Crimes Amendment (Consent-Sexual Assault Offences) Bill 2007

About this Item
Speakers - Firth Ms Verity; Smith Mr Greg; Collier Mr Barry; Goward Ms Pru; McKay Ms Jodi; Hazzard Mr Brad; Terenzini Mr Frank; Stokes Mr Rob; McMahon Ms Lylea
Business - Bill, Agreement in Principle, Consideration in Detail, Passing of the Bill, Motion

CRIMES AMENDMENT (CONSENT—SEXUAL ASSAULT OFFENCES) BILL 2007

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Agreement in Principle

Ms VERITY FIRTH (Balmain—Minister for Women, Minister for Science and Medical Research, Minister Assisting the Minister for Health (Cancer), Minister Assisting the Minister for Climate Change, Environment and Water (Environment)) [8.41 p.m.]: I move:

That this bill be now agreed to in principle.

The Government is pleased to introduce the Crimes Amendment (Consent—Sexual Assault Offences) Bill 2007, as amended by the Government in the Legislative Council. The bill is substantially the same as that introduced in the Legislative Council on 7 November this year, and I direct members to the second reading speech on this bill in *Hansard* for more information about its provisions. The bill has been amended by the Government in the Legislative Council to require a review to be carried out to determine whether the policy objectives of the Crimes Amendment (Consent—Sexual Assault Offences) Act 2007 remain valid and whether the terms of the amendments made by the Act remain appropriate for the securing of those objectives.

That review is to be undertaken as soon as possible after the conclusion of four years from the date of commencement of the legislation. A report on the outcome of the review is to be tabled within 12 months after the end of that period of four years. This has been done because it is necessary to have a sufficient number of cases go through the courts after the introduction of the bill to provide enough material on which to base a review. On advice that the Government has received it will require a time frame of four years for these cases to progress through the courts. It is the Government's intention to have the review, although a ministerial review, conducted by the Sexual Offences Task Force. Those same stakeholders will have the opportunity to review the work and contribute to debate and discussion on the issue. Given their level of experience in such matters and their excellent contribution to the report, that will be appropriate. I commend the bill to the House.

Mr GREG SMITH (Epping) [8.42 p.m.]: I lead for the Opposition on the Crimes Amendment (Consent—Sexual Assault Offences) Bill 2007. The Opposition will not oppose the bill but will seek to amend it to substitute the Law Reform Commission as the investigator after three years. The bill amends the Crimes Act 1900. It defines consent for the purposes of sexual assault offences as "free and voluntary agreement to sexual intercourse". Previously common law prevailed and the definition is consistent with most definitions given by trial judges in this State.

The bill also repeals section 61R, which currently provides that a person who has sexual intercourse with another person without consent of the other person, or 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. The bill replaces that provision with section 61HA (3), which retains "recklessness" but also provides that the person knows that the other person does not consent to sexual intercourse if the person has no reasonable grounds for believing that the other person consents to the sexual intercourse. The judge or 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.

New section 61HA (4) contains provisions that negate consent when complainants do not have the capacity or opportunity to consent because of sleep or unconsciousness or when a person is exposed to threats or being unlawfully detained. New section 61HA (5) provides that consent is not given when a complainant acts out of a mistaken belief or fraud. These provisions replicate current section 61R (2). New section 61HA (6) provides that the grounds on which it may be established that a person does not consent to sexual intercourse include if that person is substantially intoxicated by alcohol, is induced to have sexual intercourse because of intimidatory or coercive conduct, or is subject to abuse of a position of authority or trust. New section 61HA (7) provides that the lack of physical resistance by a complainant is not in itself sufficient to constitute consent.

Although it has been said that the bill is a response to the recommendation of the Sexual Assault Task Force, the task force made no such recommendation, and I will come to those recommendations shortly. When the *Daily Telegraph*, particularly Janet Fife-Yeomans, commenced a series of articles on behalf of various women's groups,

including the Rape Crisis Centre, entitled "Justice for Women Now" the Government provided a response, to which I shall return shortly. The *Daily Telegraph* sought four key reforms. First, it asked that there be no delay and that there be a limit of 12 months from the date charges are laid to the end of the appeal process. It would not be possible for the Government to comply with that request because the criminal process would prevent a guarantee that everything would be completed in 12 months.

Second, the *Daily Telegraph* asked that lawyers represent victims. Under the current system the Crown appears for the community while a lawyer usually represents the accused. As far as I am aware, the Government has not responded to that request and it would be unusual in our system of justice unless a victim has a claim for privilege or something similar. The third request was codification of the idea that "No" means no. The simple statutory definition of consent is that the person has the capacity to consent and did so freely and voluntarily. Indeed, new section 61HA (2) states:

A person ***consents*** to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse.

The fourth request was for a one-stop shop with all government services being available to the rape victim rather than the victim attending appointments. I do not believe that system is in place. Indeed, it would be difficult to achieve in remote areas. However, I commend the initiative and, hopefully, when the Coalition is in government we will strive to achieve that. In response to the campaign the Attorney General said that the system had failed all rape victims, and he launched a discussion paper on the meaning of consent. However, it was not all about the meaning of consent. There is no evidence that changing the definition of "consent" and including an objective test will improve the situation for women. In England in 2003, under the Sexual Offences Act, the British Parliament did away with the subjective aspects of lack of knowledge of consent and brought in an objective requirement similar to that set out in paragraph (c). As a result there has not been any significant increase in the number of convictions obtained in the British courts. I will come back to that.

Throughout the campaign the Opposition has called on the Government to increase funding to the criminal justice system to remove delays, provide further assistance to victims, set up one-stop shops, and provide special courts for sexual assault offences. One of the primary recommendations of the Criminal Justice Sexual Offences Task Force was that there be specialised courts with training judges, prosecutors, witness assistance officers and other people so the trauma of giving evidence in a rape case would be reduced to a certain extent. Such trauma can never be eliminated because of the subject matter and the fact that where there is a trial there is inevitably conflict between the accused and the complainant and undoubtedly there will be attempts to test the credibility and accuracy of the complainant.

The Government has failed to respond to the Opposition's request for specialised courts. It has also failed to respond to the call for one-stop shops, and it has failed to respond to calls to streamline the system to remove delays. The Government has not responded by simply asking the Bar Association to somehow clip the wings of defence counsel by telling them, "Don't get involved in lengthy cross-examination. Don't get involved in offensive cross-examination." The Government has enacted provisions in the Criminal Procedure Act, which it is now translating into the Evidence Act, which require judges to stop offensive cross-examination. That is a good thing. But in my experience there is not a lot of offensive cross-examination, because it is almost forensic suicide for the defence counsel to be too offensive with the complainant. The jury will get its back up immediately, and that will be a big weight in the consideration of guilt: it will weigh heavily in favour of the Crown.

With regard to the Opposition's call for the Government to provide further assistance to victims, the real assistance it could provide to victims would be to bring in laws that restrict pre-trial applications to the extent that there is a limit to how long a person has to bring such applications and how long the applications last. In the case of *The Queen v. G*—who was named originally but was not named in his second trial—I led Ms Cuneen in the Court of Criminal Appeal. The pre-trial proceedings had taken place 12 to 18 months before that, and the decision was made by the trial judge to exclude the identification evidence, which basically killed the Crown case. It took nine months for the Court of Criminal Appeal to decide that case, which it decided in our favour. In the meantime, however, Ms Cuneen had made her famous speech at Newcastle university about which there was a public outcry.

After the case went back to the judge—a different judge may have heard the further matters—further pre-trial applications were made. Looking from the outside, one might suspect that, this man having already been through a trial where the issues had been largely decided, these pre-trial applications were really trial by attrition, to try to wear out the victim, as they did. The victim eventually refused to give evidence. It was only then that the operation of the other amendments—which allowed evidence to be given by way of the transcript or by way of a tape of the evidence given in the first trial—were allowed to be used. Ultimately Ms Cuneen was excluded from the case after defence counsel objected to her continuing to prosecute because of her comments at Newcastle university. Another extremely able prosecutor took over the case—but without a victim, as it were. The new prosecutor simply had to use a transcript, which of course does not have any emotion. The trial involved someone monotonously reading out days and days of transcript. The original trial involved multiple accused, including Bilal Skaf, Mohammed Skaf and others. Ultimately the jury acquitted the accused and the case was thrown out.

The real assistance the Government could give to improve the situation for sexual assault victims would be to cut back on these prolix pre-trial applications and stop the filibustering, which wears out the resolve of a victim who

has already been under enormous pressure through the tragedy of a vicious rape. Certainly convictions were confirmed against most of the accused in that matter. However, the victim was put through an enormous ordeal, one that would infuriate every decent member of the community. Yet the lawyers dragged those proceedings out for more than two years. This is where the Government must step in rather than asking the Bar Council to do something—which most of its members would be against because an accused person is entitled to a fair trial and most Bar Council members are more in the defence bar league than in the prosecution league. The Government has failed to do that. Indeed, the Government has conned the women's movement by saying that these changes to consent laws will fix everything. They certainly will not. I will return to the bill's definition of "consent", which is in line with the definition proposed by the Commonwealth's model criminal code, that being "by free and voluntary agreement".

Wisely, recklessness as to whether the complainant is consenting is preserved and the common law is not altered by statutory definition. I will return to the aspect of recklessness and will refer to the High Court's decision in the case of Banditt, which I do not think the Government has given sufficient consideration to in its drafting of the legislation. The bill effectively creates a new crime of negligent sexual assault, inserting section 61HA (3) (c), which states, "The person has no reasonable grounds for believing that the other person consents to the sexual intercourse." The significance of this provision is enhanced by the fact that section 61HA (3) (e) states that the court cannot have regard to any self-inducing detoxification of the person committing the act. I think this is part of the area where England now has a battle between the judges, the politicians and the lawyers about the extent to which people have been affected, regarding their clarity of mind and to what extent that can be taken into account by the jury.

The Attorney General claimed in his second reading speech that these changes are in line with what was recommended by the Sexual Assault Task Force. Indeed, task force recommendation 14 was not nearly as definite as some of the others, asking the Attorney General's Department to give "further consideration to whether the common law should be modified to adopt an objective fault element for offences of sexual intercourse without consent, or by introduction of a new provision creating a separate offence". The separate offence aspect had been raised in the task force, I think to some extent by Mr Odgers for the Bar Association but by others as well. The Law Society objected to the objective standard and rejected the Canadian model, from which this was to some extent being taken. Asking that further consideration be given to the aspect of consent or to the introduction of a new provision creating a separate offence is hardly a recommendation that one should do what has been done here.

The Government has used the review of the consent laws as its response to the *Daily Telegraph* campaign. There is no reason to think it will result in increasing conviction rates, which is what the women's movement and society want. They would like to see a higher conviction rate. Wouldn't we all? Higher conviction rates are being achieved not by this—because it has already happened. They are being convicted because the Court of Criminal Appeal and the High Court have clarified the law in recent years. We have a good standard of Crown prosecutors, public defenders and defence counsel who are well on top of the intricacies of the Evidence Act. We have good witness assistance people who are helping the victims. We also have courageous victims who are willing to give evidence.

Probably one of the reasons for the increase in the rate of conviction is that there are probably not as many historical sexual assault cases coming through now. There was a period when there were many women generally, but sometimes men, talking about interference by relatives, people in positions of trust and others 20 to 30 years ago. It was very difficult to obtain a conviction in those instances or to get any corroboration. With the warnings that had to be given according to the High Court and the other courts it was very difficult to obtain a conviction and, if a conviction was obtained, it was very difficult to hold it.

My observation is that there are fewer cases coming through now. I might be wrong but I think that is the fact. Also the law has been improved. Some of the improvements have been because of the Opposition's attitude. For example, the Opposition proposed that the evidence given in the first trial be used in the next trial to save trauma to the victim. At first the Government pooh-poohed that but ultimately after the Skaf matter was set down for retrial—after the two jurors went to the park and created a successful appeal point—the victim refused to give evidence, the case was no billed and the Government had to capitulate and enact a law that allowed the transcript of the previous evidence to be used. A conviction was obtained the second time. That change, as will some of the other changes that have been made, has made things easier for women and other victims. It is not all women; it is mainly women. Those improvements are to be applauded.

It is wrong to think the solution to the current conviction rate will come from changing the consent clause. I think it will make it harder to get a conviction. The Bar Association believes there will be more convictions, and it may be right. It will be a much easier test to satisfy with the person having no reasonable grounds for believing that the other person consented—that is negligence effectively. The problem is that negligence is being mixed in with the subjective standards of actual intention or recklessness. It is hard enough at the moment with intention and recklessness mixed together. "Recklessness" can mean that it is not given any thought; one just proceeds willy-nilly with the act without giving a moment's thought to whether a woman is consenting, or the person might have some doubt about it but goes ahead anyway. That is an example of two types of recklessness. When that is mixed up with intention it causes confusion. Including that a person has no reasonable grounds for believing that

the other person has consented creates a very confusing summing-up.

I am not trying to big-note myself but we have to draw on people who have had the experience of running these cases in courts, calling witnesses, examining the accused, and then arguing these cases in the Court of Criminal Appeal and the High Court. Often it is the direction of the judge that decides whether someone is convicted. It becomes very difficult when you have confusing directions. We have this new concept of an objective ground, a negligence offence. The criminal law has always recognised that negligent actions attract lower penalties. Negligently causing grievous bodily harm has a maximum penalty of two years. Recklessly inflicting grievous bodily harm has a maximum penalty of 10 years. Deliberately or intentionally causing grievous bodily harm—what used to be called "maliciously"—has a maximum penalty of 25 years if there is intent. There is a gradation in the fault situation. If it is a negligent offence only a small penalty is imposed. Negligent driving causing death or grievous bodily harm attracts smaller penalties than dangerous driving, which is in between simple negligence and criminal negligence. Dangerous driving is an objective offence, as in paragraph (c)—how a reasonable person would consider the behaviour of the driver.

We are now introducing one offence, with one penalty—in some cases 25 years but generally 14 years for simple sexual assault, if I can call it that, without the aggravating circumstances. We are saying that what appears for grievous bodily harm with a 2, 10 and 25 gradation will now be 14 years. I wonder whether juries and society will jack up because of boys who have one-night stands with girls, which is part of our culture these days when alcohol is involved. There may appear to be consensual intercourse, but if the man then acts unkindly or brashly and just walks away, girls may change their mind. That is the example that the Bar Association has given.

Ms Verity Firth: You know that it is not saying that.

Mr GREG SMITH: I see that we have people who are wiser than I am, so they can keep talking because they will blindly follow whatever they are told to follow. The Opposition is not opposing the legislation but we have a duty to society.

Ms Lylea McMahon: Arrogant dinosaurs who think women cannot think for themselves.

Mr GREG SMITH: Women deserve as much help in sexual assault cases as society can possibly give. Women deserve as much sympathy, comfort and as much, as it were, restoration of a sense of justice for what has happened to them. In many cases I do not think we can restore a sense of justice because what has happened to them is something that some women will never recover from. I think a man can do nothing worse than to deliberately rape a woman. I think that is about the worst thing he could do except, perhaps, kill someone. In some cases it is like a killing. In fact sometimes, unfortunately, they kill the woman as well to stop evidence from being given.

We are genuinely concerned about the Government's mixture of onuses. This is something they have not tried in Britain because they have done away with the subjective test; they only have the objective test. It is something that has not been done in the other States. How is it a solution? Is it just done to get the *Daily Telegraph* off their back? Is it done to appease the Rape Crisis Centre and the women's groups, or is it done with wisdom? I think the former rather than the latter. It does not show an appreciation of sexual assault cases and of the law as decided by the courts.

The United Kingdom Sexual Offences Act 2003 sought to clarify the law on consent by defining the offence of rape as being committed if a person deliberately penetrates the vagina, anus or mouth of another, when that person does not consent to penetration and the perpetrator has no reasonable belief that consent was given. There is no question that this person knows that consent was not given—but undoubtedly the person would be caught by it. That the person is reckless seems to have been eliminated. It is an objective test and is to like effect as the third limb of the definition of consent. In favour of this legislation, the law provides certainty in relation to definitions of consent and may improve the number of convictions. We do not oppose making the meaning of "consent" a statutory definition rather than a common law definition.

The arguments against are that the cumulative effect of the bill criminalises actions that should not be subject to the severe penalties that are currently imposed on sexual assault. Such scenarios could include two people being intoxicated, one giving consent and then alleging rape the next day once that person has sobered up and feels they have been used. Under the changed law this may be considered sexual assault if the person has suffered from cognitive incapacity, and the person alleged to have committed the assault is to be assessed by the standards of a sober, reasonable person and may be found to have lacked reasonable grounds for believing the other person had the capacity to consent. The changes will add also an objective element to a criminal test, which is not in line with the criminal tenet of mens rea—guilty mind—which applies to most criminal offences, and, as such, will criminalise actions that are not necessarily criminal in nature. The introduction of an objective test in a predominantly subjective field may have the effect of confusing juries rather than clarifying the position. In the current legislation section 61R states:

> 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 is to be taken to know that the

other person does not consent to the sexual intercourse.

A number of situations are set out where consent is vitiated, and I have mentioned those. This legislation adds a couple of extra examples that are not set out here but the common law always recognises, for example, that if someone was mistaken in who they were having sexual intercourse with that could not be consent. For example, if a woman thought she was having consensual sexual intercourse with her husband but it had been with his twin brother, that woman may well have been raped because there has been fraud—it was not true consent.

As a result of the Attorney General's wish to respond to newspaper articles the Criminal Law Review Division put out a discussion paper and various stakeholders responded—the Director of Public Prosecutions, the New South Wales Bar Association, the Rape Crisis Centre, the Law Society of New South Wales, various women's groups, and I think the Legal Aid Commission and probably the Public Defenders Office. It has been said that the Director of Public Prosecutions supports the proposal. I do not believe that is correct, although it does support an element of objectiveness. In a letter dated 20 July 2007 the Office of the Director of Public Prosecutions said it would be prepared to support a definition of consent—not the one contained in the draft consultation bill but one drafted without the consequent need to prove double negatives beyond reasonable doubt.

Secondly, the Office of the Director of Public Prosecutions said it would support an inclusion of unlawful detention as a factor that negates consent—and I do not think anyone would argue with that. It supported the inclusion of non-violent threats as negating consent but with modifications as to the drafting. It supported the introduction of intoxication as a factor that may negate consent if it is considered necessary, but not in the manner set out in the draft bill, and it supported the introduction of the concept of reasonable belief as to consent, but not without concurrent introduction of provisions for alternative verdicts, depending on the basis established by the evidence.

This is one of the problems when I compare it with inflicting grievous bodily harm. I saw that a man pleaded guilty today to the throwing of a rock that hit the lady in the Wollongong area and tragically caused her grave damage. He was originally charged with maliciously inflicting grievous bodily harm and was later charged with negligently inflicting grievous bodily harm—two separate offences. I note from the newspaper report that the lesser offence of negligence has been withdrawn and he has pleaded guilty to the serious charge.

In criminal cases it is not uncommon for the Crown to have in its indictment a charge of aggravated sexual assault, alternative sexual assault and alternative indecent assault because sometimes the evidence is not entirely clear as to whether there has been penetration. In such a case the Director of Public Prosecutions is suggesting that with the reasonable belief aspect of the case it really should be the subject of a separate offence, which the task force discussed. Mr Odgers was a member of the task force and he is an eminent criminal lawyer who regularly appears in the Court of Criminal Appeal and the High Court and is the author of a leading book on evidence. His proposal was, among other things, that the proposed section, which was then called section 61I, be redrafted so that the person who has sexual intercourse with another person without the consent of the other person and either knows that the other person does not consent to the sexual intercourse, paragraph (a), or is indifferent or reckless as to whether the person does or does not consent to sexual intercourse, paragraph (b), is liable to imprisonment for 14 years. That is the current penalty and there is no proposal to change that.

His second proposal was that section 61R, which deems "recklessness" to be knowledge, be repealed. Mr Odgers has covered that in his second point. There would be no need to keep "recklessness" when he has already put it in. The third proposal was that a new offence be created, namely 61IA, that says:

> Any person who has sexual intercourse with another person without the consent of the other person and who failed to take reasonable steps to ascertain whether the other person consented, is liable to imprisonment for five years.

He then said a new section should be created so that if in a trial for an offence under section 61I the jury is not satisfied that the accused is guilty of the offence charged but is satisfied on the evidence that the accused is guilty of an offence under section 61IA, it may find the accused guilty of the latter offence and the accused is liable to punishment accordingly. That is a standard provision that appears when people are charged with murder or manslaughter over a driving offence. There can be an alternative charge of dangerous driving if the jury is not satisfied that the elements of those more serious offences are satisfied. The task force accepted Mr Odgers' recommendation to an extent by recommending in 14:

> The New South Wales Attorney General' Department should give further consideration to whether the common law should be modified to adopt an objective fault element for offences of sexual intercourse without consent or by introduction of a provision creating a new offence.

It is given equal status. In 15 the task force recommends:

> There should be no legislative attempt to define recklessness.

In effect, what has happened is that the new provision involving the reasonable belief concept has been put in as of equal standing in the offence to absence of consent. Anyone convicted of that third leg still faces a maximum sentence of 14 years, or 25 years if it is the extreme aggravated offence or 20 years if it is not. There is much to be said for putting that in. However, it has not been. By keeping them together in the one summing up it means that some person who may previously have not been convicted, because the Crown could not have established

either recklessness or intent—he might have an honest belief, often caused by his own intoxication, and a jury would think, applying its own, not a reasonable belief, and it was not reasonable for him to go ahead—faces the full consequences of a sexual intercourse without consent conviction: a rape conviction.

The Bar Association submission has been discussed at length in the other place, and I will not go into great detail about it because most of the points have been outlined. However, I draw the attention of the House to *R v Banditt*, a case decided on 15 December 2005 by the High Court. It is educational for members to hear how a real case is conducted. Banditt was the cousin of the victim. They had been out with friends—not together but they met each other at several pubs—and I think they both consumed a bit of alcohol and some marijuana may have been ingested. The victim went home and went to bed. While she was asleep Banditt broke through the bathroom window and she woke up with him on top of her having sex intercourse with her vaginally.

Her version—it is the version that the jury, the court and I accepted—was that ultimately she realised what was happening. She felt the perpetrator's head and noted the lack of hair and realised that he was not who she might have wanted it to be. She told him to get out. Thereupon he picked up some of his apparel, leaving his glasses and his mobile phone. He went out through the back door. He claimed that he went into the house and she was awake. He said that she welcomed him and they had foreplay and consensual sexual intercourse and then she changed her mind and asked him to leave, and he did. He said there had been a sexual relationship between them in the past but that she had rejected him recently when he had come knocking on the door late one night and the neighbours yelled out telling him not to make so much noise and he went away. In summing up that matter the trial judge referred to the substance of section 61R (1) and said to the jury:

> So, if you just go ahead and do it willy-nilly, not even considering whether the person is consenting or not, you are reckless and the law says you are deemed to know that the person is not consenting.

No objection to that statement was taken at the trial or on appeal. Later in the summing up His Honour said:

> Now, recklessness is a [failure] to advert to the question of whether the person is consenting or not. It does not have to be the product of conscious thought. If the offender does not even consider whether the woman is going to consent or not then that is reckless and he is deemed to know that she is not consenting. If he is aware there is a possibility that she is not consenting but he goes ahead anyway, that is recklessness. But it is his state of mind that you are obliged to consider and include[ed] in that is the concept I discussed with you yesterday about the fact that he had had something to drink, just how drunk he was, how much he had sobered up, how capable he was of making this decision and so on.

Transplanting those facts to this amendment, the judge would then have to tell the jury to ignore what the accused thinks. There would be a third way to convict. The judge could tell the jury that if they think that the accused had no reasonable grounds for believing that the other person—his cousin—had consented to the sexual intercourse then they could convict him. However, it would be up to them as to what they think a reasonable person, being sober and looking at all the facts, would decide.

I ask members to imagine how clear that would be to a jury when there is all this other stuff about willy-nilly and being aware of the possibility that she was not consenting. The judge would probably have to provide all of that information because, if the accused is claiming there was consent, the difference in the versions offered by both the complainant and the accused would mean that it could cover without consent or recklessness. The judge would have would have to provide all three versions in his directions to the jury. That is a difficult direction and it is one that the High Court said was correct. The trial judge then went on to refer to the evidence of the complainant:

> So the Crown relies on her evidence to say that she was not consenting and the Crown suggests that you will be persuaded beyond reasonable doubt that he either knew, because he penetrated her before she woke up, or he was reckless in the sense that he did not even consider whether she was going to consent or not, or at least he recognised that there was a possibility that she may not consent but he went ahead and he did it anyway and the accused['s] case is that he thought she had consented, and he had this belief.

In the Court of Criminal Appeal and in the High Court counsel for the appellant, Mr Odgers, submitted that recklessness cannot be satisfied by an awareness of a risk; it is a satisfied by a discrete mental state, which is, "Even if I knew I would continue. It does not matter to me." The Crown—represented by me—said that the respondent counters that the appellant's submission set up a false dichotomy between proceeding regardless of an awareness of a possibility of lack of consent and proceeding regardless of indifference as to whether there is consent. When used in the particular circumstances of the case, the term "reckless" may encompass various formulations, including "indifference as to whether or not there is consent", "determination to have intercourse with a person whether or not that person is consenting", "awareness of the possibility of absence of consent and proceeding anyway". The court said that it would be necessary to come back to that submission. It did so and said the submission was correct.

At paragraph 20 of their judgement, Justices Gummow, Hayne and Heydon referred to a commentary on the 1981 Act entitled *Sexual Assault Law Reforms in New South Wales*, which was issued by the Director of the Criminal Law Review Division of the Attorney General's Department and the Department of Justice with a foreword by the

New South Wales Attorney General. Unlike the second reading speech in the Legislative Council, this included a consideration of section 61D (2). The director at the time was Dr Greg Woods, who is now a judge of the District Court. The commentary states:

> section 61D (2) was not an attempt to reintroduce a notion of "sexual assault by negligence" which might be thought to have been supported by a case call the *R v Sperotto*.
>
> That section 61D (2) should be interpreted subjectively is supported by the statutory expression of the rule in the R v Morgan in section 1 of the UK *Sexual Offences (Amendment Act)*, 1996.

They go on to discuss that. At page 12 of the judgement they refer to the 2003 amendment in England, which covers A not reasonably believing that B consents and provides that whether such a belief is reasonable is to be determined having regard to all the circumstances, including any acts A has taken to ascertain whether B consents.

> This provision has been said to be designed to reverse the common law position established in *Morgan* and implemented in the 1976 UK Act.

In other words, what we are doing with this legislation is putting in two opposites. In England they sought to reverse paragraphs (a) and (b) of subsection (1) by inserting paragraph (c), but we are putting them all together. What confusion that is going to cause is anyone's business. It does not simplify the situation at all; it confuses it. If we were to insert paragraph (c) and leave the others out, it would be simpler, but by leaving in the subjective test as well, that confuses the provision more than it is at the moment. I know members are finding this riveting, but in the Banditt case the court decided:

> In the present case the trial judge properly emphasised that it was not the reaction of some notional reasonable man—

That is paragraph (c)—

> but the state of mind of the appellant which the jury was obliged to consider and that this was to be undertaken with regard to the surrounding circumstances, including the past relationship of the parties.
>
> The respondent's submission, recorded earlier in these reasons, is to the effect that in a particular case one or more of the expressions used in *Morgan* and by Professor Smith—

No relation—

> as well as those recorded in the respondent's submission, may properly be used in explaining what is required by s61R (1). That submission, as explained below, should be accepted.

So, it is not the reaction of a reasonable man that applies in the case of recklessness or in the case of intent. But when that is put into the mix enormous confusion is created. As I say, the English situation is not improved by enacting those provisions, as they did, bringing in the negligence concept. They have now created more trouble and there is a big debate going on in England at the moment. I will not bother the House with that, but the Opposition will propose an amendment in the following terms:

> Page 5, schedule 1[4]. Insert after line 8:
>
> Review of amendments
>
> (1) The Law Reform Commission is to inquire into, and report on, the amendments made to this Act by the *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007* to determine whether the policy objectives of the *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007* remain valid and whether the terms of the amendments made by that Act remain appropriate for securing those objectives.
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> (2) The inquiry and report is to be undertaken as soon as possible after the period of 3 years from the date of commencement of section 61HA (as inserted by the *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007*).
>
> (3) The Minister is required to table or cause to be tabled in Parliament the report as soon as practicable after the report is made by the Law Reform Commission.

If the Law Reform Commissioner, Mr Jim Wood, is good enough to be the Department of Community Services special commission of inquiry to try to help sort out the tragedies occurring to children and families, I suggest he is good enough to be the objective person to make the decisions about this. How one reconstitutes the sexual assault task force with the same people, I do not know. Does it have to be exactly the same? It is absurd. I suggest the Attorney General did that on the run yesterday. I was listening to him. He did not want to have the responsibility himself. He knew he would be accused of having partisan attitudes because he would want to make sure his own legislation was upheld so he gets some other group that is basically chaired by the director of the Criminal Law Review Division, and that person, who is a very skilled lawyer currently and always, is liable to have enormous effect. We submit to have the Law Reform Commissioner, Justice Wood, do it is a better suggestion.

When we reach the detail stage we will commend the amendment to the House but we have not reached that stage of the debate. We do not oppose the legislation

Mr BARRY COLLIER (Miranda—Parliamentary Secretary) [9.34 p.m.]: I welcome the bill and the changes to the law of sexual assault it seeks to implement. I also acknowledge the presence in the gallery of Karen Willis from the New South Wales Rape Crisis Centre. The bill arises out of the report of the Attorney General's New South Wales Justice Sexual Offences Task Force—*Responding to Sexual Assault: the way forward*—and the subsequent, widely circulated draft bill. As a member of the bar and a former Director of Public Prosecutions and legal aid solicitor, I know only too well that one of the most common and key issues arising in sexual assault trials is the issue of consent.

For lawyers, and, indeed, for complainants, the most controversial area is the state of mind or the mens rea which the Crown must prove to establish sexual intercourse without consent. Until now the prosecution has had to prove beyond reasonable doubt that the accused knew the complainant did not consent. This is a completely subjective—as opposed to an objective—test requiring an assessment of what was going on in the mind of the accused. If the accused believed the complainant was consenting, the accused would have to be acquitted, whether or not there were any reasonable grounds for that belief.

This test derives from the old House of Lords case of *DPP v Morgan [1976] AC 192* and confirmed recently by the Court of Criminal Appeal in *Regina v Banditt [2004] NSWCCA at 208*. The subjective test, solely from the accused's viewpoint, has come in for much criticism. For example, the accused can simply assert that he or she had an honest belief in consent, which is difficult to refute, no matter how unreasonable that belief is. Problems with the test and the increasing recognition that sexual assault is a crime that is seriously underreported have led other jurisdictions—in Australia and overseas—to change their laws in relation to consent in sexual assault matters.

One of the most important changes introduced by the comprehensive reform of the United Kingdom law on sexual assault was to override the common law test as set out in the *DPP v Morgan*. In late August, and as part of a Commonwealth Parliamentary Association study tour, I visited the United Kingdom with my wife, Jeanette, who is in the back of the House tonight. In London we met with Assistant Commissioner Tim Godwin of the Metropolitan Police and Chairman of the London Criminal Justice Board. We also met with Minister Tony McNulty from the Home Office, Helen Musgrave, Head of the Home Office Sexual Assault Team, and a specialist rape casework lawyer, Claire Ward of the Crown Prosecution Service. We discussed the law reforms in the United Kingdom and our draft New South Wales bill. Both the police and the Crown Prosecution Service commented favourably on the proposed bill and, in particular, the provisions regarding intoxication, which, they felt in hindsight, would have been better spelt out in their own legislation.

My wife and I also visited "The Haven", which was a sexual assault referral centre discreetly attached to St Mary's Hospital in Paddington. The Havens are specialist centres attached to hospitals providing medical assistance, counselling and forensic services for sexual assault victims. Victims either self-refer or are referred by police. The Crown Prosecution Service also comes on board at a very early stage, and the whole team works with the complainants from the time they first report to the Haven until the conclusion of the court case and beyond. This is all part of the Government supporting victims of sexual assault and encouraging more and more victims to come forward.

This bill amends part 3 of the Crimes Act in relation to the law of consent in order to make it clear to the community and the courts what is meant by consent and to provide further protections to victims of sexual assault by extending the legislative meaning of what does or may not negate consent. In particular, the bill amends section 61R and introduces the objective fault test. The present common law test, as I have said, 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 viewpoint of the accused.

Under the proposed objective fault test a person will be taken to know that the other person does not consent to the sexual act, not only in a situation where the person knows that the other person does not consent, but also where the person is reckless as to whether the other person consents or has no reasonable grounds for believing that the other person consents to the sexual act. In determining whether a person has reasonable grounds to believe that another person consents to the act, regard must be had to all the circumstances of the case, including steps taken by the accused to ascertain whether the other person consents to the sexual intercourse.

In the public domain a number of matters have been misrepresented and I seek to correct them and draw them to the attention of the House. Firstly, it has been asserted that these new consent laws will criminalise consensual sexual intercourse if the parties were drunk. It does not do this. The current state of common law in relation to consent to sexual intercourse, which has been well settled for many years, is that if someone has become so intoxicated that they do not have the capacity to say yes or no to sex, then no consent can be given and having sex with someone in those circumstances is rape. This is quite different from the situation where people have something to drink, lose their inhibitions and have sex but are still able to consent to it.

This law simply says that substantial intoxication on the part of the victim may—not must—negate consent. That is, it is a circumstance that juries may take into account when considering whether or not consent was freely and voluntarily given. It serves as a reminder that just because a person is drunk does not mean they may be assumed to be a target for non-consensual sex, as a small minority of the community may still think is the case.

Secondly, it has been said that the new statutory definition will create greater confusion because words like "freely", "voluntary" and "capacity" will not be understood by courts or juries. "Freely" is a word that is used in legislation or the common law in jurisdictions such as Victoria, Queensland, Western Australia, Tasmania, South Australia, Northern Territory, Canada and the United Kingdom. It was a word used by the Australian Model Criminal Code Committee in its recommended statutory definition, which, incidentally, is the same as this new New South Wales statutory definition. It has even been used by some judges in New South Wales when directing juries on the law of consent.

"Voluntary" is currently part of the direction given to juries in New South Wales and is a word used by many other jurisdictions. The use of the word "capacity" in section 61HA (4) (a) includes age or cognitive incapacity. Cognitive incapacity may refer either to an inability to understand the sexual nature or quality of the act or an inability to understand the nature and effect of the consent.

Thirdly, it was initially claimed that the new consent law will remove the need to prove mens rea or a guilty mind on the part of an accused and that it will "turn our young men into rapists". That is not correct. There will still need to be proof beyond reasonable doubt as to what the accused knew in relation to consent. Rather than removing the element of the guilty mind, as has been wrongly asserted, it is the test of a guilty mind that is changed. An accused will no longer be able to simply say that he had an honest belief that there was consent, no matter how outrageous that belief might be. The belief will now also have to be reasonable according to the objective standards of the community.

At least this must now be clear to those who objected, as it has been more recently claimed that the subjective test is not outdated; that it is a fundamental principle of the criminal law that should be abandoned only where the case for doing so is overwhelming or the offence is trivial. That is correct. This Government's position is that the case for such a test here is overwhelming. Some draw a distinction between the "stupid", "negligent" or "drunk" rapist and the "true" rapist. But for rape victims there are no differences. Rape is rape. The Government is committed to ensuring that a reasonable standard of care is taken to ascertain that a person is consenting before potentially damaging behaviour is embarked upon.

Contrary to what has been claimed, this is not the first time that an objective test has been applied to a serious offence. In the law there are several different ways of committing the offence of manslaughter, each of varying severity. Manslaughter by criminal negligence can be proved if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care that a reasonable man would have exercised, and involved such a high risk that death or grievous bodily harm would follow, that the doing of the act merited criminal punishment.

Fourthly, it is said that those convicted without a subjectively guilty mind will be subjected to the same sentences as those who commit sexual assault fully knowing that there was no consent. That is not correct. When sentencing, judges will be required to make a finding of fact—just as they do in relation to the various forms of manslaughter.

Fifthly, it is said that a statutory definition of consent is unnecessary because the current law is clear—the New South Wales Bench Book ensures that standard directions are given to juries. That is not the case, according to the New South Wales Court of Criminal Appeal, as recently as 2005: There is clear unresolved reported disagreement between members of the New South Wales judiciary in this regard. In *R v Mueller* [2005] 62 NSWLR 476, an appeal against the trial judge's directions that consent had to be free and voluntary, Justice Studdert adopted the common law principle of consent stated in South Australia where the court said:

> The law on the topic of consent is clear. Consent must be free and voluntary consent.

In examining this issue, Justice Studdert noted that the expression "freely and voluntary"' is used in both the Criminal Code of Western Australia and Criminal Code Act 1899 of Queensland where consent is defined. Additionally, he observed that in Victoria consent is defined by section 36 of the Crimes Act 1958 as meaning "free agreement". His Honour also considered the decision of *R v Clark*, unreported, NSWCCA 18 April 1998, where Justice Simpson expressed the view that for the purpose of New South Wales law, consent meant "consent freely and voluntarily given".

However, Justice Hunt and Justice Hulme indicated they held reservations about this statement of law. Quite correctly, the Sexual Assault Task Force Report noted that the comments made by Mr Justice Hunt and Justice Hulme squarely raise for consideration whether New South Wales should include a definition of consent in the Crimes Act 1900. That is exactly what this Government has done in consultation with a wide range of stakeholders.

Sixthly, it has been said that the Government should not influence the way people interact in the community, and that it wants to affect sexual relationships and make people be much more civilised about their behaviour. That is quite right where sexual assault is concerned and this Government makes no apology for that. It has also been said that the criminal law is a very blunt and brutal instrument for influencing social behaviour. The criminal law should be reserved for behaviour that is so seriously wrong as to be deserving of criminal punishment, not behaviour that might be regarded as uncivilised or lacking respect for others. That is precisely what this Government is doing and the New South Wales Supreme Court agreed when it stated:

> 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.

That quote is from *The Queen v. Tolmie* 1995 37NSWLR 660 at 672. [*Extension of time agreed to*.]

This bill is part of the Government's ongoing commitment to ensuring that the criminal law and the processes of the criminal justice system do not compound the harm suffered by victims of sexual assault. The law in relation to consent will be clear. The changes in relation to proof of whether or not reasonable steps have been taken to ensure that consent to sexual intercourse is a free and voluntary agreement should send a message to the minority in the community who might disregard the rights of others.

It is hoped that this bill will result in less sexual assault offences being committed in the first place by making clear to the community the appropriate standards of acceptable consensual sexual behaviour. It will reduce the stress and trauma associated with the court process, and help to prevent the re-victimisation that many complainants experience at the hands of the criminal justice system. These measures will increase public confidence in the legal process, lead to greater reporting of instances of sexual assault and more successful prosecution of these matters. I commend the bill to the House.

Ms PRU GOWARD (Goulburn) [9.48 p.m.]: I speak on the Crimes Amendment (Consent—Sexual Assault Offences) Bill 2007 and support the Government's decision to review the bill in four years time. I acknowledge also the presence in the gallery of Karen Willis from the New South Wales Rape Crisis Centre. I thank her for her advice and guidance. It stands as one of the few black marks against the status of women in Australia today that rape and sexual assault remain such unreported crimes and that there is a widespread view amongst women in this State that it is not worth reporting a crime that is so awful and destructive—a view that is often shared by husbands, fathers and male friends. In other words, there is a general view in the community that the reporting of sexual assault is not supported by the criminal justice system.

The New South Wales Rape Crisis Centre has provided significant statistics regarding rape. The proportion of reported incidents that lead to convictions is currently around 1 per cent. About 90 per cent of sexual assault incidents reported to police are accepted for investigation. Of the 90 per cent of cases reported, only 65 per cent lead to a person being identified. In 20 per cent of cases investigated, legal proceedings are commenced by police. Where legal proceedings are commenced, 40 per cent of cases are withdrawn by the police prosecutor. Of the cases that proceed to court 80 per cent of defendants plead guilty, but usually to a lesser charge. The conviction rate at a trial is 35 per cent compared with over 70 per cent in all other criminal matters. At each stage the victim, still alive, lives through the nightmare again.

It is a black mark against this State that a fundamental human right—the right to live in safety and security—is perceived to be poorly protected. Clearly, change is in order. No-one on this side of the House denies the fact that sexual assault and prosecution need to be better addressed and reformed. Clearly, there is a view in the community that the under-reporting and under-conviction rates for rape are a reflection of an anti-female culture within the criminal justice system, particularly poor practice by police and the courts, and laws and regulations which disadvantage the victim, who is usually a woman.

There also needs to be greater support for victims as they go through the various stages of prosecution—support that enables them not only to persist with their evidence, under the pressure of cross-examination, but to literally remain sane. I am sure all members know of women in their electorates who have suffered incredible mental stress and distress as a result of having to give evidence in a sexual assault trial. As the Law Society and the Bar Association have sought to identify, the Parliament needs to be cautious when it amends the law in this way, particularly when it seeks to modify the principle of mens rea, or the guilty mind. The principle of mens rea has governed criminal prosecutions, which carry harsh sentences, for several hundred years, and we must have respect for the principle.

We have to ask ourselves: Will the bill solve the problem of under-reporting, under-conviction, and lack of confidence in the criminal justice system's determination to protect the rights of women? It is a serious question, and it is one the Opposition has considered very carefully. We need to be confident that the amendments we pass in this House will not only enable a jury to more confidently convict, without producing unsafe outcomes, but also ensure that the law retains the confidence of the people. I am particularly pleased that the Government has now

agreed to a four-year review of the legislation, as many of us on this side of the House have wished and certainly as my consultations with relevant women's groups suggested was acceptable to them. We have proposed a similar review, although over a shorter duration, and the member for Epping has clearly outlined our reasoning for this course.

I would hate the bill to make no difference, as has been suggested to me by some lawyers. I would hate women to have their expectations raised by the passing of the bill and then be let down. I believe there is a serious risk of that if we do not also pursue changes in court resourcing, procedures and practices. We also need to change public attitudes to violence against women, both sexual and domestic. Sexual assault is of concern at all levels of government. While the Howard Government has committed some $75.7 million to addressing violence against women, the State's court-based system and social justice forums also need to actively promote the notion that violence against women is not acceptable, that a person who abuses women will be prosecuted and the time that person spends in prison will be long and arduous.

Will this bill mean that more women will report the crime? Will the reported crimes lead to more prosecutions and more convictions? The number of convictions at the moment as a result of complaints seems so low that, as has been said, many women do not want to go through the process of making a complaint. We must ensure that we do not make mistakes in this respect. We need to make sure that any changes we make to the system will lead, firstly, to fewer incidents. Prevention of this nightmare must be our first priority. We must also make sure that where incidents have occurred, they are more likely to be reported to police, and that when they are reported they lead to a prosecution and, if the facts are proven, to conviction. Every sexual assault case that does not lead to a conviction is a miscarriage of justice. A caller to the New South Wales Rape Crisis Centre was quoted as saying:

> I was sexually assaulted eight years ago. I have been through two court hearings and three appeals, and it is not over yet. If I knew then what I know now I would have gone home, had a shower and never told anyone what had happened.

The woman was 32 years old. The question we must ask is: Will the bill ensure that in future women will not have to suffer that nightmare? It is a disgrace that a woman should come to the conclusion, regarding her own safety and the crime against her, that silence would have been better. I am sure that Government members would agree. The question to be asked is: Will the bill make the conviction process simpler, as the court system now works through a number of definitions of sexual assault? Are there sufficient resources to support women in these cases, to ensure that evidence is carefully taken and that court resources are sufficient to protect women from long and offensive cross-examination? One of the benefits of the bill may be that there will now be more focus on the behaviour, attitudes and motivations of the accused, not just the victim. It is about time that occurred.

It would be a terrible outcome for the women of New South Wales if these changes to the law are made, with some fanfare, and then there are insufficient resources and insufficient procedural change instituted to ensure that the changes have the opportunity to work without either unfairly and wrongly imprisoning men or ending up with the same delays, the same repetitious and unfair cross-examination, the same difficulties at the Court of Appeal stage, where evidence becomes less relevant, and the same demeaning processes that will result in women still being unwilling to come to the police and pursue their legal rights through the courts.

This bill is an important and very new step for the law and for our criminal justice system. It will need to be monitored carefully and handled wisely. I welcome the Government's acceptance of the need for a review, although, as we have said, to leave it for four years is to leave it for too long. What this Parliament must primarily want from these amendments is that justice is more likely to be done and seen to be done. The liberty of the people is only as strong as their belief in the rule of law. If these amendments are seen to have either failed women, failed men or been irrelevant, not only will victims continue to suffer and reject recourse to the law but confidence in the rule of law will also have been eroded. That must not happen, and for this reason it is vital that not only does the Government proceed with its review but it also ensures that the criminal justice system has sufficient resources—in other words, more police, more support for victims, more judges, fewer delays, better training, tougher control of cross-examination, and even specialist courts. When we start to see the Government committing to some of these additional components of sexual assault reform, perhaps then the Opposition—and myself particularly—will believe that the Government is sincere in its wish to do better for the women of this State.

Ms JODI McKAY (Newcastle) [9.58 p.m.]: It is very sad that the Opposition has failed to properly support this bill, and instead has tried to obstruct it by sending it off for review by a parliamentary committee—a process that will merely repeat the discussions that have already taken place in the extensive consultation process that has occurred and will delay the implementation of these reforms by months, if not years. What is also sad is the fact that, despite the support for the provisions of the bill by several women in the Liberal Party, Opposition members have failed to convince their parliamentary colleagues to endorse the bill fully. Yesterday in the other place Robyn Parker had this to say about the bill's provisions:

> A definition of "consent" will give juries greater guidance when assessing the evidence and deciding whether or not the complainant actually did give their consent freely and voluntarily.
>
> But the most important part of consent is that it is an educative tool. The new definition of "consent" states what we already know—that most reasonable people no longer consider appropriate predatory or opportunistic behaviour for gaining sexual intimacy. The new definition sends a message that sex gained by

> any means other than free or voluntary agreement is not acceptable in our society. It is no defence to state that someone was asleep, intoxicated, unconscious, or unable to resist. I support the inclusion in the legislation of a new provision that defines the term "consent"

Despite that, the Liberal Party voted to send the bill off for committee consultation. Robyn Parker was absent from the Chamber at the time of the vote. Catherine Cusack also absented herself from the Chamber. This is what Catherine Cusack had to say about the bill:

> It seems to me that the central issue is that the law as it stands makes consent about what the offender believed at the time the offence was committed. Thus a case revolves around the offender's state of mind and what a jury decides he may or may not have been thinking at the time. The reforms in the bill will refocus attention on the crime that occurred. That is why women's groups have supported this proposition so strongly for so many years. I realise that some sections of the legal community would have us believe the changes will cause the sky to come tumbling in. But there was never any question that altering the law of consent would necessitate a significant change to legal principles. The question was whether it would be too difficult to attempt. But that attempt has been made and this bill is before Parliament today.

This is a clear case of an opportunity lost for the Opposition to take a stand and support the victims of sexual assault in their campaign for the reform of sexual assault law in this State. I commend the bill to the House.

Mr BRAD HAZZARD (Wakehurst) [10.01 p.m.]: As has been indicated by the shadow Minister, the Opposition will not oppose the bill. I would like to place on record the concern that the Opposition has about sexual assault and the procedures and resources available to women to work through the issues after a sexual assault. Whilst this has been a good debate, as it was in the other House, as to consent and an objective consideration versus a subjective consideration, I would like to place on record that the New South Wales Opposition and, I am sure, members of the Government have one important issue at heart. We would all like to have the law enhanced to ensure that women who are subject to sexual assault or rape have confidence in the system that is available to support them. At the moment the problem is that 85 per cent of women who are subjected to sexual assault or rape in fact do not have confidence in the system. That is apparent because they do not report the assaults to police. The issue is much greater than what simply appears in black and white in the statute.

As the member for Goulburn acknowledged, Karen Willis from the Rape Crisis Centre is in the gallery. We should all be grateful that women such as Karen Willis are prepared to stand up for women who are often extremely vulnerable when this sort of thing happens. If they do not have confidence in the system, we as a Parliament and the community are faced with a huge issue. One benefit to come out of this debate is that young people will have heard that there is an issue relating to consent. They may not yet understand the full implications, but least we as a Parliament and the community have sent a message to young people that consent is a critical issue in intimate relationships, usually between a man and a woman. I think each of us would value this debate if it sends a clear message to young people that they must consider the issue of consent.

The Sexual Assault Task Force made about 70 recommendations. When one goes through those recommendations one realises that this issue is not just about the black and white letter of the law. It is about the resources that we as a community are prepared to put in to back up this black and white letter of the law. I am sure members on both sides of the House want to see increased resources and increased opportunities for women to feel that when they report a sexual assault they will be listened to in a way that reflects appropriately the situation they are in. If a woman is sexually assaulted or raped on the northern beaches she would normally be taken to the Royal North Shore Hospital. I was discussing this only a few moments ago with Karen Willis.

The woman would be given the opportunity to see a counsellor and to have certain forensic examinations and tests done. The important issue is that she will have that opportunity. She will not be told, she will not be forced but will be given the opportunity. That is because certain resources are available at that hospital. At some point police will be available to her. It may be some time after the event before she feels confident enough to want to give the evidence. She then has to consider whether the forensic tests that were taken should be available to the police and whether she wants to be involved in a prosecution.

I am confident in saying on behalf of all members of the Coalition and, I believe, the members of the Government that we as a community should ensure that women in that situation are dealt with in a respectful way. It is critical that they know that the resources are available and that they will not be treated inappropriately: they will be offered an opportunity to see counsellors, medical staff and trained police, who carry out the procedures and take the necessary steps to bring the offender to justice. The Opposition will support any initiatives taken by the Government to ensure adequate resources are available to empower women to make those reports and to be confident that they will be followed through in a safe, efficient and effective way.

Mr FRANK TERENZINI (Maitland) [10.08 p.m.]: I support the Crimes Amendment (Consent—Sexual Assault Offences) Bill 2007. The objects of the bill are to define "consent" for the purposes of sexual assault offences as free and voluntary agreement to sexual intercourse; to include in 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 position of authority or trust; and 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.

New section 61HA (3) retains recklessness, which is part of the common law, and also provides that a 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—the jury or the judge acting as the 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.

The negation of consent provision, new section 61HA (4) and (5), provides that a person does not consent to sexual intercourse with another person if the person does not have the capacity to consent, including because of age or cognitive incapacity; if the person does not have the opportunity to consent because the person is unconscious or asleep; 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 if the person consents to the sexual intercourse because the person is unlawfully detained. A person does not consent to sexual intercourse if under a mistaken belief as to the identity of the other person, a mistaken belief that the person is married to the other person or a mistaken belief that the sexual intercourse is for medical or hygienic purposes.

New section 61HA (6) provides that the grounds on which it may be established that a person does not consent to sexual intercourse include if the person has sexual intercourse while substantially intoxicated by alcohol or any drug; if the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force; or if the person has sexual intercourse because of the abuse of a position of authority or trust. The current state of the law with regard to consent is that the Crown has the onus of proof beyond reasonable doubt. The question from the start of the trial until the end is whether the Crown has proved beyond reasonable doubt that the offence has occurred. One current element is that the accused must know that the complainant does not consent. That is a subjective test. All the surrounding circumstances of the case are taken into account to decide whether the accused knew that the complainant was not consenting.

The bill introduces a cultural shift, an educative process, to move the traditional thinking that there is a presumption that a woman will consent to sexual conduct. The bias and stereotypical beliefs held by some people will be swept away because the jury will be able to take into account objective facts and circumstances and will be directed accordingly. The bill, amongst other things, will have an enormous educational effect on the community, not to mention the benefit that it will bring to a jury deliberating on its verdict. The mens rea issue will remain; the requirement for the prosecution to prove beyond reasonable doubt that the accused knew or was reckless about the victim's lack of consent, or had no reasonable grounds for believing that she had consented, will remain. The objective fault test is an important part of modernising sexual assault laws, and that is the beauty of these amendments.

I have to register my disappointment about the conduct of the Opposition in the upper House. The Criminal Justice Sexual Offences Task Force published its report, which contained 70 recommendations, in 2006. There were two years of comprehensive consultation process, which represented the most comprehensive review in this area of the law for some 20 years. Unfortunately, the conduct of the Opposition in the upper House was to move the bill to a committee, to stall it. I note that the two Liberal Party members of the Legislative Council who split from the group and spoke in favour of the bill knew very well what it is about. They knew that it was a cultural shift, an educational shift, to move away from the bias and stereotypical beliefs and to modernise the state of the law. I commend them for that. That is significant because, apart from showing that at least two Liberal Party members were prepared to break ranks, it means that these proposals are correct, they are on track and they move the law along.

Experience in the courts clearly shows the difficulty of discharging the burden of proof in these cases. When I was in the office of the Director of Public Prosecutions some years ago, one in five cases would result in prosecution. One of the main obstacles was overcoming the subjective criteria of proving to the jury beyond reasonable doubt that the accused, usually a male, believed there was consent. It would not matter how unreasonable the surrounding circumstances were that supported the accused's belief: the question that the jury had to answer was whether the accused held that belief. That did not reflect the standard of the time and does not reflect the community expectation as to how the law should operate. The bill moves that along and updates it. Mens rea and recklessness are retained, and the onus is still on the Crown to prove that the accused knew there was a lack of consent. The difference is the objective test. The reasonable person test makes it clearer and easier for the jury to follow.

In the Banditt case that the member for Epping referred to, if a person broke through a window, had sexual intercourse with a person and the complainant then found out it was not the person she thought it was, and the accused says, "I thought it was alright", that makes it clear. We can take into account the fact that he broke through a window, we can take into account intoxication. We can take all of those things into account and then ask ourselves: Is this reasonable? Is it proper? Would a reasonable person believe this? That is the difference in

the criteria. It makes things much simpler.

There was a scenario in an article in yesterday's newspapers in which a woman goes out on her first date with a man. She does not want to have sex on their first date, but after they have both had too much to drink she says yes to sex. The next morning the man has moved on; she feels humiliated and decides to call the police. It is claimed that if the law was changed as proposed her apparent consent, however slurred, may not be regarded as true consent because there was no free agreement or because she suffered from cognitive incapacity and she was drunk. The beauty about the changes in the bill is that all those facts will be taken into account on the objective fault criteria, and that means that all of those facts will be relative. Merely because there is incapacity because of the consumption of alcohol does not automatically negate consent; it may negate consent. What is reasonable in the particular circumstances? Every case is different. I know that because I can remember many of the cases I prosecuted. Every case is different and each relies on its own facts. If we take the reasonable person test the jury have a much clearer idea on how to deliberate.

A case of driving in a dangerous manner is based on the reasonable person test. The reasonable person test is applied in deciding whether a person committed the offence of driving dangerously. There is no difference between that case and what the jury is asked to decide in a sexual assault case. When a jury is given these directions in a summing up, it will be told to use the objective test and to use the reasonable person test. It will be told to take all factors into account and that the state of mind of the accused is relevant, but that is not the only thing we have to think about. The state of mind of the accused is relevant, it is taken into account, but we do not ask ourselves: What was the particular accused thinking? We ask ourselves: What are the circumstances? What are the facts? How would we look at this as reasonable people?

We take into account also what the accused says he was thinking. If he says, "I had a reasonable assumption that there was consent", the jury can take that into account, but the jury is not directed by the judge that the Crown must prove beyond reasonable doubt that the accused knew the complainant was not consenting. The jury will be directed that they can take into account what the accused is saying but they also have to take into account all the other relevant objective circumstances that existed at the time. This will make it easier for a jury to deliberate; it will give them a wider scope and they will be able to take into account more facts and circumstances.

The bill modernises the law and brings it into line with community standards, and that is what the community wants. The community does not want to be hemmed into an archaic way of thinking that there is a presumption that a woman will consent to sexual activity unless it is communicated to the accused that that is not the case. This turns that around and makes the criteria much easier for the jury to follow. In that respect it brings the law into the twenty-first century. For all those reasons I commend the bill to the House.

Mr ROB STOKES (Pittwater) [10.20 p.m.]: I speak to the Crimes Amendment (Consent—Sexual Assault Offences) Bill 2007. Many people here tonight know a lot more about the law on this issue than I do, but I reckon I know what is right and I certainly do not oppose any changes designed to ensure that more perpetrators of sexual assault are convicted. I understand that this is a difficult area and that some potential legal intricacies must be ironed out. I agree therefore that it is appropriate to provide that the effectiveness of this legislation be looked at in the next few years. I also believe that better resourcing of criminal justice agencies is always the most effective way of dealing with crime.

I believe that sexual assault in our community is so serious and so heinous a crime that we in this place must do everything we can to ensure that the perpetrators of sexual assault are brought to justice. Occasionally that means we must experiment with the law. It sometimes means that we should try things that may not go along with the traditional concept of mens rea, but if we have to do that to secure justice then so be it. I have looked carefully at the concept of an objective test. Fundamentally, if someone is unsure as to whether their sexual partner is consenting then there is no basis upon which they should proceed to have sexual intercourse.

It is also very important to educate our community that if there is any doubt at all about consent then sexual intercourse should not even be contemplated. I acknowledge that a number of technical difficulties can be looked at during a review period, but I believe this is an appropriate way to respond to the enduring problem of sexual assault and winning justice for the victims of sexual assault.

Ms LYLEA McMAHON (Shellharbour) [10.23 p.m.]: I speak in support of the Crimes Amendment (Consent—Sexual Assault Offences) Bill 2007. As a supporter of the No Means No campaign in my community for many years, this is a very sweet moment for me. Women's groups and sexual assault victims groups have been fighting for a clear definition of "consent" in sexual intercourse for at least two decades. Groups such as the Rape Crisis Centre and women's groups in my own area, including the Warilla Women's Health Centre, have been part of this fight. It is with great satisfaction that I participate in this debate that, with the successful passage of this bill, will see their aims finally realised.

The addition of a definition of "consent" to the law of sexual assault does two things. First, as there is no current statutory definition of "consent" in New South Wales, this bill brings New South Wales into line with a number of other Australian and overseas common law jurisdictions that have adopted a statutory definition of "consent".

Secondly, this definition will clearly articulate to the community what does and does not amount to consent. The introduction of a definition of "consent" provides an opportunity to enact a more contemporary and appropriate definition of "consent" than is currently available under common law.

In July the Government circulated a discussion paper that examined whether a legislative definition of "consent" could be introduced into the Crimes Act 1900 to clarify the issue of consent and to give greater protection to the autonomy of the complainant. The majority of those consulted submitted that New South Wales should adopt a statutory definition of "consent". They included the Office of the Director of Public Prosecutions, a public defender, victims and women's groups such as the Rape Crisis Centre, the Victims Advisory Board and the Women's Legal Service. Those in favour believed a definition would have an educative function for both the community and jurors and that it would ensure standard directions are given to juries, thus leading to fewer appeals. The prevailing view was that it is time for New South Wales to fall into line with other Australian jurisdictions as well as the United Kingdom and Canada, and to codify the law of consent.

A recent report commissioned by the New South Wales Attorney General's Department and conducted by the Australian Institute of Criminology on jurors' perceptions of sexual assault victims suggested that consent is a difficult concept for juries to understand. The findings of the institute suggest there is a strong argument for adopting a definition. The issue of lack of consent is ultimately a matter of fact to be determined by a jury, and clear guidance should be given as to what consent means. The task force noted that there is a considerable body of academic literature describing the inherent problems with the legal concept of consent and how to define consent so as to give it appropriate contextual and contemporary meaning.

The common law definition of "consent" has been evolving but continues to remain unclear. The Court of Criminal Appeal recently disagreed on the proper direction to be given with respect to consent. Justice Studdert expressed the view that consent must be freely and voluntarily given. This represented a shift in thinking towards the proposed statutory definition of consent. Two other members of the court held onto a longstanding view that as consent may be given reluctantly or after a deal of persuasion it could not always be described as having been given freely and voluntarily. This view is out of date with community standards and expectations.

As demonstrated by the majority of submissions received in response to the discussion paper and as demonstrated by the majority of participants on the task force, the use of the word "agreement" reinforces that consent should always be seen as a positive state of mind involving an active decision to engage in sexual activity rather than one of passive acquiescence. The majority of members of the task force supported a definition of "consent" based on variations of the definition developed by the Model Criminal Code Officers Committee of May 1999 that "consent" means free and voluntary agreement.

The draft consultation bill contained a definition of "consent" with similar elements to those noted above. However, it was unanimously criticised for being phrased in the negative. The submissions supported a positive statement of consent as this would be clearer and have a better educative function. The bill will introduce a definition of "consent" to sexual intercourse as occurring when a person "freely and voluntarily" agrees to intercourse. It is a welcome win for victims of sexual assault. On that note, I read an article in the weekend's *Illawarra Mercury* entitled "The making of Tegan Wagner". I take this opportunity to commend her for her bravery, her story, and her role in changing the way we see the world.

Ms VERITY FIRTH (Balmain—Minister for Women, Minister for Science and Medical Research, Minister Assisting the Minister for Health (Cancer), Minister Assisting the Minister for Climate Change, Environment and Water (Environment)) [10.30 p.m.], in reply: I thank members for their contributions to this debate. I am pleased to hear all members' interests in better protecting women in our community from the terrible impact of sexual assault. The Government is committed to continuing to provide support for victims of sexual assault, to do all it can to minimise the trauma that they face in criminal proceedings and to help them seek justice in our courts. That is what the bill is all about.

I listened with interest to the speech of the member for Epping. I point out that the member talked about supporting the bill but then spent close to 40 minutes disputing many of its key aspects—indeed, the key aspects that deliver on the recommendations of the task force. That is not real support; at best, it is grudging support. As we all know, and as has been outlined by previous speakers, on top of this only yesterday the Opposition moved an amendment in the other place to defer or delay the passage of this bill so that a parliamentary committee can consider it. This is after more than two years of serious consultations with a task force comprised of a broad range of government and non-government agencies, including the Rape Crisis Centre, Women's Legal Services, members of the legal profession from both the prosecution and defence sides, members of the judiciary, the courts, police, corrections, health, community services and academics.

The task force has been meeting for more than two years, and the Opposition wants the bill to be further delayed. The member for Epping may talk about supporting the bill, but he has not done a lot to show that support. The member said that no recommendation had been made by the task force about this change with regard to consent. That is simply not true. Recommendation 9 of the task force specifically stated that New South Wales should include a statutory definition of "consent" in the Crimes Act 1900, and recommendation 10 stated that a definition

of consent be adopted partially based on the United Kingdom definition, that is, a person consents if she freely and voluntarily agrees to the sexual act and has the capacity to make that choice. For the member for Epping to say that the task force provided no recommendation with regard to consent is simply not true.

The member also talked about specialised courts. As has been explained in numerous other speeches, the Government is training judges and magistrates across New South Wales in sexual assault matters to better meet the needs of victims of sexual assault. Sexual assault has no postcode, so we are ensuring that all New South Wales courts, not just a select group, are equipped to deal with sexual assault matters. The member for Epping is incorrect in saying that specialised courts were a recommendation of the task force. In fact, they were not. The only recommendation was for specialised case management, and technology to support it, for sexual assault cases—recommendations implemented by the Government through, for example, the issuing of a special District Court practice note to set time deadlines for all sexual assault matters, which is now six months. The member for Epping also claimed that the Director of Public Prosecutions did not support this.

The member for Epping talked about the subjective-objective mixture test. He suggested that sexual assault that is reckless, or where there is no reasonable belief in consent, is somehow less serious or that where there is knowledge that the woman is not consenting is somehow less serious. This is crucial. The Government does not believe in a graded scheme of sexual assault. All rape is serious and the courts must deal with all sexual assault as a serious criminal offence. The member for Epping's comments are similar to those made by the Bar Association, which claimed that "the stupid, the negligent, the intoxicated, the crazy will be treated as if they are the same as the true rapist who knows that there is no consent to sexual intercourse".

As the Attorney General said—I was proud to be associated with the Attorney General when he made this statement—although they may like to draw a distinction between the "stupid" or "drunk" rapist and the "true" rapist, unfortunately for rape victims the difference between these categories does not matter a great deal. It will be a matter for the sentencing judge to decide to what extent these factors may make the offender more or less culpable. But the Government and the law are clear: to have intercourse without consent is rape. There will be no return to the bad old days of ignoring rape complaints and arguing that no means yes. The Director of Public Prosecutions' comments did not support the creation of a new, less serious offence where the objective fault test applies, as the member for Epping asserted.

This suggestion was supported only by some groups of defence lawyers and rejected by the vast majority of those involved in the consultation. The Director of Public Prosecutions' comments, including the need to state the consent definition in the positive, were acted on and applied in the final bill, which is now before the House. The member for Goulburn raised the need to protect the mens rea requirement for sexual assault offences as an important part of the protections inherent in our legal system. Again I clarify exactly what the Government is doing. Several Australian States have removed the mens rea requirement for sexual assault offences—Western Australia, Queensland and Tasmania—but New South Wales has not taken this option. There will still need to be proof beyond reasonable doubt as to what the accused knew in relation to consent.

Rather than removing the element of the guilty mind, as has been wrongly asserted, it is the test of a guilty mind that has changed. An accused will no longer be able to simply say that he had an honest belief that there was consent, no matter how outrageous that belief might be. Under this legislation, that belief will also have to be reasonable according to the objective standards of the community. That is incredibly important. Another allegation raised by the member for Epping related to recklessness: Why has recklessness not been given a statutory definition? The Sexual Assault Offences Taskforce specifically recommended—recommendation 15—that there should be no legislative attempt to define recklessness. There was unanimous support from all stakeholder groups on this issue: The member for Epping is entirely out of step with the community. In his submission the Director of Public Prosecutions agreed that there should be no legislative attempt to define recklessness.

The submission noted that the term "reckless" is retained in the proposed legislation. It submitted that following the decision in the Banditt case, to which the member for Epping referred, the term should be retained for the reasons identified by the Criminal Law Review Division. Furthermore, task force recommendation 15 stated that there should be no legislative attempt to define "recklessness". The common law in relation to the concept of recklessness and the proper form of the direction that should be given to juries was settled by the High Court in Banditt's case in 2005. Their Honours determined that if an offender is aware of the possibility that the woman is not consenting but goes ahead anyway then he is reckless. That is the point that the member for Pittwater raised. Further in that decision it was suggested by one member of the court that attempts to define "recklessness" give rise to uncertainty. The court stated that "reckless" is an old and well understood English word. It has been said that there are no true synonyms in the English language. The search for a truly synonymous phrase or expression will equally frequently be likely to be futile.

The member for Goulburn raised the sad and touching case of the individual who rang the Rape Crisis Centre and said that eight years after the event her case is still in the appeals procedure. Had she known that it would take so long she would never have gone down that path. We are all very concerned about that, which is why the Government has introduced this legislation and has proposed these reforms. The Government wants to give victims of sexual assault the confidence to navigate the system knowing that the law is on their side. It wants to

give them the confidence to know that they will not simply lose.

The Government acknowledges the community concerns expressed by the member for Goulburn about the attrition rate for sexual assault prosecutions, which is still too high. However, the significant reforms that the Government has introduced since the report of the Sexual Assault Offences Taskforce in 2005 have already borne results. For instance, the rate of guilty verdicts for adult sexual assault cases in the New South Wales District Court and the Supreme Court rose from 35 per cent in 2004 to 49 per cent in 2006. That will give women confidence to proceed. They will know that the law is there for them, that justice is on their side, that they can navigate the system and that they will get results. That is one of the crucial goals the Government is attempting to achieve in adopting the recommendations of the task force.

It is disappointing that in the twenty-first century we still must focus our attention on decreasing the rates of sexual assault in the New South Wales community. However, while there has clearly been some improvement in community awareness about sexual assault, the statistics still paint a very bleak picture indeed. The 2005 National Personal Safety Survey, released by the Australian Bureau of Statistics last year, found that in the 12 months prior to the survey, 126,100 women and 46,700 men experienced sexual violence, including being threatened or assaulted. Of the women who experienced sexual violence, 81 per cent experienced an incident of sexual assault and 28 per cent experienced a threat of sexual assault. That is still an enormous number of people. Perhaps most disturbingly, only 19 per cent of the women who had experienced sexual violence by a male perpetrator reported the incident to police.

Looking beyond 12 months, the personal safety survey reported that since the age of 15, and compared to 5.5 per cent of men, 19 per cent of women reported experiencing sexual assault—that is almost one in five women. In New South Wales in 2005, 4,016 sexual assaults and 3,456 indecent assaults were reported. Of the incidences that went to court, 821 sexual assault charges were finalised in the Local Court and 1,174 in the higher courts.

Members are aware that sexual assault is the most underreported of all crimes and has low conviction and imprisonment rates. However, I am pleased that the New South Wales Bureau of Crime Statistics and Research has stated in a recent report that we are making some real progress on this front in New South Wales: conviction rates in sexual assault proceedings at an all time high and almost half of all accused sexual offenders are found guilty. However, the low rates of reporting these serious crimes remain a concern for the New South Wales Government and the community at large. That is why the Government has introduced this legislation.

The Government has made significant progress in the past three years with the introduction of widespread reforms that place the victim's needs at the centre of the legal process. As members are aware, this bill is the latest measure by the Iemma Government in a suite of initiatives to assist victims of sexual assault. The New South Wales Police Force, criminal justice departments and human service agencies are already rolling out these initiatives. These measures include implementing many of the recommendations of the Criminal Justice Sexual Offences Taskforce. The Government established the task force in 2004 to examine sexual assault and how it is prosecuted. This represented the most comprehensive review of these laws in 20 years. To have the Opposition move in the other place to delay this process yet again is absolutely outrageous. I can understand why two members of the Opposition felt that they could not be present for the vote. Indeed, it would have been very embarrassing.

To give credit where it is due, the task force was established, in part, as a result of representations by one of the key organisations working in this field, the New South Wales Rape Crisis Centre. Like many members have done already, I acknowledge Karen Willis in the gallery tonight. The Government has been progressing well in its implementation of the recommendations of the task force. To date, about two-thirds of the 70 recommendations have been, or are in the process of being, implemented. These include: reforming warnings given to juries and expanding and improving non-publication provisions to protect victims—that is, preventing circulation and unauthorised copying of sensitive evidence; and working to address delays in relation to sexual assault matters. The member for Epping raised that issue.

The District Court has already introduced mandatory timetables for sexual assault matters, which means that trials are listed within four months of the date of committal and no later than six months, to make allowances for regional sittings. The Attorney General's Department is now undertaking further work with the Court of Criminal Appeal to streamline appeals in rape cases. The Government has also implemented the recommendations to close courts when victims give evidence, but to allow a support person to remain and to make it clear that a complainant is entitled to use alternative methods, such as closed circuit television, video link or segregated seating, for giving evidence so they do not have to face their assailant.

There are currently 78 remote witness facilities in New South Wales metropolitan and regional courts. A transcript or recording of a complainant's evidence can now be used in a retrial ordered following an appeal, so that the complainant cannot be forced to give her evidence again, unless she chooses to. Judges are required to disallow improper questions in cross-examination, and unrepresented accused are prohibited from directly cross-examining victims in court. Child complainants in sexual assault matters have also been exempted from attending committal hearings to give oral evidence. The Government has also increased training for criminal justice

personnel in dealing with victims, especially children and other vulnerable victims.

Importantly, the Government has also provided continuing education for members of the judiciary on sexual assault matters and asked the New South Wales Judicial Commission to put together an education package for District Court judges to assist them to support victims by getting tough on defence lawyers and preventing hostile questioning of victims. The New South Wales Government has also introduced standard minimum sentences for a range of sexual offences, and increased the maximum penalties for sexual assault offences to 25 years and for sexual assault in company to imprisonment for life. Further reforms have also been recently introduced via the Criminal Procedure Amendment (Vulnerable Persons) Bill 2007 to provide greater protection for children and victims with an intellectual disability in relation to giving evidence.

Recently, my colleague the Attorney General announced the Labor Government's latest reforms of sexual assault law with the release of a discussion paper and exposure draft of this bill to define "consent" and to introduce an objective fault test into the law. I am pleased that this process has provided an opportunity for members of the public as well as the legal profession to have input into the proposed changes to the legislation. I understand that submissions were received from more than 20 organisations with an interest in this area. The proposals to better define consent in this bill have been met with a great deal of support by many of the excellent organisations working with victims of sexual assault. The New South Wales Director of Public Prosecutions has also supported the changes.

Modernising the New South Wales law as it relates to consent aims to bring about a cultural shift in the response to victims of sexual assault in the wider community and in the legal profession. Changes to the law to better define consent have already been introduced in Queensland and Victoria as well as a number of international jurisdictions such as the United Kingdom. These reforms are also supported by a recent study released by the Australian Institute of Criminology in August. The results of this research demonstrate that judgments made by jurors in rape trials are influenced more by their personal attitudes, beliefs and biases about rape, than the objective facts of the case presented.

It is also concerning, but perhaps not surprising, that the study found that old-fashioned stereotypical beliefs about rape and rape victims still exist. The research found that some members of our community still held the view that when women say no they mean yes, that women who are raped ask for it, and that rape results from men not being able to control their need for sex. The bill reflects the views of the other, much-larger section of our community that wants to stand up for victims and reject these disgusting and outdated views.

The current subjective test of consent in the Crimes Act in relation to sexual assault offences encourages defence lawyers to employ intimidating and harassing tactics that attempt to demean the character of the victim. In the past that has resulted in situations, such as, for example, in the recent gang rape trials, where defence lawyers suggested to jurors that when a victim was crying, screaming and telling the rapist to stop she was in fact "moaning in pleasure". That kind of disgraceful strategy by defence lawyers will be made far less likely under these proposals to objectively define "consent". The bill defines "consent" as "free and voluntary agreement to sexual intercourse". The bill also spells out when consent is or may be negated; that is in situations where a victim cannot give consent because of incapacity or substantial intoxication, when a victim is asleep or unconscious, when a victim is being unlawfully detained, when a perpetrator uses intimidatory or coercive contact, or when the perpetrator abuses his or her position of power, authority or trust.

That definition is important because it much more clearly articulates what does and does not amount to consent. Clearly articulating the meaning of "consent" will have a really important educative function, for both potential jurors and the broader community. Although the absence of consent will be still ultimately decided by juries, it is essential that clear and consistent guidance is given by our courts as to what amounts to consent. The member for Epping suggested that those changes would mean that innocent young men would be labelled as criminals and rapists. The example that is cited is that consensual sexual intercourse will later be criminalised if a couple are drunk. That is absolutely not the case. The bill clarifies that if a person is so intoxicated as to be unable to give consent to sex, having sex with that person is indeed sexual assault.

It is important to make the point that currently that is the situation arising from existing case law precedent. That is the current case law. The law recognises that just because a person has had too much to drink does not mean that the person is incapable of consenting to sex, but it does provide that people should take reasonable steps to ascertain whether the other party is consenting to sex. However, if a victim is unconscious or asleep as a result of substantial alcohol consumption she or he can clearly not consent and the new law will recognise that. Currently an accused person can assert that he or she believed that the other person was consenting, no matter how unreasonable the circumstances. As it stands, the law does not adequately protect victims of sexual assault when the perpetrator has a genuine but completely distorted view about appropriate sexual conduct.

The current subjective test is outdated and fails to ensure that reasonable care is taken to ensure that a person is consenting before sexual intercourse occurs. The Iemma Government will continue to work to provide greater assistance to victims of sexual assault, especially in dealings with the legal system. It is committed to a continued program of reform in that area. The bill is an important step forward in protecting the rights of victims of sexual

assault in New South Wales.

I conclude by thanking all members for their contribution to the debate. I take this opportunity to place on the record my thanks to the tireless advocacy undertaken by those organisations that work with sexual assault victims; organisations such as the New South Wales Rape Crisis Centre. That centre and the NSW Health-funded sexual assault services across the State work every day with women, men and children who have experienced sexual violence. I thank the staff of those organisations for their incredibly important work, which does not go unnoticed. I know I speak on behalf of the House when I say thank you for treating victims of sexual assault with dignity, compassion and respect, and for providing them with much-needed assistance and support at a time that is so unimaginable. Thank you for your work, and thank you to members of the House.

Question—That this bill be now agreed to in principle—put and resolved in the affirmative.

Motion agreed to.

Bill agreed to in principle.

Consideration in detail requested by Mr Greg Smith.

Consideration in Detail

Clauses 1 to 4 agreed to.

Mr GREG SMITH (Epping) [10.55 p.m.]: I move Opposition amendment No. 1:

No. 1 Page 5, schedule 1 [4]. Insert after line 8:

Review of amendments

(1) The Law Reform Commission is to inquire into, and report on, the amendments made to this Act by the *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007* to determine whether the policy objectives of the *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007* remain valid and whether the terms of the amendments made by that Act remain appropriate for securing those objectives.

(2) The inquiry and report is to be undertaken as soon as possible after the period of 3 years from the date of commencement of section 61HA (as inserted by the *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007*).

(3) The Minister is required to table or cause to be tabled in Parliament the report as soon as practicable after the report is made by the Law Reform Commission.

The amendment is proposed purely in the interests of women. The review should be brought forward to be presented in three years, not four years. England has reviewed its legislation after three years of operation, and three years is a sufficient period to see how the law is working. The Law Reform Commission is a more suitable and objective organisation to do that review than is the Attorney General, as currently provided in the bill.

Earlier I overlooked thanking Karen Willis from the Rape Crisis Centre and Dr Anne Cossins of the University of New South Wales School of Law for their great work. I have a paper by Anne Cossins that was sent to me by Karen Willis, which I found to be of great assistance in understanding the different considerations.

Ms VERITY FIRTH (Balmain—Minister for Women, Minister for Science and Medical Research, Minister Assisting the Minister for Health (Cancer), Minister Assisting the Minister for Climate Change, Environment and Water (Environment)) [10.56 p.m.]: As I stated in my agreement in principle speech, the Government has already amended the bill to provide for a review of its provisions, to ensure that they are achieving the desired effect in the prosecution of sexual assault offences. The Government has provided for ministerial review, but that review will be conducted by the groups involved in the Sexual Offences Taskforce, groups that include all the stakeholders in the area of prosecution of sexual assault and assistance to its victims.

As I said earlier, that taskforce comprises a broad range of government and non-government agencies, including the Rape Crisis Centre, women's legal services, members of the legal profession from both the prosecution and defence, judiciary, courts, police, Corrections Health, community services and academics. The task force has shown its effectiveness and expertise in investigating and making recommendations for reform of sexual assault laws and is better positioned to conduct that review than is any other organisation. That remains the Government's position. In regard to the three years versus four years, the Government has received advice that a time frame of four years is necessary. It is necessary to have a sufficient number of cases go through the courts after the introduction of the bill so as to provide enough material on which to base a review. The Government has received advice that it will require four years for cases to progress through the courts. The Government does not

believe the amendment should be supported, and we will not do so.

Question—That the amendment be agreed to—put and resolved in the negative.

Amendment negatived.

Schedule 1 agreed to.

Consideration in detail concluded.

Passing of the Bill

Motion by Ms Verity Firth agreed to:

That this bill be now passed.

Bill passed and returned to the Legislative Council without amendment.

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