



Full Day Hansard Transcript (Legislative Council, 13 November 2007, Proof)

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Extract from NSW Legislative Council Hansard and Papers Tuesday, 13 November 2007 (Proof).

Ms LEE RHIANNON [5.16 p.m.]: The Crimes Amendment (Consent—Sexual Assault Offences) Bill 2007 changes the law of consent in sexual assault cases. It makes a number of amendments to section 61R of the Crimes Amendment Act regarding the law of consent. The object of the bill is to make it clear to the courts and to the community what consenting to sex means. The bill provides further protections to victims of sexual assault by extending the legislative meaning of what may or may not negate consent. Importantly, this bill delivers on a key long-term demand of women's legal services, community groups, sexual assault victims groups and law reform groups to create an objective fault test for consent.

The Greens congratulate the Government on acting to reform sexual assault law to address low reporting and conviction rates of sexual assaults—something that has been of concern to many people. It is quite alarming that those reporting rates have remained low for many years. However, the Greens acknowledge that this bill is challenging, as is any bill that changes a long-held common law principle. The Greens have consulted with the Bar Association, the Law Society, the New South Wales Rape Crisis Centre and the Women's Legal Service on this bill. We recognise that these reforms have not been plucked out of the air; they are based on the work of the Criminal Justice Sexual Offence Taskforce and its 2006 report entitled "Responding to sexual assault—The way forward". The Government undertook a further round of consultation in July this year.

It is clear that currently the laws are not working: they are not delivering justice for victims of sexual assault in New South Wales. In 2005 only 9,500 complaints of sexual assault were made to the police. The rate of reporting is far lower for sexual assault than for any other offence. The Greens recognise that the nature of sexual assault makes it a very difficult crime to prosecute. In general, only two people are involved, there are no witnesses and there is little or, more commonly, no corroborating evidence. The fact is that the vast majority of victims do not report sexual assault. In the case when an assault is reported, few proceed to charges and even fewer secure a conviction in cases that go to trial.

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We have a reporting rate of less than 15 per cent and the Rape Crisis Centre estimates that we have a conviction rate of about 1 per cent. This is clearly not good enough. Something must shift: hopefully that will occur when this legislation is in place

New section 61HA (2) in schedule 1 of the bill introduces a statutory definition of "consent". Most sexual assault trials turn on the issue of consent. It is of key importance, yet there is currently no statutory definition of "consent" in New South Wales. Indeed, New South Wales is the only State without a statutory definition of "consent". I understand that the common law definition of "consent" is very confusing for jurors. The Women's Legal Service advises that it is "archaic and out of step with contemporary views of sexual relations". A recent study of 18 sexual assault trials found that jurors were often bamboozled by attempts in court to define "consent". The directions given to jurors can be very confusing. New section 61HA (2) proposes to introduce a statutory

definition of "consent" to be "free and voluntary agreement to sexual intercourse". To put it simply, sex gained by means other than free and voluntary agreement is not acceptable. The Greens support the definition in the bill. It is a positive definition in line with United Kingdom and Victorian definitions. It recognises that sexual relations between adults should be mutual, equal and negotiated. This is what we, as a community, expect in adult sexual relations.

New section 61R expands the list of circumstances in which consent is always negated or may be negated. Under the new section, consent will be negated when the complainant did not have the capacity to consent, when the complainant was unlawfully detained, when the complainant was unconscious or asleep, when the complainant submitted due to force or fear of force to his or her person, or that of another. Further, the bill provides that consent may be negated—and I emphasise the phrase "may be negated"—when the complainant is intoxicated or affected by drugs, when the complainant submits to the sexual act due to intimidatory or coercive conduct or other non-violent threat, or when the complainant submits due to the abuse of authority.

I am concerned that there have been some misleading media reports about that new section, particularly about the role of intoxication. There has been some suggestion that a woman who is drunk cannot consent to sex and that the accused is automatically charged with sexual assault. That is not the case. The bill does not say that if a complainant is drunk, they are incapable of giving consent. The bill says that consent may be negated by intoxication. This would be a matter of fact for the jury to determine. If a complainant is so intoxicated that they do not have the capacity to say yes or no, then clearly consent cannot be given. Sex in those circumstances is rape. Juries will have to take into account what the accused did or did not do to work out whether the person agreed to sex. As Karen Willis of the New South Wales Rape Crisis Centre has stated:

The new definition sends a message that sex gained by any means other than free and voluntary agreement is not acceptable in our modern society. If a person is unconscious, asleep or too intoxicated to resist, the law will now recognise that they do not have the capacity to consent. Someone who takes advantage of such a situation is committing a criminal act.

The bill proposes to introduce an objective fault test. The present test is based on common law and is a subjective fault test. An accused need merely prove that they believe the complainant was consenting. The test is solely from the point of view of the accused. The subjective test allows the accused to simply assert that they held an honest belief in consent. This is difficult to refute, regardless of how unreasonable the belief is. The test also has been criticised on the basis that the subjective test outlined in the case of *R v Morgan* encourages myths that women desire to be overpowered or are afraid to articulate their true desires. The Victorian Law Reform Commission has suggested that the current test does not adequately provide protection for women when an accused has distorted views about sex, or when the accused does not endorse the communicative model for sexual relations.

The Greens believe that switching to an objective test is more in line with community expectations. As a matter of policy, a reasonable standard of care should be taken to ascertain whether a woman is consenting before embarking on what could be potentially

damaging behaviour. Under the new formulation, a person will be taken to know that the other person does not consent to the sexual act when the person believes that the other person does not consent to the sexual act, and when that 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 sexual act, regard must be had to all the circumstances of the case, including any steps taken by the accused to ascertain whether the other person consents.

I note that an objective or reasonableness test exists in many comparable jurisdictions. Earlier I mentioned Victoria and the United Kingdom, but an objective test also applies to Queensland, Western Australia, Tasmania and Canada. Similarly I note that there is support for an objective test from the Director of Public Prosecutions, New South Wales Health, Women's Legal Services, the Office for Women, Victims Services and the New South Wales Rape Crisis Centre. The Law Society and the Bar Association have raised concerns that the objective test will effectively remove the need for mens rea to prove the intent of the accused and make sexual assault a strict liability offence. The Greens recognise that mens rea is one of the most controversial areas of sexual assault law. Any moves to weaken mens rea are not taken lightly by the Greens, and should not be taken lightly by this House.

I have mentioned these concerns to the Attorney General's office and I understand that mens rea remains intact in this bill. Under this bill mens rea will be satisfied either by knowledge or recklessness, or if there are no reasonable grounds for believing that the other person consents to the sexual act. Recklessness has counted toward mens rea in New South Wales for many years. From my reading of the bill, if the accused believes that the sexual act was consensual, then the court will inquire what led that person to that belief. If the court finds that there are reasonable grounds to believe that the other person consented, then so be it. The Bar Association has a particular concern that this bill provides that whether the accused is intoxicated cannot be used in judging whether the accused had reasonable grounds to believe that the other person consented.

The Greens would like the Attorney General to clarify that provision. Does it mean that the objective standard to be applied is that of the sober person? Will a jury be directed not to consider whether the accused was intoxicated at the time? I understand from the Attorney General that the significance of the proposed section is that the defence will not be able to lead evidence of self-induced intoxication. I also understand that this clause makes no change to the existing criminal law in New South Wales—that this is the status quo for most criminal matters involving intent. For example, if a person is charged with robbery, the defence will not be able to lead evidence that the person was drunk at the time and is therefore somehow not culpable for the offence. Specifically section 428D of the Crimes Act already provides:

In determining whether a person had the mens rea for an offence other than an offence of specific intent, evidence that a person was intoxicated at the time of the relevant conduct:

(a) if the intoxication was self-induced—cannot be taken into account ...

I would like the Attorney General to address the concern of the Bar Association. I understand also that the Government will move an amendment to this bill to institute a

four-year review of the Sexual Assault Task Force. This is an appropriate amendment, given the strong concerns expressed by the Bar Association. The Greens will support the amendment. The Greens acknowledge that this is a challenging bill. We have raised a number of concerns that we hope will be addressed by the Attorney General in his reply. The bill delivers on key demands that the women's movement has long called for. In doing so, it makes a significant change to the law of consent. Changing long-held principles of common law is enough to ring alarm bells. However, the Greens acknowledge that this change comes out of a long period of consultation with legal groups, women's groups and other groups.

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The bill states clearly that sexual assault will not be tolerated and that no means no. The Greens congratulate the Government on introducing an objective fault test for sexual assault. I also acknowledge Karen Willis, who is in the public gallery, and congratulate the New South Wales Rape Crisis Centre and members of the Sexual Assault Taskforce on their ongoing work to reform sexual assault laws. It has certainly been a long journey and this is another important step in improving the law. As for the remaining recommendations of the Criminal Justice Sexual Offences Taskforce, the Greens congratulate the Government on implementing some of the recommendations of the task force but we note that a large number remain nothing more than words on paper gathering dust. It is not surprising that the recommendations that have not been implemented are those with price tags attached. The Greens will continue to campaign for the implementation of the remaining recommendations, including the call for one-stop shops for victims of rape.
