Crimes Amendment (Consent-Sexual Assault Offences) Bill 2007

About this Item
Speakers - Hatzistergos The Hon John
Business - Bill, First Reading, Bill Introduced, Second Reading, Motion

CRIMES AMENDMENT (CONSENT—SEXUAL ASSAULT OFFENCES) BILL 2007

Page: 3584

Bill introduced, read a first time and ordered to be printed on motion by the Hon. John Hatzistergos.

Second Reading

The Hon. JOHN HATZISTERGOS (Attorney General, and Minister for Justice) [11.06 a.m.]: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Crimes Amendment (Consent—Sexual Assault Offences) Bill 2007. This bill addresses a key element of the Government's ongoing legal reforms in the area of sexual assault prosecution: the reform of the law of consent. The Government has been relentless in its reform of all aspects of the investigation and prosecution of sexual assault.

Prior to 2006, reforms in the area of sexual assault prosecution included allowing the evidence in chief of children to be given by electronic pre-recording of evidence; prohibiting an accused from personally cross-examining the complainant; establishing remote witness facilities and allowing complainants to use closed-circuit television from these facilities to give their evidence; creating a positive duty on the court to disallow improper questions; closing the court when the victim gives evidence in sexual assault proceedings; introducing new rules governing the service of sensitive evidence; prohibiting a child complainant from being called at the committal; improving the case management of these cases by introducing pre-trial binding directions; and acknowledging the role of a support person in legislation.

In 2006 the Government, building on these earlier reforms, implemented a number of recommendations made by the Criminal Justice Sexual Offences Task Force, including reformation of jury warnings and directions concerning delay in the reporting of sexual assault by victims; expanding the circumstances in which recorded evidence given in an original trial can be used in subsequent trials to include hung juries and aborted trials; expanding and improving non-publication provisions to better protect sexual assault complainants; amending the committal procedure to reduce instances where victims must give evidence; and improving circumstances for vulnerable victims when giving evidence. This year, again in line with the task force recommendations, legislative amendments were introduced to extend the protections currently provided to children in the criminal justice system to other vulnerable witnesses, such as the intellectually impaired.

What has been the result? The New South Wales Bureau of Crime Statistics and Research figures show that the cumulative effect of these ongoing reforms in relation to sexual assault prosecution is working. In 2004, 58 per cent of people appearing in higher courts for a child sex offence were found guilty of at least one child sex offence, compared with 67 per cent in 2006. For people appearing for sex offences not involving adults the percentage convicted has gone from 35 per cent in 2004 to 49 per cent in 2006. There have also been increases in convictions in the Local Court. There has been both an increase in guilty pleas and an increase in convictions at trial. These significant improvements in the rates of conviction for sexual offences show that the Government's reforms are effective and will instil greater confidence in victims to come forward.

This bill arises out of the recommendations of the Criminal Justice Sexual Offences Task Force Report. The task force report, published in April 2006, contained 70 recommendations and represented the most comprehensive review of the law in this area in the past 20 years. A broad range of government and non-government agencies was represented on the task force, including those representing women's and victims' interests such as the Rape Crisis Centre and the Women's Legal Services, members of the legal profession for the prosecution and defence, the judiciary, the courts, police, corrections, health, community services and academics.

Because these recommendations involve highly complex and significant issues, before final approval my department undertook further consultation, particularly with experts in the field. I released a discussion paper and draft consultation bill to the public in May 2007 and 21 submissions were received in response. I take this opportunity to thank the contributors for their hard work and efforts in this very important endeavour.

The task force recommendations not only highlighted the need to change laws and procedures affecting the prosecution of sexual assault matters but were also aimed at bringing about a cultural shift in the way sexual offences are investigated and prosecuted, and the attitudes of key participants within the criminal justice system. It is anticipated that addressing these issues will help further alleviate the high rates of attrition in sexual offences.

Modernisation of the law relating to consent, in particular, is aimed at bringing about both a cultural shift in the response to victims of sexual assault by the community and by key participants within the criminal justice system. Reform of the law of consent for those reasons is supported by a study released in August 2007 by the Australian Institute of Criminology. The results of that study show that juror judgments in rape trials are influenced more by the attitudes, beliefs and biases about rape that jurors bring with them into the courtroom than by the objective facts presented, and that stereotypical beliefs about rape and its victims still exist within the community.

The report found that some members of the community still hold the view that women often say "no" when they mean "yes", that women who are raped often ask for it, and that rape results from men not being able to control their need for sex and responsibility for rape is therefore removed. This bill reflects the views of the greater majority of the community of New South Wales who strongly reject those outdated views.

I now turn to the detail of the bill. Under the Crimes Act 1900, the offence of sexual assault is committed if a person has sexual intercourse with another person without that other person's consent and knowing or being reckless that the other person does not consent. The object of this bill is to amend the Crimes Act 1900 to define "consent" for the purposes of sexual assault offences as free and voluntary agreement to sexual intercourse; to include in cases where consent to sexual intercourse is or may be negated an incapacity to consent, intoxication, persons who are asleep or unconscious, unlawful detention, intimidatory or coercive conduct and abuse of a position of authority or trust; and 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.

At present, section 61R of the Crimes Act 1900 provides for a number of matters relating to consent for the purposes of the offences of sexual assault, as defined in section 61I; aggravated sexual assault, section 61J; and aggravated sexual assault in company, section 61JA. To facilitate a number of changes in relation to consent, schedule 1 item [1] inserts proposed section 61HA and item [2] omits section 61R. Consent is an element in each of the offences under sections 61I, 61J and 61JA. Proposed section 61HA (2) provides a statutory definition stating that a person consents to sexual intercourse if the person freely and voluntarily agrees to the intercourse. This is consistent with the definition in the Model Criminal Code recommended by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, "Chapter 5—Sexual Offences Against the Person".

Currently, there is no statutory definition of consent in New South Wales. A number of Australian and overseas jurisdictions have adopted a statutory definition of consent. This amendment serves a dual purpose. First, the definition will clearly articulate what does and does not amount to consent. It will have an educative function for both the community and jurors and it will ensure that standard directions are given to juries. Lack of consent is ultimately a matter of fact to be determined by a jury. It is essential that the courts give clear and consistent guidance as to what this means.

Secondly, the introduction of this statutory definition of consent provides the opportunity to enact a more contemporary and appropriate definition than is currently available under the common law. Knowledge is also an element of each of the offences under sections 61I, 61J and 61JA. Section 61R (1) provides that a person who has sexual intercourse with another person without the consent of the other person and who is reckless as to whether the other person consents to the sexual intercourse knows that the other person does not consent to the sexual intercourse.

The present common law test 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 point of view of the accused. The accuser's assertion that he or she had a belief that the other person had consented is difficult to refute, no matter how unreasonable in the circumstances. The law does not adequately protect victims of sexual assault when the offender has genuine but distorted views about appropriate sexual conduct. The subjective test is outdated. It reflects archaic views about sexual activity. It fails to ensure a reasonable standard of care is taken to ascertain a person is consenting before embarking on potentially damaging behaviour. An objective test is required to ensure the jury applies its common sense regarding current community standards.

Some might think that it is wrong to remove the subjective belief of the offender and criminalise a person who sincerely but unreasonably believes that another is consenting to sex. However, in New South Wales the law has already recognised that an accused person possesses the requisite intent to have non-consensual intercourse, or guilty mind, when they have failed to turn their mind to the issue at all. This has been most eloquently justified by the New South Wales Court of Criminal Appeal when it was stated that:

> 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.

Proposed section 61HA (3) retains recklessness, but offers an additional third limb for what is meant by that element of these offences "knows that the other person does not consent". It provides that the person knows that the other person does not consent to the sexual intercourse if the person has no reasonable grounds for believing that the other person consents to the sexual intercourse. The proposed subsection further provides that the trier of fact—that is, a jury or a judge disposing of a matter without a jury—must have regard to all the circumstances of the case, including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but not including any self-induced intoxication of the person.

The reference to the exclusion of self-induced intoxication as a relevant circumstance simply replicates the current provisions in division 11A of the Crimes Act 1900 in relation to intoxication. It serves as an important reminder that self-induced intoxication cannot be taken into account in relation to the mens rea for these sexual assault offences. It also clarifies what is meant by "all the circumstances of the case" in the section.

Currently, section 61R of the Crimes Act 1900 provides a list of factors that might vitiate or negate consent, including mistaken belief as to the identity of the other person, as to marriage, or as to medical or hygienic purposes or as a result of threats or terror. The term "vitiate" is replaced with the term "negate" for ease of understanding. These amendments will extend the list of factors that negate consent. Proposed section 61HA (4) provides that a person does not consent to sexual intercourse with another person:

(a) if the person does not have the capacity to consent including because of age or cognitive incapacity, or

(b) if the person does not have the opportunity to consent because the person is unconscious or asleep, or

(c) if the person consents because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or

(d) if the person consents because the person is unlawfully detained.

Proposed subsection (5) provides that a person who consents under a mistaken belief as to the identity of the other person or under the mistaken belief that the other person is married to the person or that the sexual intercourse is for medical or hygienic purposes—or under any other mistaken belief about the nature of the act induced by fraudulent means—does not consent to the sexual intercourse. Cognitive incapacity, referred to in paragraph (a) of proposed subsection (4), refers 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. The circumstances set out in paragraph (c) of proposed subsection (4) and proposed subsection (5) replace similar provisions currently set out in section 61R (2) of the Act.

A list of factors may negate consent. The list will provide further guidance to juries when determining those factors that may be relevant to the question of consent. Of course, they are not intended in any way to reverse the onus of proof. Proposed section 61HA (6) provides that the grounds on which it may be established that a person does not consent to sexual intercourse include:

(a) if the person has sexual intercourse while substantially intoxicated by alcohol or any drug, or

(b) if the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force, or

(c) if the person has sexual intercourse because of the abuse of a position of authority or trust.

Proposed section 61HA (7) provides that a person is not to be regarded as consenting to sexual intercourse by reason only of the fact that the person does not offer physical resistance to the sexual intercourse. This replaces a similar provision currently contained in section 61R (2) (d) of the Act. Proposed section 61HA (8) makes it clear that the above provisions do not limit the grounds on which it may be established that a person does not consent to sexual intercourse. Item [3] of schedule 1 repeals section 65A of the Crimes Act, which refers to sexual intercourse procured by intimidation, coercion and other non-violent threats, as a consequence of the amendments dealing with circumstances in which consent may be negated. As a result, if consent to sexual intercourse is negated because of any such non-violent threats, the accused will be subject to prosecution for sexual assault, which carries a maximum penalty of imprisonment of 14 years, instead of the current maximum period of six years under the separate offence in section 65A. Item [4] of schedule 1 contains a savings and transitional provision consequent on the enactment of the proposed Act. I commend the bill to the House.

Debate adjourned on motion by the Hon. Don Harwin and set down as an order of the day for a future day.