Crimes Amendment (Sexual Offences) Bill.

Second Reading

The Hon. CARMEL TEBBUTT (Minister for Community Services, Minister for Ageing, Minister for Disability Services, and Minister for Youth) [9.38 p.m.]: I move:

That this bill be now read a second time.

I seek leave to table my second reading speech, which essentially is the same as that delivered by the Attorney General in the other place with the exception that the paragraph referring to section 49, which was subject to an amendment in the other place, has been omitted.

Leave granted.

The Government is pleased to introduce this important legislation. The Crimes Amendment (Sexual Offences) Bill amends the Crimes Act 1900 to provide for the equal treatment of sexual offences irrespective of whether the victim or the perpetrator is male or female. The Crimes Act is presently discriminatory in that it provides different penalties for sexual offences depending on whether the perpetrator and victim are male or female. The Act is also discriminatory in that it provides different ages of consent for heterosexual and homosexual intercourse. The bill removes this discrimination and ensures equal treatment before the law. The bill rationalises the age of consent in New South Wales to 16 years of age for all persons irrespective of gender or sexual orientation. The lower age limit is absolute—no specific statutory defence is provided for.

The bill removes gender-specific offences and amends the Crimes Act for the consistent use of non-gender-specific language. Previous attempts to bring about equity in this area have been unsuccessful in this Parliament. As a result, New South Wales is the last State in Australia to have a discriminatory age of consent for males and females. In 1999 the Hon. Jan Burnswoods, MLC, introduced in the Legislative Council a private member's bill providing for equal age of consent in New South Wales of 16 years of age. The bill failed to pass the Legislative Council at second reading by one vote. In 2002 Ms Burnswoods introduced a further private member's bill that also provided for equal age of consent of 16 years of age. The bill was referred to the Legislative Council Standing Committee on Social Issues.

The bill now before the House has several crucial differences from the private member's bills previously introduced, as it contains important additional safeguards to protect our young people from sexual exploitation. These further safeguards include the removal of the defence to carnal knowledge based on reasonable mistake of age, the establishment of new aggravated child sexual assault offences and the rationalisation of offences to bring greater rigour and consistency to penalties involving child sexual assault. A number of Australian royal commissions, committees and reports have been supportive of a reduction of the age of consent for homosexual intercourse to 16 years of age. These include the 1997 Wood Royal Commission into the New South Wales Police Service, and the Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General. Justice James Wood in his 1997 royal commission found that the current legislation contributes to a climate conducive to corrupt law enforcement practices and possible extortion of young gay men. It is of particular significance that bodies of such high standing support the introduction of a uniform age of consent.

The age of consent in other jurisdictions in both Australia and overseas is currently as follows. In the United Kingdom, Victoria, Western Australia and the Australian Capital Territory the uniform age of consent is 16 years. In South Australia and Tasmania the uniform age of consent is 17 years. Queensland has a uniform age of consent which is not gender specific, 16 and 18, for different kinds of sexual activity. In the Northern Territory it is unlawful to have sexual intercourse or commit an act of gross indecency with a female under 16 years. For males it is unlawful to have sexual intercourse or commit acts of gross indecency with other males under 18 years. It is relevant to note that a number of countries have an equal age of consent that has existed for some time. France, for example, introduced a non-discriminatory age of consent in the Code Napoleon in 1810. The age of consent in France is 15. In Italy, the uniform age of consent is 14; in Germany, 16. Poland and the Czech Republic have an equal age of consent of 15, while in Spain it is 13. Interested members can obtain from my office a table setting out the position in various jurisdictions—I suspect that they may find it instructive.

While New South Wales has lagged behind other jurisdictions in this area, the social cost of these discriminatory laws has continued to be felt in this State. Of particular importance to the debate are the public health issues involved in the present environment of discriminatory unequal age of consent law. These include the increased difficulty in combating HIV-AIDS, rates of violence towards gay men, and rates of male youth suicide. Most young

gay men grow up in a decidedly homophobic environment, facing threats to their psychological and physical wellbeing. Research has found that young gay men are up to 300 per cent more likely to commit suicide than their heterosexual peers, making suicide the leading cause of death among young gay men. This is a staggering statistic, which is the cause of greatest concern by the community. In the Government's view, the present discriminatory legislation in New South Wales provides tacit support to entrenched homophobic elements that negatively impact upon social integration and the psychological health of young gay men.

Research in the United States of America and Australia leaves little doubt that stigmatisation of sexuality and criminalisation of victimless sexual conduct are significant contributors to both the high rates of violence towards boys perceived as gay and to male youth suicide. The 1994 Legislative Council Standing Committee on Social Issues report entitled "Suicide in Rural New South Wales" found that this was particularly the case in rural New South Wales, where support services, such as counselling, are not readily available. Research has also found that the unequal age of consent has impeded the fight against HIV-AIDS in this State, as the criminalisation of victimless conduct makes it more difficult to achieve widespread behavioural change to reduce transmission risks and poses an impediment to early diagnosis of infection.

The same applies to the public health problems of other sexually transmissible diseases. The present legislation relating to sexual conduct means that disclosure of risk status, disclosure of possible transmissible events, or even just seeking testing for HIV, could lead to criminal prosecution. Similarly, the offence under section 78Q (2) of the Crimes Act of soliciting, procuring, inciting or advising a male person under 18 to commit or be party to an act of homosexual intercourse, or an act of gross indecency with or towards a male person, is inconsistent with public health initiatives, including counselling of gay youth about safe sex.

On 21 December 2001 the Crown Advocate provided an advice to me concerning the likelihood that the Court of Criminal Appeal would grant a guideline judgment with respect to child sexual assault offences. That advice suggested that at the present time it is unlikely that the court would grant a guideline judgment, partially because the legislation itself is inconsistent in the penalties imposed. The Crown Advocate went on to make a number of recommendations concerning the rationalisation of the legislation regarding child sexual assault.

To partly address these recommendations, the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002 repealed the offences of homosexual intercourse and attempted homosexual intercourse with a child under 10 years of age—sections 78H and 78I of the Crimes Act. The amendment Act increased the penalties for the offences of sexual intercourse and attempted sexual intercourse with a child under 10 years—sections 66A and 66B of the Crimes Act 1900—from 20 to 25 years imprisonment. These amendments ensured that all sexual assaults upon children under 10 years of age will be brought under the same non-gender-specific provisions.

The Crown Advocate also highlighted the disparity in the maximum penalty between the offence of sexual intercourse with a child under 10 years of age of 20 years imprisonment—section 66A—and sexual intercourse with an 11-year-old child of only 8 years imprisonment—section 66C (1). The amendment Act, by increasing the penalty under section 66A to 25 years, further increased this disparity. This disparity and others that require legislative amendment are addressed by the present bill, which includes a recommendation that the maximum penalty for an offence under section 66C (1) be increased from 8 to 16 years.

There are cogent arguments why there should be no distinction between homosexual intercourse with a child and heterosexual intercourse with a child. Either is equally abhorrent. It may be said that to send any message of a distinction between homosexual and heterosexual sexual assaults upon children is inflammatory and archaic. The point of such legislation is to protect children from sexual exploitation by sexual predators. The logic of the argument for rationalisation of child sexual assault legislation is simple—the harm to children is the same regardless of gender. It is absurd to suggest that a homosexual act on a young boy is more heinous than a sexual assault on a young girl. The current law makes sexual assaults of young girls less criminal than sexual assaults on young boys. Such a distinction is discriminatory and has no justification in logic.

In proposing a uniform age of consent in New South Wales the bill employs further strict safeguards to protect children from exploitation by sexual predators. The sexual exploitation of our children is criminal conduct of the most heinous and abhorrent kind and must be deplored by the Legislature through the imposition of heavy deterrent penalties. The bill therefore increases penalties for sexual offences upon children under the age of 16 years. The bill eliminates the defence currently available to consensual sexual activity with young people aged between 14 and 16 years, formerly known as carnal knowledge.

The bill removes the express statutory defence presently provided in section 77 (2) (c) of the Crimes Act that the person charged had reasonable cause to believe, and did in fact believe, that the child was of or above the age of 16 years. As a consequence, it will no longer be possible to argue that a uniform age of consent of 16 years creates an effective age of consent of 14 years. The increased safeguards also include the introduction of additional aggravated sexual offences against children. The bill repeals a number of separate offences relating to homosexual acts with males between 10 and 18 years of age. The result will be that sexual assault and offences against children will be dealt with by the same set of provisions that apply irrespective of whether the victim or the

perpetrator is male or female. It will also result in a uniform age of consent of 16 years.

In relation to the offence of sexual intercourse with a person under 16 years and over 10 years, the bill increases the maximum penalties and establishes new aggravated offences. The bill reduces the inappropriate disparity between the offence of sexual intercourse with a child under 16 years and over 10 years, currently 8 years imprisonment, and the offence of sexual intercourse with a child under 10 years old, currently 25 years imprisonment.

Under the present Act, an offender convicted of having sexual intercourse with a 9-year-old is liable to a penalty of 25 years imprisonment, whilst an offender convicted of the same offence with an 11 year old is only liable to 8 years imprisonment. The bill increases the penalties as follows: where a child is between 10 and 14 years of age, from 8 years to 16 years imprisonment; where a child is between 10 and 14 years of age in circumstances of aggravation, from 10 years to 20 years imprisonment; where a child is between 14 and 16 years of age, from 8 years to 10 years imprisonment; where a child is between 14 and 16 years of age in circumstances of aggravation, from 10 years to 12 years imprisonment.

The offence of aggravated sexual intercourse without consent, the aggravation being that the person is under 16 years of age, will continue to attract a penalty of 20 years imprisonment. Sexual intercourse with a child under 10 years will continue to attract a penalty of 25 years imprisonment. The bill extends the circumstances of aggravation applicable to sexual assault to offences of sexual intercourse with a person under 16 years and over 10 years. In particular, section 66C (5) (d) refers to the alleged victim being under the authority of the alleged offender. It is intended that this provision cover a broad range of relationships in which a child is under the care of an offender, even if only for a football club day trip, church outing or after-school sporting activity.

A further circumstance of aggravation featured within the bill under section 66C (5) (g) is the situation where an offender takes advantage of an alleged victim being under the influence of alcohol or a drug in order to commit the offence. This will provide protection from sexual predators who deliberately drug children, as well as those who take advantage of children who have self-intoxicated. The bill will remove the anachronistic term "carnal knowledge" and utilise the term "sexual intercourse", which is consistent with the modern language of the Act. The offence of procuring carnal knowledge by fraud found in section 66 of the Act is removed, as it is an obsolete offence. The issue of fraud is incorporated through amendment of the consent provisions found in section 61R of the Act.

The bill also removes the offence of carnal knowledge by a male teacher, parent or step-parent under section 73 of the Act. The provision is replaced with the offence of sexual intercourse by a teacher. The revised offence will apply to both male and female perpetrators and complainants. References to parent and step-parent have been removed as they are adequately dealt with in the revised incest provision. The revised incest offence applies to any person who has sexual intercourse with a close family member of or above the age of 16 years. The Act presently only criminalises behaviour defined as carnal knowledge, within a family, committed by a male against a female or allowed by a female to be committed against her by a male.
The bill also provides for the equal treatment of offences relating to child prostitution, irrespective of the gender of the child concerned. The amendment rectifies the present situation where section 91D (2) provides for a defence relating to girls but not to boys. This ironically makes child prostitution with girls more defensible than child prostitution with boys. That cannot have been the intention of the Legislature. The defence will now apply equally to alleged offenders irrespective of whether the offender or the child is male or female.

The bill repeals an obsolete provision relating to the guardianship of female incest complainants by male offenders. This provision is replaced by the new section 80AA, a general provision that allows a court to refer the matter to an appropriate child protection agency where a person is convicted of any sexual offence and the victim is under the authority of the offender. The Government takes the view that it is more appropriate to refer the issue of guardianship, irrespective of the gender of the guardian or the child, to the appropriate expert tribunal where detailed safeguards are in place in relation to care proceedings, rather than leaving it to the determination of a criminal court.

The bill will remove discriminatory provisions from the Crimes Act and ensure that certain types of sexual misconduct by any person, whether male or female, against any other person, whether male or female, will be dealt with on the same bases, including as to the age of the victim, the defences available to the accused and the penalties for the offence. It is clear that the arguments in favour of a uniform age of consent of 16 years in New South Wales are extremely powerful. The present discriminatory laws have been found to have serious detrimental impacts not only on the mental health of gay youth but also on public health issues generally. The introduction of a uniform age of consent in New South Wales will therefore have a positive impact not only on the physical and mental wellbeing of our youth but also will have a positive impact upon society generally.

The repeal of current laws that discriminate purely on the ground of sexual orientation will serve to provide a more just, equitable and tolerant society. The opponents of previous attempts in this Parliament to remove that discrimination have focused upon the potential for the exploitation of young people. This legislation removes any such apparent connection. The Crimes (Sexual Offences) Bill establishes an absolute uniform minimum age of

consent of 16 years. There are no statutory exceptions. At the same time the bill creates new factors of aggravation to deal with exploitation, and rationalises and increases penalties. I commend the bill to the House.