CRIMINAL LEGISLATION (AMENDMENT) ACT 1992 No. 2

NEW SOUTH WALES

TABLE OF PROVISIONS

CRIMINAL LEGISLATION (AMENDMENT) ACT 1992 No. 2

NEW SOUTH WALES

Act No. 2, 1992

An Act to amend the Crimes Act 1900, the Bail Act 1978, the Criminal Appeal Act 1912, the Mental Health (Criminal Procedure) Act 1990 and the Summary Offences Act 1988 with respect to sexual offences, bail applications, reduction of sentences, apprehended violence orders, appeals against sentences, judges instead of juries determining unfitness to plead and special hearings and other matters; and for other purposes. [Assented to 17 March 1992]

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Criminal Legislation (Amendment) Act 1992.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Amendments

3. Each Act specified in Schedules 1–5 is amended as set out in those Schedules.

Explanatory notes

4. Matter appearing under the heading "Explanatory note" in Schedules 1–5 does not form part of this Act.

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40

Amendments—consequential

(1) Section 1 **(Short title and contents of Act):**

(a) From the matter relating to Part 12, omit " , 442A", insert instead " – 442B".

(b) From the matter relating to Part 14, omit "(4A) *Unlawfully using vehicle or boat—s.* 526A".

Explanatory note—item (1)

Item (1) (a) is consequential on the proposed amendment contained in item (10) inserting section 442B.

Item (1) (b) is consequential on the proposed amendment contained in item (14) omitting section 526A.

Amendment—definition of "sexual intercourse"

(2) Section 61H **(Definition of sexual intercourse etc.):**

Omit section 61H (1) (a), insert instead:

(a) sexual connection occasioned by the penetration to any extent of the genitalia of a female person or the anus of any person by:

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

(i) any part of the body of another person; or

(ii) any object manipulated by another person,

except where the penetration is carried out for proper medical purposes; or

Explanatory note—item (2)

The definition of "sexual intercourse" currently found in section 61H includes, as part of the definition, the phrase "sexual connection occasioned by the penetration of the vagina of any person". This phrase is repeated from the definition previously inserted as section 61A by the Crimes (Sexual Assault) Amendment Act 1981.

There is the possibility that the identification of a ,particular part of the female genitalia, namely, the vagina, may lead to the conclusion that the penetration of those parts of the female genitalia which are external to the vagina would not be sufficient to constitute sexual intercourse. (This argument was considered and rejected in *R v Randall* by the South Australian Court of Criminal Appeal in June 1991.) The technicality of the current definition could raise particular difficulties in child sexual assault cases where the evidence of the child is that penetration took place but is not at all specific as to the degree of penetration.

Before the 1981 amendments, the common law position concerning rape was that even the slightest degree of penetration of the woman's genitals was sufficient to constitute the offence. (See, for example, *R v Lines* (1844) 1 Car & K 393.) It is apparent that the 1981 amendments did not intend to change the common law in this respect by making legal something that was previously illegal. The commentary on the 1981 amendments, "Sexual Assault Law Reforms in New South Wales" by the then Director of the Criminal Law Review Division in the Attorney General's Department, noted that "what was previously covered by the law of rape will be prohibited under the new law".

Part of the proposed amendment comprises the expression "genitalia of a female person". Whether or not the expression applies to a transsexual can only be determined having regard to the circumstances of the transsexual. (See *R v Harris and McGuiness* (1988) 17 NSWLR 158.)

Amendments—acts of indecency

(3) Section 61N **(Act of indecency):**

After "with" where secondly occurring, insert "or towards".

Explanatory note—item (3)

Item (3) amends section 61N to make the language of the provision relating to incitement to an act of indecency consistent with the language relating to the offence of committing an act of indecency.

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

Amendments—consent to sexual intercourse

(4) Section 61R **(Consent):**

(a) After section 61R (2) (a), insert:

(a1) a person who consents to sexual intercourse with another person under a mistaken belief that the sexual intercourse is for medical or hygienic purposes is taken not to consent to the sexual intercourse; and

(b) Section 61R (2) (b):

After "paragraph (a)", insert "or (a1)".

Explanatory note—item (4)

Item (4) provides that consent to sexual intercourse that is given under a mistaken belief that it is for medical or hygienic purposes is taken not to be consent. The purpose of the amendment is to provide that such an act of sexual intercourse will amount to sexual assault in such circumstances, even though the act is consented to. This will overcome the possible effect in New South Wales of the decision in *R v Mobilio* in 1990 in which the Victorian Court of Criminal Appeal held there was consent to an act of sexual intercourse even though the victims concerned might have believed the act was required for diagnostic purposes.

Amendment—time limit on prosecution of certain offences

(5) Section 78 **(Limitation):**

Omit the section.

Explanatory note—item (5)

Item (5) removes the 12 month limit for commencing prosecutions for offences under sections 61E (1), 66C (1), 66D, 71,72 and 76 (relating to sexual assault) if the child on whom the offence was alleged to have been committed was at the time of the alleged offence between 14 and 16 years of age.

Amendment—acts of gross indecency

(6) Section 78Q **(Acts of gross indecency):**

After "with" wherever occurring, insert "or towards".

Explanatory note—item (6)

Item (6) amends section 78Q to make the language of the provision more consistent with section 61N and other provisions relating to acts of indecency.

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

Amendment—time limit on prosecution of certain offences

(7) Section 78T **(Limitations (cf. ss. 78, 78F)):**

Omit section 78T (1).

Explanatory note—item (7)

Item (7) removes the 12 month time limit for commencing prosecutions for offences under sections 78K and 78L (relating to homosexual intercourse with males) if the male on whom the offence was alleged to have been committed was at the time of the alleged offence between 16 and 18 years of age.

Amendments—apprehension of offenders

(8) Section 352 **(Person in act of committing or having committed offence):**

(a) Section 352 (1), (2) and (3):

Omit "a Justice" wherever occurring, insert instead "an authorised Justice".

(b) Omit section 352 (5), insert instead:

(5) In this section:

"authorised Justice" means:

(a) a Magistrate; or

(b) a Justice employed in the Department of Courts Administration;

"telegraph" includes telephone, radio, telex, facsimile transmission, computer used to relay information and any other communication device.

Explanatory note—item (8)

Item (8) restricts the Justices before whom an apprehended offender may be brought to be dealt with according to law to Magistrates or Justices employed in the Department of Courts Administration. The effect of this and other amendments to the Bail Act 1978 will be to confine the determination of bail applications to such Justices.

Amendment–witness statements

(9) Section 409 **(Depositions may be read as evidence for prosecution etc.):**

Omit section 409 (11), insert instead:

(11) In this section, **"prescribed statement"** means:

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

(a) a written statement the whole or a part of which was admitted as evidence under section 48A of the Justices Act 1902 and includes a part of any such statement rejected under section 48F of that Act; or

(b) a written statement the whole or a part of which was tendered as evidence on a plea of guilty under section 51A of the Justices Act 1902.

Explanatory note—item (9)

Item (9) allows statements tendered as evidence on a plea of guilty in committal proceedings to be used, if the maker of the statement is unavailable, as evidence if the plea of guilty is reversed.

Amendment—reduction of sentences

(10) Section 442B:

After section 442A, insert:

Reduction of sentences for assistance to authorities

442B. (1) In determining the sentence to be passed on a person convicted of an offence, a court may reduce the sentence it would otherwise impose, having regard to the degree to which the person has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence or other offences.

(2) A court must not reduce a sentence so that the sentence becomes unreasonably disproportionate to the nature and circumstances of the offence.

(3) In deciding whether to reduce a sentence and the extent of any reduction, the court is required to consider the following matters:

(a) the effect of the offence for which the offender is being sentenced on the victim or victims of the offence and the family or families of the victim or victims;

(b) the significance and usefulness of the offender's assistance to the authority or authorities concerned, taking into consideration any evaluation by the authority or authorities of the assistance rendered or undertaken to be rendered;

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

(c) the truthfulness, completeness and reliability of any information or evidence provided by the offender;

(d) the nature and extent of the offender's assistance or promised assistance;

(e) the timeliness of the assistance or undertaking to assist;

(f) any benefits that the offender has gained or may gain by reason of the assistance or undertaking to assist;

(g) whether the offender will suffer harsher custodial conditions;

(h) any injury suffered by the offender or the offender's family, or any danger or risk of injury to the offender or the offender's family, resulting from the assistance or the undertaking to assist;

(i) whether the assistance or promised assistance concerns the offence for which the offender is being sentenced or an unrelated offence;

(j) the likelihood that the offender will commit further offences after release.

(4) Nothing in this section precludes a court from considering any other matter that- the court is required to consider or that the court considers it is appropriate to consider in sentencing an offender or in deciding to reduce a sentence and the extent of any reduction.

(5) In this section, a reference to a court includes a reference to a Judge and a Magistrate (whether exercising jurisdiction in respect of an indictable offence or a summary offence).

Explanatory note—item (10)

Item (10) inserts a new section 442B. The purpose of this section is to provide guidance to sentencing courts when dealing with offenders who have assisted the authorities.

The section recognises the well-established practice of courts discounting sentences where the offender has assisted or undertakes to assist law enforcement authorities in the prevention, detection or investigation of an offence. It specifies that the overriding principle to be observed in applying the practice is that a court must not reduce a sentence so that the sentence becomes unreasonably disproportionate to the nature and circumstances of the offence. The section also lists a number of criteria a court is required to consider in deciding whether to reduce a sentence.

SCHEDULE l—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

Amendments—inquiries into guilt subsequent to conviction

(11) Section 475 **(Governor or Judge may direct inquiry etc.):**

(a) After "conviction" in section 475 (l), insert "in any court".

(b) After "Supreme Court" in section 475 (l), insert "on application by or on behalf of the person or".

(c) From section 475, omit "Justice" wherever occurring, insert instead "prescribed person".

(d) After section 475 (4), insert:

(5) In this section:

"prescribed person" means a Justice or a judicial officer within the meaning of the Judicial Officers Act 1986.

Explanatory note—item (11)

Item (11) amends a provision which currently enables the Governor on petition of a convicted person or the Supreme Court on its own motion to direct a Justice to inquire into any doubt or question arising as to the guilt of the convicted person, or any mitigating circumstances or evidence in the case.

The proposed amendments will enable the Supreme Court to give such a direction on application by or on behalf of any convicted person, make it clear that such a direction may be given in respect of a conviction in any court and enable such a direction to be given to any judicial officer.

Amendments—indictable offences punishable summarily

(12) Section 476 **(Indictable offences punishable summarily with consent of accused):**

(a) After "offence" in section 476 (6) (a) (i), insert "(other than an offence mentioned in section 154A)";

(b) From section 476 (6) (d), omit "154A,".

Explanatory note—item (12)

Item (12) is consequential on the proposed amendment contained in item (13).

Amendments—taking conveyance

(13) Section 496A **(Additional indictable offences punishable summarily without consent of accused):**

Omit section 496A (l), insert instead:

SCHEDULE l—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

(1) Proceedings for an offence under section 93G, 93H or 154A may be disposed of in a summary manner before a Local Court constituted by a Magistrate sitting alone.

Explanatory note—item (13)

Item (13) inserts a provision enabling offences under section 154A (taking a conveyance without consent of owner) to be dealt with summarily without the consent of the accused whatever the value of the conveyance. The penalty that may be imposed is imprisonment for a maximum period of 2 years, or a fine not exceeding $5,000, or both.

(14) Section 526A **(Taking a conveyance without the consent of the owner):**

Omit the section and the short heading before the section.

Explanatory note—item (14)

Item (14) is consequential on the proposed amendment contained in item (13) which makes it no longer necessary to have a separate summary offence of taking a conveyance without consent.

Amendment—apprehended violence orders

(15) Section 562D **(Prohibitions and restrictions imposed by orders):**

Omit section 562D (2), insert instead:

(2) In deciding whether or not to make an order which prohibits or restricts access to the defendant's residence, the court is to consider:

(a) the accommodation needs of all relevant parties; and

(b) the effect of making an order on any children living or ordinarily living at the residence; and

(c) the consequences for the person for whose protection the order would be made and any children living or ordinarily living at the residence if an order restricting access by the defendant to the residence is not made.

Explanatory note—item (15)

Item (15) includes among the matters a court must take into consideration in deciding whether or not to make an apprehended violence order restricting access to a defendant's residence the consequences for the person for whose protection the order would be made, and for children living or ordinarily living at the residence, if the order is not made.

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

Amendment—savings and transitional provisions

(16) Eleventh Schedule **(Savings and transitional provisions):**

After Part 1, insert:

Part 2—Criminal Legislation (Amendment) Act 1992

Sexual intercourse

3. It is declared that, from 14 July 1981 (being the date of commencement of the amendments made by the Crimes (Sexual Assault) Amendment Act 1981) until the commencement of the amendment made by the Criminal Legislation (Amendment) Act 1992 to section, 61H, an act has been an act of sexual intercourse within the meaning of this Act at the relevant time if the act has comprised sexual intercourse within the meaning of section 61H, as amended by the Criminal Legislation (Amendment) Act 1992.

Consent to sexual intercourse

4. The amendments to section 61R made by the Criminal Legislation (Amendment) Act 1992 apply only in respect of offences committed after the commencement of the amendments.

Application of amendment to section 409

5. The amendment made by the Criminal Legislation (Amendment) Act 1992 to section 409, to the extent to which it applies to a written statement the whole or a part of which was tendered as evidence on a plea of guilty under section 51A of the Justices Act 1902, applies to such a statement tendered after the commencement of the amendment.

Operation of amendments relating to taking of vehicles without consent and other indictable offences

6. (1) The amendments to sections 476 and 496A made by the Criminal Legislation (Amendment) Act 1992 apply only in respect of proceedings for offences committed after the commencement of the amendments.

(2) This Act applies in respect of proceedings for offences committed before the commencement of any such amendments as if the amendments had not been made.

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

(3) Section 526A continues to apply to offences committed before that section was repealed as if the section is still in force.

Reduction of sentences for assistance to authorities

7. Section 442B of this Act and section 5DA of the Criminal Appeal Act 1912, as inserted by the Criminal Legislation (Amendment) Act 1992, apply only to a sentence imposed after the commencement of the section concerned, but so apply whether the offence in relation to which the sentence is imposed was committed before or after that commencement.

Explanatory note—item (16)

Item (16) inserts the following savings and transitional provisions, relating to amendments made by the proposed Act:

- a provision applying the new definition of "sexual intercourse" to sexual assault offences which occurred after 14 July 1981
- a provision that makes it clear that amendments relating to consent in sexual offences apply only in respect of offences committed after the commencement of the amendments
- a provision that applies amendments enabling the use of previous witnesses' statements in the trial of a person who has previously pleaded guilty to statements first used after the commencement of the amendment
- a provision that makes it clear that amendments in relation to the summary disposal of offences apply only in respect of proceedings for offences committed after the amendments commence
- a provision applying the section enabling sentences to be reduced for assistance or promised assistance to law enforcement authorities, and the section enabling appeals against such sentences in the event of a failure to assist, to sentences imposed after the section commences whether or not the offence was committed before or after the commencement

SCHEDULE 2—AMENDMENT OF BAIL ACT 1978 No. 161

Amendments—bail determinations

(1) Section 23 **(Power of magistrates and justices to grant bail):**

After "justice", insert "(being a justice employed in the Department of Courts Administration)".

(2) Section 50 **(Arrest for absconding or breaching condition):**

After section 50 (4), insert:

(5) In this section, "court" does not include a justice who is not a justice employed in the Department of Courts Administration.

Explanatory note—items (1) and (2)

Items (1) and (2) provide that the only justices who may make bail determinations are justices employed in the Department of Courts Administration.

SCHEDULE 3—AMENDMENT OF CRIMINAL APPEAL ACT 1912 No. 16

Amendments—appeals by Crown against sentence

(1) Section 5D **(Appeal by Crown against sentence):**

After section 5D (2), insert:

(3) This section does not apply to an appeal referred to in section 5DA.

(2) Section 5DA:

After section 5D, insert:

Appeal by Crown against reduced sentence for assistance to authorities

5DA. (1) The Attorney General or the Director of Public Prosecutions may .appeal to the Court of Criminal Appeal against any sentence imposed on a person that was reduced because the person undertook to assist law enforcement authorities if the person fails wholly or partly to fulfil the undertaking.

SCHEDULE 3—AMENDMENT OF CRIMINAL APPEAL ACT 1912 No. 16—*continued*

(2) On an appeal the Court of Criminal Appeal may, if it is satisfied that the person has failed wholly or partly to fulfil the undertaking, vary the sentence and impose such sentence as it thinks fit.

Explanatory note—items (1) and (2)

Item (2) inserts a provision that enables the Crown to appeal against a reduced sentence where the sentence has been reduced because of assistance to be given to law enforcement authorities and that assistance has not been given.

Item (1) makes an amendment consequential on the amendment made by item (2).

SCHEDULE 4—AMENDMENT OF MENTAL HEALTH (CRIMINAL PROCEDURE) ACT 1990 No. 10

Amendments—determination of question of unfitness

(1) Section 11 **(Determination of question of unfitness):**

After "purpose" in section 11 (l), insert ", except as provided by section 11A)'.

(2) Section 11A:

After section 11, insert:

Determination of question of unfitness by judge

11A. (1) The question of a person's unfitness to be tried for an offence is to be determined by the Judge alone if the person so elects in accordance with this section and the Judge is satisfied that the person, before making the election, sought and received advice in relation to the election from a barrister or solicitor.

(2) An election may be made only with the consent of the prosecutor.

(3) A person who elects to have the question determined by the Judge alone may, at any time before the date fixed for the determination of the person's unfitness to be tried, subsequently elect to have the question determined by a jury.

(4) The Judge may make any finding that could have been made by a jury on the question of the person's unfitness to be tried. Any such finding has, for all purposes, the same effect as a finding of a jury.

SCHEDULE 4—AMENDMENT OF MENTAL HEALTH (CRIMINAL PROCEDURE) ACT 1990 No. 10—*continued*

(5) Any determination by the Judge under this section must include the principles of law applied by the Judge and the findings of fact on which the Judge relied.

(6) Rules of court may be made with respect to elections under this section.

Explanatory note—items (1) and (2)

Item (2) enables the question of whether a person is unfit to be tried for an offence to be determined by a Judge instead of a jury with the consent of the person and the prosecutor.

Item (1) is consequential on the proposed amendment contained in item (2).

Amendments—determination of special hearings

(3) Section 19 **(Court to hold special hearing on direction of Attorney General):**

After "is" in section 19 (2), insert ", except as provided by section 21A,".

(4) Sections 2IA, 21B:

After section 21, insert:

Judge may try special hearing

21A. (1) At a special hearing, the question whether an accused person has committed an offence charged or any other offence available as an alternative to an offence charged is to be determined by the Judge alone if the person so elects in accordance with this section and the Judge is satisfied that the person, before making the election, sought and received advice in relation to the election from a barrister or solicitor.

(2) An election may be made only with the consent of the prosecutor.

(3) An election must be made before the date fixed for the person's special hearing in the Supreme Court or District court.

(4) An accused person who elects to have a special hearing determined by the Judge alone may, at any time before the date fixed for the person's special hearing, subsequently elect to have the matter determined by a jury.

SCHEDULE 4—AMENDMENT OF MENTAL HEALTH (CRIMINAL PROCEDURE) ACT 1990 No. 10—*continued*

(5) Rules of court may be made with respect to elections under this section.

Verdict of Judge

21B. (1) The verdicts available to a Judge who determines a special hearing without a jury are the verdicts available to a jury under section 22. Any such verdict has, for all purposes, the same effect as a verdict of a jury.

(2) A determination by a Judge in any such special hearing must include the principles of law applied by the Judge and the findings of fact on which the Judge relied.

(5) Section 25 **(Special verdict of not guilty by reason of mental illness):**

After "jury" wherever occurring, insert "or Judge, as the case may be,".

Explanatory note—items (3)–(5)

Item (4) enables a special hearing of an accused person who is unfit to be tried for an offence to be determined by a judge instead of a jury, with the consent of the person and the prosecutor.

Items (3) and (5) are consequential on the proposed amendment contained in item (4).

SCHEDULE 5—AMENDMENTOF SUMMARY OFFENCES ACT 1988 No. 25

Amendment—Climbing on or jumping from buildings and other structures

Section 8A:

After section 8, insert:

Climbing on or jumping from buildings and other structures

8A. (1) A person who risks the safety of any other person as a consequence of:

(a) abseiling, jumping or parachuting from any part of a building or other structure; or

SCHEDULE 5—AMENDMENT OF SUMMARY OFFENCES ACT 1988 No. 25—*continued*

(b) climbing down or up or on or otherwise descending (except as referred to in paragraph (a)) or ascending any part of a building or other structure, except by use of the stairs, lifts or other means provided for ascent or descent of it,

is guilty of an offence.

Maximum penalty: 10 penalty units or imprisonment for 3 months, or both.

(2) A person is not guilty of an offence under this section for doing anything if the person establishes that he or she had some reasonable excuse for doing it or did it for a lawful purpose.

(3) In this section:

"structure" includes a bridge, crane (whether mobile or not) and tower, but does not include a structure provided for climbing or jumping for recreational purposes.

Explanatory note

Proposed section 8A makes it an offence (with a maximum penalty of 10 penalty units (currently $1,000) or 3 months imprisonment, or both) to risk the safety of another person as a result of climbing or jumping from or abseiling, parachuting etc. down a building or other structure. A person who does so for a lawful purpose or with reasonable excuse will not be guilty of an offence.

[Minister's second reading speech made in—

Legislative Assembly on 25 1992

Legislative Council on 6 March 1992]