

The Hon VERITY FIRTH MP

Member for 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))

Speech in Reply: 14 November 2007

CRIMES AMENDMENT (CONSENT—SEXUAL ASSAULT OFFENCES) BILL 2007

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 this 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 also 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.