forbid any report or account of any evidence under section 375 of this Act or any other enactment.”

PART II

AMENDMENTS OF EVIDENCE ACT 1908

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6. This Part to be read with Evidence Act 1908—This Part of this Act shall be read together with and deemed part of the Evidence Act 1908* (hereafter in this Part referred to as the principal Act).

7. Evidence of complainant in rape cases—Section 23A 25 of the principal Act (as inserted by section 2 of the Evidence Amendment Act 1977) is hereby amended by omitting from the definition of the term “complainant” in subsection (1) the words “woman or girl”, and substituting the word “person”.

8. New sections (relating to sexual cases) inserted in 30 principal Act—The principal Act is hereby amended by inserting, after section 23A (as inserted by section 2 of the Evidence Amendment Act 1977), the following sections:

“23AA. **Corroboration in sexual cases**—(1) Where any person is tried for an offence against any of sections 128 to 35 144 of the Crimes Act 1961 or for any other offence against the person of a sexual nature, no corroboration of the complainant’s evidence shall be required for that person to be convicted and it shall not be necessary in any such case for the Judge to give any warning to the jury relating to the 40 absence of corroboration.

*R.S. Vol. 2, p. 339

Amendments: 1980, No. 6; 1980, No. 27; 1982, No. 48

“(2) Nothing in **subsection (1)** of this section shall limit the Judge’s discretion to give such directions to the jury, and to make such comments on the evidence, as he thinks appropriate in the particular case; but if he decides to comment on the
5 absence of corroboration he shall not use words to the effect that it is unsafe or dangerous to convict on the uncorroborated evidence of the complainant.

“**23AB. Delay in making complaint in sexual cases—** Where, during the trial of any person for an offence against
10 any of sections 128 to 144 of the Crimes Act 1961 or for any other offence against the person of a sexual nature, evidence is given or a question is asked of a witness that tends to suggest an absence of complaint in respect of the alleged offence by the person upon whom the offence is alleged to have been
15 committed, or to suggest delay by that person in making any such complaint, the Judge may tell the jury that there may be good reasons why the victim of such an offence may refrain from or delay in making such a complaint.”

PART III

20 AMENDMENTS OF SUMMARY PROCEEDINGS ACT 1957

9. This Part to be read with Summary Proceedings Act 1957—This Part of this Act shall be read together with and deemed part of the Summary Proceedings Act 1957* (hereafter in this Part referred to as the principal Act).

25 **10. Jurisdiction to conduct preliminary hearing of indictable offences—**Section 5 of the principal Act is hereby amended by inserting, before the words “A Court”, the words “Subject to **section 185B** of this Act,”.

11. New Part (relating to preliminary hearings in cases
30 **of rape) inserted in principal Act—**The principal Act is hereby amended by inserting, after Part V, the following Part:

“PART VA

“SPECIAL PROVISIONS RELATING TO PRELIMINARY HEARINGS IN RAPE CASES

35 **“185A. Application—**This Part of this Act applies to preliminary hearings of offences against section 128 (rape) or section 129 (attempt to commit rape) of the Crimes Act 1961.

*R.S. Vol. 9, p. 583

Amendments: 1982, No. 47; 1982, No. 131; 1982, No. 158

“185B. **Hearings to be conducted by Judge**—Every Court conducting a preliminary hearing to which this Part of this Act applies shall be presided over by a District Court Judge.

“185C. **Evidence of complainant**—(1) Notwithstanding anything in Part V of this Act, at any preliminary hearing to which this Part of this Act applies, the complainant’s evidence shall be given in the form of a written statement, and the complainant shall not be examined or cross-examined on that statement unless,—

“(a) The Judge is satisfied that the complainant has been advised of the right to give evidence in the form of a written statement but nevertheless wishes to give evidence orally; or

“(b) The Judge orders that the complainant’s evidence be given orally on the ground—

“(i) That the written statement of the complainant, together with any other evidence tendered, is not sufficient to justify putting the defendant on trial; or

“(ii) That it is indispensable in the interests of justice that the evidence be given orally.

“(2) Where, in such a case, the complainant gives oral evidence (whether in chief or under cross-examination), all persons shall be excluded from the Court while that evidence is being given, except—

“(a) The informant:

“(b) The defendant:

“(c) Any barrister or solicitor engaged in the proceedings:

“(d) Any officer of the Court:

“(e) The member of the Police in charge of the case:

“(f) Any accredited news media reporter:

“(g) Any person whose presence is requested by the complainant:

“(h) Any person expressly permitted by the Judge to be present.

“185D. **Power of Court to prohibit publication of certain details**—Where in any preliminary hearing to which this Part of this Act applies the Court is of the opinion that the interests of the complainant so require, it may make an order forbidding publication of any report or account giving details of the criminal acts alleged to have been performed on the complainant.

“185E. **Other powers of Court preserved**—Nothing in section 185c (2) or section 185D of this Act shall limit or affect the powers of the Court to exclude any person or forbid any report or account of any evidence under section 156 of this Act or any other enactment.”