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Department of Justice

STATEMENT

OF

VICTORIA TOENSING
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE THE

SUBCOMMITTEE ON
CRIMINAL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 4876
THE "SEXUAL ASSAULT ACT OF 1984"

ON

SEPTEMBER 12, 1984

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Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to present the views of the Department of Justice on H.R. 4876, the "Sexual Assault Act of 1984." The Department strongly urges reform of the current federal sexual offense laws. We support the approach to do so in H.R. 4876. There are several aspects of H.R. 4876 as drafted, however, which cause problems, and my statement will suggest changes helpful to the successful prosecution of these heinous crimes.

H.R. 4876 replaces the current rape and statutory rape laws in title 18 of the United States Code with a series of graded offenses. It substitutes more modern terms, such as aggravated sexual assault and sexual abuse, for the old common law terms of "rape" and "carnal knowledge" and includes a precise description of this prohibited conduct. H.R. 4876 eliminates the current exception under federal law that a spouse cannot be raped. And, it makes the federal provisions sex neutral.

The most serious offense under H.R. 4876 is aggravated sexual assault, which consists of compelling another person to engage in a sexual act by physical force or threat of death, serious bodily injury, or kidnaping. The offense of aggravated sexual assault also includes two other types of behavior: (1) participating in a sexual act with a person under twelve

years of age if the offender is at least four years older and (2) forcing an intoxicant on a person, which impairs his or her ability to appraise or control conduct, and who thereby performs a sexual act with the offender. Aggravated sexual assault would be punishable by up to twenty-five years' imprisonment or by life imprisonment in certain circumstances.

The second most serious offense under the bill is sexual assault. This is defined as (1) engaging in a sexual act with a person known by the offender to be incapable of appraising the nature of the conduct or physically incapable of declining participation in it, or (2) compelling a sexual act through threats or fear. This offense is punishable by up to fifteen years' imprisonment.

Additionally, the bill prohibits a person from having a sexual act with a minor between twelve and fifteen years of age if the offender is at least four years older than the minor. Finally, H.R. 4876 proscribes aggravated sexual battery and sexual battery, which concern "sexual contacts," as defined in the bill and distinguished from "sexual acts." The bill applies to offenses within the special maritime and territorial jurisdiction of the United States.

The need for reform of the federal sexual offense statutes is clear. Indeed, criminal code revision bills considered in recent years in both the House and Senate Judiciary Committees

included proposals for reform similar in outline to H.R 4876. Current law prohibiting rape is very limited. It does not proscribe a full range of serious sexual offenses. Sections 2031 and 2032 of title 18, United States Code, prohibit only rape and statutory rape; 18 U.S.C. 113(a) prohibits assault with intent to commit rape. Aside from prostitution offenses, these are virtually the only federal statutes that describe and punish sexual crimes. The present rape statute, section 2031, has been construed as proscribing rape as defined in the common law -- that is, carnal knowledge of a female (not the offender's wife) by force or threat of bodily harm and without her consent. Rape, under present federal law, has been held inapplicable to homosexual rapes.[1] The statutory rape provision, section 2032, also reflects gender bias by expressly protecting only females (not the offender's wife) under the age of sixteen from carnal knowledge. No lesser offenses, such as those described in H.R. 4876 as well as in more modern State penal codes, are in the current United States Code. Nor does the Code punish such serious offenses as forcible sodomy.

Therefore, the Department of Justice supports the thrust of H.R. 4876, that is, to create a rationally graded, comprehensive sex-neutral series of offenses in place of the inadequate laws now on the books. However, there are certain aspects of the bill as introduced which the Department does not favor. In our

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1 United States v. Smith, 574 F.2d 988 (9th Cir. 1978), cert. denied, 439 U.S. 852 (1978).

June 6, 1984, letter to the Chairman of the Judiciary Committee, the Department furnished requested comments on H.R. 4876 by discussing some difficulties presented by the bill and the need for amending it. Since that time, and upon further reflection, we have identified certain additional areas in which we believe the bill should be strengthened. I shall discuss only our most significant concerns.

First, we recommend that H.R. 4876 be amended to include attempted offenses. Despite the fact that H.R. 4876 provides a series of graded offenses, it nevertheless retains unmerited gaps because it lacks an attempt provision. For example, it would not cover the situation where an offender coerces a victim by threat to go to a secluded area to compel a sexual act but is prevented by a bystander or law enforcement official from actually engaging in the sexual act or in sexual contact as defined by the bill. Such conduct should not escape new federal sex offense laws if the offender intentionally engages in the conduct and if the conduct constitutes a substantial step toward the commission of the crime.

Second, the maximum terms of imprisonment applicable to the most serious offenses of aggravated sexual assault and sexual assault should be increased. H.R. 4876 provides that aggravated sexual assault is punishable by a maximum of twenty-five years' imprisonment, except that life imprisonment is authorized if during the offense the offender inflicts "severe bodily injury,

disfigurement, permanent disease, or protracted incapacitating mental anguish on any person." In our view, life imprisonment should be applicable to any conviction for aggravated sexual assault. This change would make punishment for aggravated sexual assault consistent with punishment under the present rape law. Determining whether an offender has inflicted "protracted incapacitating mental anguish" could be extremely difficult in many cases. Moreover, the seriousness of the offense justifies the possible imposition of life imprisonment even where the offender has not permanently disfigured the victim or inflicted "severe bodily injury," such as where the defendant has a previous criminal history of sexual crimes. We also believe that the penalty for sexual assault should be increased from fifteen to twenty years to reflect the seriousness of this offense.

Third, H.R. 4876 should include, either in the bill or its legislative history, a clear statement that corroboration is not required to prove the offenses under the bill.[2] Without a clear statement on the issue of corroboration, H.R. 4876 would leave courts to fashion their own rules. While current federal case law indicates it is unlikely that corroboration would be required, the case law is not so extensive as to have settled the matter. A statement by Congress would avoid the need for protracted litigation.

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2 We express no view as to whether corroboration should, nevertheless, be required in interspousal cases since this issue is best left for determination by the Congress.

Fourth, the jurisdictional scope of H.R. 4876 should be expanded to cover offenses committed against any person in official detention in a federal facility. There are seven federal prisons which are not currently within the special maritime and territorial jurisdiction of the United States, although plans exist to bring them within such jurisdiction. Extension of jurisdiction to persons in official detention in a federal facility would assure coverage of sex offenses committed against inmates of a federal detention facility following, for example, arrest, surrender in lieu of arrest, charge or conviction of an offense, or an allegation or finding of juvenile delinquency. Such an extension of jurisdiction would also include coverage of persons in official detention in a federal facility pursuant to a State sentence.

Fifth, the four-year age differential, required as an element of the proposed offense of aggravated sexual assault, should be deleted. As proposed, the bill would make it an offense for a person to engage in a sexual act with an individual less than twelve years old only if the actor were at least four years older than the victim. This evidently represents an effort to distinguish, in terms of blameworthiness, between sexual activity among young peer group members and such activity between a young person and a person considerably older than that person, who may well have taken advantage of the victim's immaturity. While we acknowledge that some increase in the gravity of the offense may be present when the offender is

significantly older than the juvenile victim, we do not agree that the solution is to decriminalize sexual conduct with persons less than twelve years old based upon an arbitrary age differential. The effect of such legislation might be to send an unfortunate signal that the Congress condones sexual activity by and with pre-teen age children, so long as both participants are of similar tender years. We believe that the better solution is, as under current law, to criminalize sexual activity by anyone with a person under twelve years old, and to leave to prosecutorial and judicial discretion the occasions when such activity occurs between two persons of very young age. We are not aware of any instance in which such discretion is alleged to have been abused.

Sixth, H.R. 4876 does not provide for an appropriate defense to the crime of sexual abuse of a minor between the ages of twelve and fifteen regarding the defendant's belief as to the victim's age. Some teenagers have been known to hold themselves out as adults. Sex offense laws should reflect the view that, in some limited circumstances, a belief as to the victim's age is a defense to a prosecution under proposed 18 U.S.C. 2243. A person who genuinely and reasonably believes that another person with whom he or she engages in sexual activity is sixteen years of age or older does not pose the same danger to society as a person who intends to have sexual relations with a child. However, the availability of this defense should be limited to persons who establish by a preponderance of the evidence that they not only

believed the other person to be sixteen or older but had substantial reason for this belief. Moreover, the defense should be limited to cases in which the defendant's course of conduct did not also constitute an offense under 18 U.S.C. 2251, sexual exploitation of children; 18 U.S.C. Chap. 117, the White Slave Traffic Act; or 18 U.S.C. 1952, the Travel Act, to the extent that this last provision is violated with respect to prostitution activities. The limitations on this suggested defense are designed to prevent a person from commercially exploiting teenage victims by developing false documentary evidence indicating the victim's age to be sixteen or older.

Seventh, appropriate fines should be provided for each of the offenses. The bill currently only provides for a fine (of $500) for violations of proposed 18 U.S.C. 2245 concerning sexual battery but not for the more serious offenses in the bill. In our view fines should be included for all the offenses since some cases may warrant a fine as well as imprisonment.

Eighth, conforming amendments to other statutes, such as the Major Crimes Act, 18 U.S.C. 1153, are necessary to deal with the elimination of the current rape and carnal knowledge provisions, and certain ambiguities and overlap in the sexual assault and aggravated sexual assault provisions should be remedied.

We suggest that thought be given to the possibility of redesignating the labels of the enumerated offenses. To some extent, "assault" and "battery" as used in H.R. 4876 are confusing inasmuch as the offenses defined by these terms do not correspond to their common law definitions. Additionally, it may be simpler to combine all of the crimes relating to children into the same section.

With these amendments and the others recommended in our letter to Chairman Rodino, H.R. 4876 would constitute a valuable revision and strengthening of the federal sexual offense laws.

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