

Crimes Amendment (Consent—Sexual Assault Offences) Bill 2007

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

Under the *Crimes Act 1900*, the offence of sexual assault is committed if a person has sexual intercourse with another person without that other person's consent and knowing or being reckless that the other person does not consent.

The object of this Bill is to amend the *Crimes Act 1900*:

- (a) to define "consent" for the purposes of sexual assault offences as free and voluntary agreement to sexual intercourse, and
- (b) to include in the cases when consent to sexual intercourse is or may be negated: incapacity to consent, intoxication, persons who are asleep or unconscious, unlawful detention, intimidatory or coercive conduct and abuse of a position of authority or trust, and
- (c) to provide that a person commits sexual assault if the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *Crimes Act 1900* set out in Schedule 1.

Clause 4 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendments

At present, section 61R of the *Crimes Act 1900* provides for a number of matters relating to consent for the purposes of the offences of sexual assault (section 61I), aggravated sexual assault (section 61J) and aggravated sexual assault in company (section 61JA). To facilitate a number of changes in relation to consent, **Schedule 1 [2]** repeals section 61R and **Schedule 1 [1]** inserts proposed section 61HA. The changes are outlined below.

Meaning of consent

Consent is an element in each of the offences under sections 61I, 61J and 61JA.

Proposed section 61HA (2) provides that a person **consents** to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse. This is consistent with the definition in the Model Criminal Code, recommended by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Chapter 5—Sexual Offences Against the Person.

Knowledge about consent

Knowledge is also an element of each of the offences under sections 61I, 61J and 61JA. Section 61R (1) currently provides that a person who has sexual intercourse with another person without the consent of the other person and who is reckless as to whether the other person consents to the sexual intercourse knows that the other person does not consent to the sexual intercourse.

Proposed section 61HA (3) retains recklessness, but also 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. The subsection further provides that the trier of fact (ie a jury or a judge disposing of a matter without a jury) must have regard to all the circumstances of the case, including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but not including any self-induced intoxication of the person.

Negation of consent

Proposed section 61HA (4) and (5) provide that a person does not consent to sexual intercourse with another person:

- (a) if the person does not have the capacity to consent, including because of age or cognitive incapacity, or
- (b) if the person does not have the opportunity to consent because the person is unconscious or asleep, or
- (c) if the person consents because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or
- (d) if the person consents because the person is unlawfully detained, or (e) if the person consents under a mistaken belief as to the identity of the other person, that the other person is married to the person or that the sexual intercourse is for medical or hygienic purposes (or under any other mistaken belief about the nature of the act induced by fraudulent means).

The circumstances set out in paragraphs (c) and (e), above, replace similar provisions currently set out in section 61R (2).

Proposed section 61HA (6) provides that the grounds on which it may be established that a person does not consent to sexual intercourse include:

- (a) if the person has sexual intercourse while substantially intoxicated by alcohol or any drug, or
- (b) if the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force, or
- (c) if the person has sexual intercourse because of the abuse of a position of authority or trust.

Proposed section 61HA (7) provides that a person is not to be regarded as consenting to sexual intercourse by reason only of the fact that the person does not offer actual physical resistance to the sexual intercourse. This replaces a similar provision currently contained in section 61R (2) (d).

Proposed section 61HA (8) makes it clear that the above provisions do not limit the grounds on which it may be established that a person does not consent to sexual intercourse.

Other amendments

Schedule 1 [3] repeals section 65A (Sexual intercourse procured by intimidation, coercion and other non-violent threats) of the *Crimes Act 1900* as a consequence of the amendments dealing with circumstances in which consent may be negated. As a result, if consent to sexual intercourse is negated because of any such non-violent threat, the accused will be subject to prosecution for sexual assault (which carries a maximum penalty of imprisonment for 14 years instead of the current maximum period of 6 years under the separate offence in section 65A).

Schedule 1 [4] contains a savings and transitional provision consequent on the enactment of the proposed Act.