

Ms Lylea McMahon MP
Member for Shellharbour

14 November 2007
CRIMES AMENDMENT (CONSENT – SEXUAL ASSAULT OFFENCES) BILL 2007

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.