

Crimes (Rape) Bill

EXPLANATORY MEMORANDUM

Clause 1 sets out the purpose of the Act.

Clause 2 provides that the Act, except for sections 7 and 8, comes into operation on proclamation. Sections 7 and 8 amend the **Crimes (Sexual Offences) Act 1991** and are to be taken to have commenced on the date of Royal Assent of that Act, 16 April 1991.

Clause 3 substitutes new provisions in relation to rape and indecent assault for the existing provisions in the **Crimes Act**, and inserts a definition of consent and directions to be given to the jury in relation to consent. The proposed new sections are as follows:

Section 35 contains definitions. It includes a definition of “sexual penetration” which will apply to rape as well as the sexual offences against children and people with impaired mental functioning, and offences committed for their purpose of effecting sexual penetration (such as administration of a drug). The definition contains an exception for appropriate medical procedures carried out in good faith.

This section also provides that “vagina” includes the external genitalia. Penetration of the external genitalia alone is sufficient at common law to constitute rape. This definition ensures that the same situation applies in relation to the new statutory offence of rape.

Section 36 provides that “consent” means free agreement. This definition of consent applies to all the sexual offences, not just rape. This ensures that there is no different or lesser standard for consent in relation to the offences against children. Section 36 also contains a non-exhaustive list of circumstances in which a person does not freely agree.

Section 37 sets out directions that a trial judge must give the jury in cases where consent or where an alleged belief that the complainant was consenting is in issue.

Section 38 creates a statutory offence of rape. The Bill abolishes the existing offences of aggravated rape and aggravated indecent assault. The penalty for the statutory offence of rape is the same as the existing penalty for aggravated rape, twenty years imprisonment. The section also sets out the elements of the statutory offence of rape. The mental element that the prosecution must prove is the same as at common law, i.e. that the defendant knew that the complainant did not consent, or was aware that he or she might not be consenting, but nevertheless proceeded or continued with penetration.

Section 39 prohibits indecent assault. It replaces the existing statutory offences of indecent assault and aggravated indecent assault. The penalty is imprisonment for ten years which is the same as the penalty for the existing offence of aggravated indecent assault. The section sets out the elements of indecent assault which are the same as the existing offence.

Clause 4 amends the provision in the **Evidence Act** which prohibits questioning of the complainant or the introduction of evidence as to her prior sexual history without the leave of the court. The amendment extends the provision to apply to prior sexual experiences with the defendant, as well as with others. The defendant must demonstrate that evidence as to his prior sexual relations with the complainant is substantially relevant or a proper matter for cross-examination as to credit before it will be admitted.

Clause 5 relates to the use of alternative arrangements for giving evidence, including the use of closed circuit TV. It amends section 37C of the **Evidence Act** which was inserted by the **Crimes (Sexual Offences) Act 1991** and allows the use of alternative arrangements for witnesses who are children or suffer from impaired mental functioning in cases of sexual assault or personal violence. Clause 5 extends the availability of alternative arrangements to adult witnesses in sexual cases where the court is satisfied that the special arrangements are necessary for the reasons set out in the provision.

Clause 6 abolishes the common law offence of rape.

Clause 7 is a drafting amendment to the **Crimes (Sexual Offences) Act 1991**.

Clause 8 corrects minor errors in the Schedule to the **Crimes (Sexual Offences) Act 1991**.

Clause 9 contains transitional provisions. The procedural changes apply to proceedings that occur after the commencement of the provision regardless of when the alleged offence was committed. These are the definition and jury directions in relation to consent, the further limitations on evidence as to prior sexual history and the provision in relation to alternative arrangements for giving evidence. The changes to the substantive law apply only to offences alleged to have been committed after the commencement of the provision.

Clause 10 provides for consequential amendments set out in the Schedule to the Act.