

1977 S.C. Op. Atty. Gen. 262 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-328, 1977 WL 24667

Office of the Attorney General

State of South Carolina
Opinion No. 77-328
October 19, 1977

*1 Representative Joyce C. Hearn
1316 Berkeley Road
Columbia, South Carolina 29205

Dear Representative Hearn:

You have requested an opinion as to the constitutionality of Act No. 157, STATUTES AT LARGE OF SOUTH CAROLINA, 1977, which excludes evidence in a rape trial of previous sexual conduct of the victim, but permits evidence of the victim's sexual activity when it constitutes adultery.

The statute appears to distinguish between married victims and unmarried victims as far as the admissibility of evidence of prior sexual misconduct is concerned. The Equal Protection Clause of the Fourteenth Amendment requires that statutory classifications must be rational. In other words, to withstand a challenge on this ground, the Legislature must have found that alleged victims who are adulterous, whether married or not, are more likely to have consented to sexual intercourse with the defendant than alleged victims who have not engaged in adultery, regardless of non-adulterous prior sexual conduct, if the defense of consent is used.

If this was not the finding of the Legislature, then the statute probably should be amended. In that event, the classification of alleged victims should be changed to correspond more closely to the likelihood of consent by the alleged victim. Or perhaps the classification should be eliminated entirely.

If you are drafting an amendment to the statute, you might consider adding a definition of 'sexual conduct' and 'adultery.' Perhaps the equal protection problem might be met simply by defining 'sexual conduct' as excluding sexual intercourse, and by defining 'adultery' as any sexual intercourse outside of marriage.

With kind regards,

Karen LeCraft Henderson
Assistant Attorney General

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