

**CRIMES (SEXUAL ASSAULT) AMENDMENT ACT,
1981, No. 42**

New South Wales



ANNO TRICESIMO

ELIZABETHÆ II REGINÆ

Act No. 42, 1981.

An Act to amend the Crimes Act, 1900, so as to abolish the crime of rape, to create 3 new offences of sexual assault and to make certain provisions relating to those and other offences, including provisions relating to evidence in sexual assault proceedings, and for other purposes. [Assented to, 15th May, 1981.]

See also Child Welfare (Amendment) Act, 1981.

Crimes (Sexual Assault) Amendment.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

Short title.

1. This Act may be cited as the "Crimes (Sexual Assault) Amendment Act, 1981".

Commencement.

2. (1) This section and section 1 shall commence on the date of assent to this Act.

(2) Except as provided in subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

Amendment of Act No. 40, 1900.

3. The Crimes Act, 1900, is amended in the manner set forth in Schedule 1.

Savings and transitional provisions.

4. (1) Section 8 of the Interpretation Act, 1897, applies to and in respect of the abolition by section 63 of the Crimes Act, 1900, as amended by this Act, of the common law offences of rape and attempted rape in the same way as it applies to and in respect of the repeal of a former Act.

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(2) On and from the day appointed and notified under section 2 (2) and without affecting subsection (1), in any other Act or any instrument made under an Act—

- (a) a reference to rape, the crime of rape, the offence of rape or an offence under section 63 of the Crimes Act, 1900, shall be read and construed as a reference to an offence under section 61B, 61C or 61D of the Crimes Act, 1900; and
- (b) a reference to attempted rape, attempting to commit rape, attempting to commit the crime of rape, attempting to commit the offence of rape or an offence under section 65 of the Crimes Act, 1900, shall be read and construed as a reference to the offence of attempting to commit an offence under section 61B, 61C or 61D of the Crimes Act, 1900,

but a reference to a crime or misdemeanour which was punishable by death immediately before the commencement of the Crimes (Amendment) Act, 1955, shall be read and construed as not including a reference to an offence under section 61B, 61C or 61D of the Crimes Act, 1900.

SCHEDULE 1.

(Sec. 3.)

AMENDMENTS TO THE CRIMES ACT, 1900.

- (1) (a) Section 1, matter relating to Part III—
Omit “Rape and similar offences.—ss. 62–78F”, insert instead “Offences in the nature of rape, offences relating to other acts of sexual assault, &c.—ss. 61A–78F”.
- (b) Section 1, matter relating to Part XI—
Omit “405A”, insert instead “405c”.
- (c) Section 1, matter relating to Part XII—
After “442”, insert “, 442A”.

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SCHEDULE 1—*continued.*AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(2) Section 4 (3)—

After section 4 (2), insert:—

(3) Notwithstanding section 11A of the Interpretation Act, 1897, every heading to a provision of this Act shall be taken to be part of this Act if it appears in italics or in capital letters.

(3) Heading before section 62—

Omit the heading, insert instead:—

Offences in the nature of rape, offences relating to other acts of sexual assault, &c.

(4) Sections 61A–61G—

After the heading before section 62, insert:—

Sexual intercourse.

61A. (1) For the purposes of this section and sections 61B, 61C and 61D, “sexual intercourse” means—

- (a) sexual connection occasioned by the penetration of the vagina of any person or anus of any person by—
 - (i) any part of the body of another person; or
 - (ii) an object manipulated by another person, except where the penetration is carried out for proper medical purposes;
- (b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person;
- (c) cunnilingus; or

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SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

(2) For the purposes of sections 61B, 61C and 61D, a person shall not, by reason only of age, be presumed incapable of having sexual intercourse with another person or of having an intent to have sexual intercourse with another person.

(3) Subsection (2) shall not be construed so as to affect the operation of any law relating to the age at which a child can be convicted of an offence.

(4) The fact that a person is married to a person—

(a) upon whom an offence under section 61B, 61C or 61D is alleged to have been committed shall be no bar to the firstmentioned person being convicted of the offence; or

(b) upon whom an offence under any of those sections is alleged to have been attempted shall be no bar to the firstmentioned person being convicted of the attempt.

Sexual assault category 1—inflicting grievous bodily harm with intent to have sexual intercourse.

61B. (1) Any person who maliciously inflicts grievous bodily harm upon another person with intent to have sexual intercourse with the other person shall be liable to penal servitude for 20 years.

(2) Any person who maliciously inflicts grievous bodily harm upon another person with intent to have sexual intercourse with a third person who is present or nearby shall be liable to penal servitude for 20 years.

Sexual assault category 2—inflicting actual bodily harm, &c., with intent to have sexual intercourse.

61C. (1) Any person who—

(a) maliciously inflicts actual bodily harm upon another person; or

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SCHEDULE 1—*continued.*AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(b) threatens to inflict actual bodily harm upon another person by means of an offensive weapon or instrument, with intent to have sexual intercourse with the other person shall be liable to penal servitude for 12 years.

(2) Any person who—

(a) maliciously inflicts actual bodily harm upon another person; or

(b) threatens to inflict actual bodily harm upon another person, with intent to have sexual intercourse with a third person who is present or nearby shall be liable to penal servitude for 12 years.

Sexual assault category 3—sexual intercourse without consent.

61D. (1) Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse shall be liable to penal servitude for 7 years or, if the other person is under the age of 16 years, to penal servitude for 10 years.

(2) For the purposes of subsection (1), a person who has sexual intercourse with another person without the consent of the other person and who is reckless as to whether the other person consents to the sexual intercourse shall be deemed to know that the other person does not consent to the sexual intercourse.

(3) For the purposes of subsection (1) and without limiting the grounds upon which it may be established that consent to sexual intercourse is vitiated—

(a) a person who consents to sexual intercourse with another person—

(i) under a mistaken belief as to the identity of the other person; or

(ii) under a mistaken belief that the other person is married to the person,

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SCHEDULE 1—*continued.*AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

- shall be deemed not to consent to the sexual intercourse;
- (b) a person who knows that another person consents to sexual intercourse under a mistaken belief referred to in paragraph (a) shall be deemed to know that the other person does not consent to the sexual intercourse;
 - (c) a person who submits to sexual intercourse with another person as a result of threats or terror, whether the threats are against, or the terror is instilled in, the person who submits to the sexual intercourse or any other person, shall be regarded as not consenting to the sexual intercourse; and
 - (d) a person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse.

Sexual assault category 4—indecent assault and act of indecency.

61E. (1) Any person who assaults another person and, at the time of, or immediately before or after, the assault, commits an act of indecency upon or in the presence of the other person, shall be liable to imprisonment for 4 years or, if the other person is under the age of 16 years, to penal servitude for 6 years.

(2) Any person who commits an act of indecency with or towards a person under the age of 16 years, or incites a person under that age to an act of indecency with that or another person, shall be liable to imprisonment for 2 years.

(3) For the purposes of this Act, a person who incites a person under the age of 16 years to an act of indecency, as referred to in subsection (2), shall be deemed to commit an offence on the person under the age of 16 years.

Attempt to commit offence under section 61B, 61C, 61D or 61E.

61F. Any person who attempts to commit an offence under section 61B, 61C, 61D or 61E shall be liable to the penalty provided for the commission of the offence.

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SCHEDULE 1—*continued.*AMENDMENTS TO THE CRIMES ACT, 1900—*continued.***Alternative verdicts.**

61G. (1) Where on the trial of a person for an offence under section 61B the jury is satisfied that the accused maliciously inflicted actual bodily harm with the intent charged but is not satisfied that the harm was grievous bodily harm, it may find the accused not guilty of the offence charged but guilty of an offence under section 61C, and the accused shall be liable to punishment accordingly.

(2) Where on the trial of a person for an offence under section 61D the jury is satisfied that the person upon whom the offence was alleged to have been committed was a girl under the age of 16 years, but above the age of 10 years, and that the accused had carnal knowledge of her but is not satisfied that carnal knowledge was had without her consent, it may find the accused not guilty of the offence charged but guilty of an offence under section 71, and the accused shall be liable to punishment accordingly.

(3) Where on the trial of a person for an offence under section 61D the jury is not satisfied that the accused is guilty of the offence charged but is satisfied that the accused is guilty of an offence under section 78A or 78B, as the case may require, it may find the accused not guilty of the offence charged but guilty of an offence under section 78A or 78B, as the case may be, and the accused shall be liable to punishment accordingly.

(5) Section 63—

Omit the section, insert instead:—

Common law offences of rape and attempted rape abolished.

63. The common law offences of rape and attempted rape are abolished.

(6) Section 64—

After “rape” where firstly occurring, insert “committed before the commencement of Schedule 1 to the Crimes (Sexual Assault) Amendment Act, 1981.”.

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SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

- (7) Section 65—
Omit the section.
- (8) Sections 76, 76A—
Omit the sections.
- (9) (a) Section 77—
Omit “the” where firstly occurring, insert instead “a”.
- (b) Section 77—
After “step-daughter”, insert “the subject of the charge”.
- (c) Section 77—
Omit “sections” wherever occurring, insert instead “section 61E (2),”.
- (d) Section 77—
Omit “, 74 or 76A”, insert instead “or 74”.
- (e) Section 77—
Omit “the female” wherever occurring, insert instead “a female the subject of the charge”.
- (f) Section 77—
Omit “76” wherever occurring, insert instead “61E (1)”.
- (g) Section 77, proviso—
(i) Omit “, 72 or 76A”, insert instead “or 72”.
(ii) From paragraph (c), omit “either”, insert instead “that”.
(iii) Omit paragraph (c) (i).
(iv) From paragraph (c) (ii), omit “that” where firstly occurring.

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SCHEDULE 1—*continued.*AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(h) Section 77 (2)—

At the end of section 77, insert:—

(2) Subsection (1) has effect—

- (a) in relation to a charge under section 76 as in force at any time before the commencement of Schedule 1 to the Crimes (Sexual Assault) Amendment Act, 1981, in the same way as it has effect in relation to a charge under section 61E (1); and
- (b) in relation to a charge under section 76A as in force at any time before that commencement, in the same way as it has effect in relation to a charge under section 61E (2).

(10) Section 77A—

Omit the section, insert instead:—

Proceedings in camera in certain cases.

77A. (1) Any proceedings or any part of any proceedings in respect of an offence under section 61B, 61C, 61D, 61E, 66, 67, 68, 71, 72, 72A, 73 or 74 or of an offence of attempting, or of conspiracy or incitement, to commit an offence under any of those sections shall, if the Court so directs, be held in camera.

(2) Subsection (1) has effect in relation to proceedings in respect of an offence under section 63, 65, 76 or 76A as respectively in force at any time before the commencement of Schedule 1 to the Crimes (Sexual Assault) Amendment Act, 1981, in the same way as it has effect in relation to proceedings in respect of the offences referred to in that subsection.

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SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(11) Section 78—

Omit “sections 71, 72, or 76 shall, if the girl in question”, insert instead “section 61E (1), 71 or 72, or under section 76 as in force at any time before the commencement of Schedule 1 to the Crimes (Sexual Assault) Amendment Act, 1981, shall, if the person upon whom the offence is alleged to have been committed”.

(12) Section 78E—

Omit “63 or under section 65”, insert instead “63 as in force at any time before the commencement of Schedule 1 to the Crimes (Sexual Assault) Amendment Act, 1981, or section 65 as so in force,”.

(13) Sections 379–380—

Omit the sections.

(14) Sections 405B, 405C—

After section 405A, insert:—

Warning to be given by Judge in relation to lack of complaint in certain sexual offence proceedings.

405B. (1) For the purposes of this section, a prescribed sexual offence is an offence under section 61B, 61C, 61D or 61E or an offence of attempting, or of conspiracy or incitement, to commit an offence under section 61B, 61C, 61D or 61E.

(2) Where on the trial of a person for a prescribed sexual offence evidence is given or a question is asked of a witness which tends to suggest an absence of complaint in respect of the commission

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SCHEDULE 1—*continued.*AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

of the alleged offence by the person upon whom the offence is alleged to have been committed or to suggest delay by that person in making any such complaint, the Judge shall—

- (a) give a warning to the jury to the effect that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false; and
- (b) inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault.

Judge not required to warn jury against convicting person of certain sexual offences.

405c. (1) In this section, “prescribed sexual offence” has the same meaning as it has in section 405B (1).

(2) On the trial of a person for a prescribed sexual offence, the Judge is not required by any rule of law or practice to give, in relation to any offence of which the person is liable to be convicted on the charge for the prescribed sexual offence, a warning to the jury to the effect that it is unsafe to convict the person on the uncorroborated evidence of the person upon whom the offence is alleged to have been committed.

(3) Nothing in subsection (2) affects the operation (if any) of any rule of law or practice which requires—

- (a) a Judge on the trial of a person for a sexual offence alleged to have been committed before the commencement of this section to give the jury a warning as referred to in subsection (2);
- (b) a Judge on the trial of a person for a sexual offence alleged to have been committed after the commencement of this section, being a sexual offence other than a prescribed sexual offence, to give the jury a warning as referred to in subsection (2); or

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SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

- (c) a Judge on the trial of any person to give the jury a warning to the effect that it is unsafe to convict the person on the uncorroborated sworn evidence of a child.

(15) Sections 409A–409C—

After section 409, insert:—

Depositions of previous connected proceedings may be read as evidence in committal proceedings.

409A. (1) In this section—

“deposition” has the same meaning as it has where it appears in section 409;

“prescribed sexual offence” has the same meaning as it has in section 405B (1).

(2) In a hearing referred to in section 41 of the Justices Act, 1902, being a hearing in relation to a prescribed sexual offence, where—

- (a) the prescribed sexual offence is alleged to have been committed in the course of a connected set of circumstances in which another prescribed sexual offence is alleged to have been committed;
- (b) a person has been committed for trial in respect of, or has been convicted of, the other prescribed sexual offence; and
- (c) each of the prescribed sexual offences is alleged to have been committed on the same person,

any of the depositions of the person referred to in paragraph (c) taken at the proceedings in which the person referred to in paragraph (b) was committed or tried in respect of the other prescribed sexual offence may, in so far as they are relevant to the prescribed sexual offence the subject of the hearing, be read as evidence.

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SCHEDULE 1—*continued.*AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(3) Where, in a hearing referred to in subsection (2) in relation to a prescribed sexual offence, the person charged with that offence has been served with a copy of the depositions referred to in subsection (2) and has had a reasonable opportunity to examine them, the person upon whom the offence is alleged to have been committed shall not, without the leave of the Justice, be asked by or on behalf of the person so charged to give in evidence any material contained in, or to answer a question which is the same or substantially similar to a question an answer to which is contained in, a deposition which may, pursuant to subsection (2), be read as evidence.

Admissibility of evidence relating to sexual experience, &c.

409B. (1) In this section—

“prescribed sexual offence” has the same meaning as it has in section 405B (1);

“prescribed sexual offence proceedings” means proceedings in which a person stands charged with a prescribed sexual offence, whether the person stands charged with that offence alone or together with any other offence (as an additional or alternative count) and whether or not the person is liable, on the charge, to be found guilty of any other offence;

“the accused person”, in relation to any proceedings, means the person who stands, or any of the persons who stand, charged in those proceedings with a prescribed sexual offence;

“the complainant”, in relation to any proceedings, means the person, or any of the persons, upon whom a prescribed sexual offence with which the accused person stands charged in those proceedings is alleged to have been committed.

(2) In prescribed sexual offence proceedings, evidence relating to the sexual reputation of the complainant is inadmissible.

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SCHEDULE 1—*continued.*AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(3) In prescribed sexual offence proceedings, evidence which discloses or implies that the complainant has or may have had sexual experience or a lack of sexual experience or has or may have taken part or not taken part in any sexual activity is inadmissible except—

(a) where it is evidence—

- (i) of sexual experience or a lack of sexual experience of, or sexual activity or a lack of sexual activity taken part in by, the complainant at or about the time of the commission of the alleged prescribed sexual offence; and
- (ii) of events which are alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed;

(b) where it is evidence relating to a relationship which was existing or recent at the time of the commission of the alleged prescribed sexual offence, being a relationship between the accused person and the complainant;

(c) where—

- (i) the accused person is alleged to have had sexual intercourse, as defined in section 61A (1), with the complainant and the accused person does not concede the sexual intercourse so alleged; and
- (ii) it is evidence relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged to have been had by the accused person;

(d) where it is evidence relevant to whether—

- (i) at the time of the commission of the alleged prescribed sexual offence, there was present in the complainant a disease which, at any relevant time, was absent in the accused person; or

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SCHEDULE 1—*continued.*AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

- (ii) at any relevant time, there was absent in the complainant a disease which, at the time of the commission of the alleged prescribed sexual offence, was present in the accused person;
- (e) where it is evidence relevant to whether the allegation that the prescribed sexual offence was committed by the accused person was first made following a realisation or discovery of the presence of pregnancy or disease in the complainant (being a realisation or discovery which took place after the commission of the alleged prescribed sexual offence); or
- (f) where it is evidence given by the complainant in cross-examination by or on behalf of the accused person, being evidence given in answer to a question which may, pursuant to subsection (5), be asked,

and its probative value outweighs any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission.

(4) In prescribed sexual offence proceedings, a witness shall not be asked—

- (a) to give evidence which is inadmissible under subsection (2) or (3); or
- (b) by or on behalf of the accused person, to give evidence which is or may be admissible under subsection (3) unless the Court or Justice has previously decided that the evidence would, if given, be admissible.

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SCHEDULE 1—*continued.*AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(5) In prescribed sexual offence proceedings, where the Court or Justice is satisfied that—

- (a) it has been disclosed or implied in the case for the prosecution against the accused person that the complainant has or may have, during a specified period or without reference to any period—
 - (i) had sexual experience, or a lack of sexual experience, of a general or specified nature; or
 - (ii) taken part or not taken part in sexual activity of a general or specified nature; and
- (b) the accused person might be unfairly prejudiced if the complainant could not be cross-examined by or on behalf of the accused person in relation to the disclosure or implication,

the complainant may be so cross-examined but only in relation to the experience or activity of the nature (if any) so specified during the period (if any) so specified.

(6) On the trial of a person, any question as to the admissibility of evidence under subsection (2) or (3) or the right to cross-examine under subsection (5) shall be decided by the Judge in the absence of the jury.

(7) Where a Court or Justice has decided that evidence is admissible under subsection (3), the Court or Justice shall, before the evidence is given, record or cause to be recorded in writing the nature and scope of the evidence that is so admissible and the reasons for that decision.

(8) Nothing in this section authorises the admission of evidence of a kind which was inadmissible immediately before the commencement of this section.

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SCHEDULE 1—*continued.*AMENDMENTS TO THE CRIMES ACT, 1900—*continued.***Limitation on dock statements in certain sexual offence proceedings.**

409C. (1) In prescribed sexual offence proceedings referred to in section 409B, a person may not, in any statement made under section 405, make reference to a matter which would not, by virtue of section 409B, be admissible if given on oath.

(2) Where a person has made reference, in a statement made under section 405, to a matter which would not, by virtue of section 409B, be admissible if given on oath, the Judge shall tell the jury to disregard that matter.

(16) Section 442A—

After section 442, insert:—

Circumstances of certain sexual offences to be considered in passing sentence.

442A. Where a person is convicted of an offence under section 61B or 61C and an offence under section 61D, whether at the same time or at different times, the Judge passing sentence on the person in respect of the 2 convictions or the later of the 2 convictions, as the case may be, shall, if it appears that the 2 offences arose substantially out of the one set of circumstances, take that fact into account in passing sentence.

(17) Section 476 (6) (b)—

Omit “71, 72, 76 or 76A, where the female the subject of the charge”, insert instead “61E, 71 or 72, or in section 76 as in force at any time before the commencement of Schedule 1 to the Crimes (Sexual Assault) Amendment Act, 1981, or section 76A as so in force, where the person upon whom the offence was committed”.

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SCHEDULE 1—*continued.*

AMENDMENTS TO THE CRIMES ACT, 1900—*continued.*

(18) (a) Section 578 (1)—

Omit “sections 63, 65, 66, 67, 68, 71, 72, 72A, 73, 74, 76, 76A, 78A, 78B, 79, 80, 81, 81A, 81B, 86, 87, 89, 90, 91A or 91B”, insert instead “section 61B, 61C, 61D, 61E, 66, 67, 68, 71, 72, 72A, 73, 74, 78A, 78B, 79, 80, 81, 81A, 81B, 86, 87, 89, 90, 91A or 91B or an offence of attempting, or of conspiracy or incitement, to commit an offence under any of those sections”.

(b) Section 578 (1A)—

After section 578 (1), insert:—

(1A) Subsection (1) has effect in relation to a trial for an offence under section 63, 65, 76 or 76A as respectively in force at any time before the commencement of Schedule 1 to the Crimes (Sexual Assault) Amendment Act, 1981, in the same way as it has effect in relation to trials for the offences referred to in that subsection.

(c) Section 578 (2)—

Omit “subsection (1)”, insert instead “this section”.