

EXPLANATORY MEMORANDUM

ACTS AMENDMENT (SEXUAL ASSAULT) BILL 1985

(THESE NOTES REFER TO THE BILL AS INTRODUCED INTO THE LEGISLATIVE ASSEMBLY.)

PART I : PRELIMINARY

Clause 1: Short title.

Clause 2: Commencement.

PART II : THE CRIMINAL CODE

Clause 3: Interpretation (definition of the Criminal Code).

Clause 4: Section 29 of the Code deals with the criminal responsibility of the very young. One of its effects is that no male person under the age of 14 years is legally capable of committing any offence which has one of its elements an act of penetration by the penis of the male child of a female's vagina.

The passage to be deleted is self-explanatory, and removes the irrebuttable presumption of law which experience has shown does not accord with fact.

Clause 5: Section 205A appears in Chapter 22 of the Code, which deals with a number of sexual offences (known colloquially as unlawful carnal knowledge, sodomy, bestiality, indecent dealing, procurement and forms of sexual abduction, incest and attempts to procure abortion).

No amendment to those provisions is proposed except the repeal of Section 205A.

The function of Section 205A is to provide that nothing in Chapter 22 is to apply to or in respect of the offences of rape or attempted rape.

Those offences will disappear from the statute book and the offences proposed to replace them will not need any provision such as Section 205A to preserve their effect.

Clause 6: Section 206 provides now for the punishment of whipping.

It is not intended that whipping should be retained or generally utilised.

In advance of general amendment to the provisions of the Code in relation to sentence, the opportunity is taken to delete the reference to the punishment in relation to the repealed sections defining rape offences and indecent assaults, and to ensure that whipping is not available with respect to the proposed new offences.

Clause 7: Sections 314 and 315 of the Code provide, respectively, for assault with intent to commit sodomy upon another and unlawful and indecent assault of a male.

The repeal of these provisions makes way for the proposed new offences.

Clause 8: Inserts into the Code a new Chapter 31A dealing with sexual assaults.

The emphasis throughout is upon the element of assault as the application or the threatened application of particular types of force of a sexual nature.

The chapter collects together indecent assaults, and sexual assaults involving sexual penetration without consent.

The term "rape" is not used in defining any of the new offences. It is deleted because the presence of that descriptive term may involve particular restricted meanings to individual jurors which do not accord with the elements of the offences as they are now proposed to be defined.

The definitions of the offences are in gender free terms both in respect of the offender and victim.

Proposed 324B and 324C: Replace the old offences of unlawful indecent assault, with respectively without and with circumstances of aggravation with punishments of a maximum of four years' and six years' imprisonment.

The proposed offences end the present distinction in relation to sentence between indecent assault offences committed upon males and offences committed upon females (four years maximum for females; three years maximum for males).

Proposed Sections 324D and 324E: Provide the much more serious offences of sexual penetration without consent, called sexual assaults. The sections provide the offence respectively in a form without circumstances of aggravation, attracting a maximum of 14 years' imprisonment, and with circumstances of aggravation, attracting a maximum of 20 years' imprisonment. (The present penalty for rape is a maximum of imprisonment for life.)

The offences do more than simply replace the present offence of rape.

Proposed Section 324: Defines sexual penetration to include not only penetration by the penis of a male of a woman's vagina, but the penetration of the anus of a man or woman by penis.

(Sodomy as such, will continue to be an offence with or without consent punishable by a maximum of 14 years' imprisonment. In a non-consenting situation, if circumstances of aggravation are present, the maximum penalty rises to 20 years.)

Sexual penetration also includes penetration by finger (or any part of the body of the offender) of the vagina or anus of another, and penetration of the vagina or anus of another by any object manipulated by the offender, except where penetration occurs for proper medical purposes.

This has the effect that the most serious forms of indecent assault, now subject to maximum penalties of three or four years' imprisonment, are to be equated in seriousness with the more recognised form of sexual intercourse or penetration.

Forms of sexual penetration which are commonly known as fellatio and cunnilingus are also to be treated in that equivalent way.

Such an approach is not novel in Australia. With minor variations, a similar approach is to be found in jurisdictions where major legislative reform of this character has occurred in recent years, in particular, New South Wales.

Proposed Section 324G: Provides a definition of "consent" for the purpose of this chapter of the Code alone.

The object is to remove some present restrictions of a technical nature in the concept of consent as they are presently contained within the definition of the present rape offence in section 325 of the Code.

The purpose is to provide a definition which will emphasise that the only consent of any interest to the court will be consent freely and voluntarily given, and not obtained in any way by any force or threat or intimidation or any deception or fraudulent means.

It is also expressly stated that a failure to offer physical resistance to a sexual assault does not of itself constitute consent to a sexual assault.

Proposed Section 324H: Defines circumstances of aggravation. The purpose is to distinguish between the less and more serious forms of both the offences of indecent assault and sexual assault.

Circumstances of aggravation will be present where, in connection with the commission of the offence, bodily harm is caused to another, the offender is armed with any weapon or pretends to be so armed, the offender does any act likely to seriously and substantially degrade or humiliate the victim, is in company with another or others, or chooses a victim who is under the age of 16 years or over the age of 60 years.

All of these circumstances are either factual circumstances, which when present will increase the likelihood of the successful commission of the offence, or increase the severity of the harmful effects upon the victim.

Proposed Section 324I: Is intended to make clear the rule of evidence (which presently applies for rape and other sexual offences) that the wife or husband of the accused person is both competent and compellable to give evidence.

This is an exception to the general rule, which makes such a person a competent but not compellable witness.

This position has long been a feature of the law in respect of such offences.

Clause 17 proposes to amend the Second Schedule of the Evidence Act to the same effect.

Clauses 9 & 10: These clauses repeal those parts of the existing Chapter 32 of the Code which provide for rape, attempted rape and indecent assaults on females.

The chapter will in future deal with abduction offences.

The repeal of section 325 will have the effect of removing the immunity with respect to rape offences of a married man who is not separated from his wife.

It is not proposed that any such immunity remain or be put in place for the Chapter 32A offences.

Clause 11: Is a consequential amendment. The offence of extortion provides a circumstance of aggravation for attempted extortion if the threat used to extort anything from a person is a threat to rape or indecently assault a girl.

The clause makes the provision consistent with the offences which will replace rape and indecent assault.

Clauses 12 & 13: These clauses are designed to make available to the new offences of alternative convictions depending on evidence establishing an alternative

Section 596 now deals generally with matters, and requires amendment so that its terms accommodate the new offences

The proposed sections 596AA - 596AD are specifically designed to provide alternative conviction capacities to a jury within the framework of the newly defined offences

If the evidence fails to establish a serious offence charged in the indictment, a conviction of a less serious offence is possible if that offence is established by the evidence.

PART III : THE EVIDENCE ACT

Clause 14: Formal.

Clause 15: The present Evidence Act provisions have existed since 1976, and provide a certain protection in relation to matters concerning for victims of sexual offences.

Section 36A provides definitions of various matters which are the subject of restrictive provisions.

Those are matters of the complainant's experiences with a person other than the defendant, the complainant's sexual reputation, excluding her disposition with respect to the defendant, and the complainant's reputation in sexual matters.

The present rule in respect of trial leave in the case of no evidence of restricted matters not adduced or given by way of cross-examination on behalf of a defendant, unless leave to call evidence has first been obtained in the case of the jury. The court is directed to grant leave unless it is satisfied that the evidence is sought to be brought out will have material relevance to the facts in issue and the complainant's credit.

Proposed Sections 36A, 36B, 36BA, 36BC:

The amendments make it clear that the provisions with respect to various restricted matters are to be applied in respect of charges of all of the newly defined indecent assaults or sexual assaults, whether the accused is charged with a completed offence, an attempt, a conspiracy or as a party counselling or procuring the commission of the offences, and whether or not there are other offences properly joined in the indictment or complaint. The amendment will apply both to committal proceedings and trial.

Proposed Section 36B: Makes reference to the sexual reputation of the complainant absolutely inadmissible on behalf of the defendant.

Proposed Section 36BA: Effects the same in relation to the complainant's sexual disposition.

Proposed Section 36BC: Widens the restrictive provision with respect to the complainant's sexual experiences. Experiences on other occasions with the defendant are to be included in the ambit of the provisions, as well as those with others.

Leave is only to be granted in relation to the introduction of such material if the court is satisfied that the evidence sought to be adduced has substantial relevance to the facts in issue (and not simply to credit) and, in addition, that that probative value is so great that having regard to the particular circumstances of the case, and the nature of the material sought to be introduced, the evidence ought to be admitted as out-weighting any distress, humiliation or embarrassment which that might cause the complainant.

The purpose of these provisions is to protect the victim from unnecessary hardship by restricting the admissibility of evidence relating to the victim's sexual history.

At the same time, the accused person's legitimate rights are to continue to be protected.

Proposed Section 36BD: Is a new provision designed to further protect the position of the complainant in the course of the trial process.

It looks to evidence in such cases which is known as evidence of recent complaint. Such evidence will generally be admissible to consider whether or not the complainant made a complaint shortly after the events in question.

That is said to relate to the issue of consent by showing the consistency of the person's conduct.

Although absence of such evidence or evidence of delay in making complaint is not directly evidence of consent, it may be the subject of comment.

This provision is designed to ensure that the court seeks to preserve a proper balance in relation to such matters. Where the matter of absence of complaint or delay in complaint is raised, the court is obliged to comment to the jury that that will not necessarily indicate that there has been a false allegation of the commission of the offence and that there may be good reasons for non-complaint or hesitation in making complaint.

In other words, where delay in complaint or the absence of complaint is raised by the defence as supporting a conclusion that the allegation against the defendant has been recently fabricated, the trial judge will be obliged to indicate to the jury that there may be another side to the picture.

Proposed Section 36BE: Is a new provision. It expressly addresses the present requirement of practice (approaching a rule of law) that the trial judge shall warn the jury of the danger of convicting upon the uncorroborated testimony of the victim. This is said to arise out of the apparent human experience that false complaints of non-consensual sexual offences are often made.

The proposed section expresses the view that such a danger is no more apparent in relation to sexual offences than in relation to complaints of any other offence against the

person. It is generally wrong to place a sexual complainant in such an invidious position by reflecting adversely upon the worth of the person's evidence without there being any particular factual matter present to indicate the need for such a warning.

The proposed section says that not only is the judge not required to give such a warning (unless it is a matter of law necessary for there to be corroboration of the victim's evidence because the person concerned is a child) but no such warning shall be given unless in the particular circumstances of a case the judge is satisfied that the interests of justice require it.

Clause 16: The present section 36C provides a restriction on publication of material to identify the complainant. The clause is designed to make the substance of the provision apply to the new offences.

Clause 17: Consequential amendment to the Second Schedule.

PART IV : CHILD WELFARE ACT

Clause 18: Formal

Clauses 19 & 20: Are designed to enable existing provisions of the Child Welfare Act to continue to operate with respect to the new offences as they would in relation to their previous equivalents.

PART V : DISTRICT COURT ACT

Clause 21: Is to provide that the newly defined offences of sexual assault and aggravated sexual assault are to be regarded as being in the most serious bracket of criminal offences by remaining (as rape is now) within the exclusive jurisdiction of the Supreme Court for trial and not being permitted to be tried upon indictment in the District Court.