



New South Wales

Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021 No 43

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New South Wales

Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021 No 43

Act No 43, 2021

An Act to amend the *Crimes Act 1900* in relation to consent to certain sexual activities that, in the absence of consent, are sexual offences; to amend the *Criminal Procedure Act 1986* in relation to directions to juries; and for other purposes. [Assented to 8 December 2021]

The Legislature of New South Wales enacts—

1 Name of Act

This Act is the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021*.

2 Commencement

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

Schedule 1 Amendment of Crimes Act 1900 No 40

[1] Section 61H Definitions

Insert after section 61H(3)—

- (4) It is not relevant for the purposes of this Division whether a part of the body referred to in this Division is surgically constructed or not.

[2] Section 61HA Meaning of “sexual intercourse”

Omit section 61HA(a)–(c). Insert instead—

- (a) the penetration to any extent of the genitalia or anus of a person by—
- (i) any part of the body of another person, or
 - (ii) any object manipulated by another person, or
- (b) the introduction of any part of the genitalia of a person into the mouth of another person, or
- (c) the application of the mouth or tongue to the female genitalia, or

[3] Section 61HA(2)

Insert at the end of section 61HA—

- (2) Penetration carried out solely for proper medical or hygienic purposes is not *sexual intercourse* for the purposes of this Division.

[4] Section 61HB Meaning of “sexual touching”

Insert after section 61HB(1)—

- (1A) The continuation of sexual touching as defined in subsection (1) is also *sexual touching* for the purposes of this Division.

[5] Sections 61HB(2)(a) and 61HC(2)(a)

Omit “or anal area or (in the case of a female person, or transgender or intersex person identifying as female) the person’s breasts, whether or not the breasts are sexually developed, or” wherever occurring.

Insert instead—

- , anal area or breasts—
- (i) whether or not the breasts are sexually developed, and
 - (ii) regardless of the person’s gender or sex, or

[6] Section 61HB(3)

Omit the subsection. Insert instead—

- (3) Touching carried out solely for proper medical or hygienic purposes is not *sexual touching* for the purposes of this Division.

[7] Section 61HC Meaning of “sexual act”

Insert after section 61HC(1)—

- (1A) The continuation of a sexual act as defined in subsection (1) is also a *sexual act* for the purposes of this Division.

[8] Section 61HC(3)

Omit the subsection. Insert instead—

- (3) An act carried out solely for proper medical or hygienic purposes is not a *sexual act* for the purposes of this Division.

[9] Part 3, Division 10, Subdivision 1A

Omit section 61HE. Insert instead—

Subdivision 1A Consent and knowledge of consent

61HF Objective

An objective of this Subdivision is to recognise the following—

- (a) every person has a right to choose whether or not to participate in a sexual activity,
- (b) consent to a sexual activity is not to be presumed,
- (c) consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.

61HG Application of Subdivision

- (1) This Subdivision applies to offences, or attempts to commit offences, against sections 61I, 61J, 61JA, 61KC, 61KD, 61KE and 61KF.
- (2) This Subdivision sets out—
 - (a) the circumstances in which a person consents or does not consent to a sexual activity, and
 - (b) the circumstances in which a person knows or is taken to know that another person does not consent to a sexual activity.

61HH Definitions

In this Subdivision—

consent has the same meaning as in section 61HI.

sexual activity means sexual intercourse, sexual touching or a sexual act.

61HI Consent generally

- (1) A person *consents* to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.
- (2) A person may, by words or conduct, withdraw consent to a sexual activity at any time.
- (3) Sexual activity that occurs after consent has been withdrawn occurs without consent.
- (4) A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.
- (5) A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity.

Example— A person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.
- (6) A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with—

- (a) that person on another occasion, or
- (b) another person on that or another occasion.

61HJ Circumstances in which there is no consent

- (1) A person does not consent to a sexual activity if—
 - (a) the person does not say or do anything to communicate consent, or
 - (b) the person does not have the capacity to consent to the sexual activity, or
 - (c) the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity, or
 - (d) the person is unconscious or asleep, or
 - (e) the person participates in the sexual activity because of force, fear of force or fear of serious harm of any kind to the person, another person, an animal or property, regardless of—
 - (i) when the force or the conduct giving rise to the fear occurs, or
 - (ii) whether it occurs as a single instance or as part of an ongoing pattern, or
 - (f) the person participates in the sexual activity because of coercion, blackmail or intimidation, regardless of—
 - (i) when the coercion, blackmail or intimidation occurs, or
 - (ii) whether it occurs as a single instance or as part of an ongoing pattern, or
 - (g) the person participates in the sexual activity because the person or another person is unlawfully detained, or
 - (h) the person participates in the sexual activity because the person is overborne by the abuse of a relationship of authority, trust or dependence, or
 - (i) the person participates in the sexual activity because the person is mistaken about—
 - (i) the nature of the sexual activity, or
 - (ii) the purpose of the sexual activity, including about whether the sexual activity is for health, hygienic or cosmetic purposes, or
 - (j) the person participates in the sexual activity with another person because the person is mistaken—
 - (i) about the identity of the other person, or
 - (ii) that the person is married to the other person, or
 - (k) the person participates in the sexual activity because of a fraudulent inducement.
- (2) This section does not limit the grounds on which it may be established that a person does not consent to a sexual activity.
- (3) In this section—

fraudulent inducement does not include a misrepresentation about a person's income, wealth or feelings.

61HK Knowledge about consent

- (1) A person (the *accused person*) is taken to know that another person does not consent to a sexual activity if—

- (a) the accused person actually knows the other person does not consent to the sexual activity, or
 - (b) the accused person is reckless as to whether the other person consents to the sexual activity, or
 - (c) any belief that the accused person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.
- (2) Without limiting subsection (1)(c), a belief that the other person consents to sexual activity is not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity.
- (3) Subsection (2) does not apply if the accused person shows that—
- (a) the accused person had at the time of the sexual activity—
 - (i) a cognitive impairment within the meaning of section 23A(8) and (9), or
 - (ii) a mental health impairment, and
 - (b) the impairment was a substantial cause of the accused person not saying or doing anything.
- (4) The onus of establishing a matter referred to in subsection (3) lies with the accused person on the balance of probabilities.
- (5) For the purposes of making any finding under this section, the trier of fact—
- (a) must consider all the circumstances of the case, including what, if anything, the accused person said or did, and
 - (b) must not consider any self-induced intoxication of the accused person.

[10] Sections 61J(2), 61KC(b), 61KD, 61KE(b), 61KF, 66C(5), 66DE(2) and 80A(1)

Omit “alleged offender” wherever occurring. Insert instead “accused person”.

[11] Section 61KA, heading

Omit “Offender married to victim”.

Insert instead “Accused person married to complainant”.

[12] Sections 61KC, 61KD(1), 61KE and 61KF(1)

Omit “(the *alleged offender*)” wherever occurring. Insert instead “(the *accused person*)”.

[13] Sections 61J(2), 61JA(1)(c), 61KC, 61KD, 61KE, 61KF, 66C(5), 66DE(2), 80A(1), definition of “circumstances of aggravation” and 80AG

Omit “alleged victim” wherever occurring. Insert instead “complainant”.

[14] Sections 61KC, 61KD(1), 61KE and 61KF(1)

Omit “(the *alleged victim*)” wherever occurring. Insert instead “(the *complainant*)”.

[15] Sections 73(3) and 73A(3)

Omit “(the *victim*)” wherever occurring. Insert instead “(the *complainant*)”.

[16] Sections 73(3) and 73A(3)

Omit “(the *offender*)” wherever occurring. Insert instead “(the *accused person*)”.

[17] Sections 73(3) and 73A(3)

Omit “offender” wherever occurring. Insert instead “accused person”.

[18] Sections 73(3), 73A(3) and 80AF(2A)(b)

Omit “victim” wherever occurring. Insert instead “complainant”.

[19] Sections 73(3)(b1) and 73A(3)(b1)

Omit “offender’s authority” wherever occurring. Insert instead “authority of the accused person”.

[20] Section 80A Sexual assault by forced self-manipulation

Omit “(including a surgically constructed vagina)” from section 80A(1), definition of *self-manipulation*.

[21] Section 80AB Alternative verdicts

Omit “alleged victim” wherever occurring in section 80AB(2) and (3).

Insert instead “complainant”.

[22] Section 80AC, heading

Omit “Offenders”. Insert instead “Accused persons”.

[23] Section 80AF Uncertainty about time when sexual offence against child occurred

Omit “victim of” from section 80AF(1)(b). Insert instead “complainant in relation to”.

[24] Section 583

Insert after section 582—

583 Review of certain provisions relating to consent

- (1) The Minister must conduct reviews of the reviewable provisions to identify if—
 - (a) the policy objectives of the reviewable provisions remain valid, and
 - (b) the terms of the reviewable provisions remain appropriate for securing the objectives.
- (2) In conducting the review, the Minister must consider the transcripts of criminal trials—
 - (a) conducted during the review period, and
 - (b) to which the reviewable provisions were applicable.
- (3) The first review must be commenced within 6 months after the period of 3 years after the commencement date.
- (4) Subsequent reviews must be commenced every 5 years after the end of the 6-month period.
- (5) A report on the outcome of each review must be tabled in each House of Parliament within 1 year after the last day by which the review must be commenced.
- (6) The Minister must, at least 6 months before each review, table in each House of Parliament a report on the training that has occurred during the review period in relation to communicative consent, detailing—
 - (a) the type of training provided, and

- (b) the number and kinds of persons to whom it has been provided, including whether it has been provided to police officers, judicial officers or legal practitioners, and
 - (c) how effective the training has been.
- (7) In this section—
- commencement date* means the date on which the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* commences.
- reviewable provisions* means—
- (a) sections 61H, 61HA, 61HB and 61HC, and
 - (b) Part 3, Division 10, Subdivision 1A.

[25] Schedule 11 Savings, transitional and other provisions

Insert at the end of the Schedule with appropriate Part and clause numbering—

Part Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021

Application of amendments

An amendment made to this Act by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* applies only in relation to an offence committed, or alleged to have been committed, on or after the commencement of the amendment.

Schedule 2 Amendment of Criminal Procedure Act 1986 No 209

[1] Chapter 6, Part 5, Division 1, Subdivision 1, heading

Insert before section 290—

Subdivision 1 Preliminary

[2] Chapter 6, Part 5, Division 1, Subdivision 2, heading

Insert after section 290A—

Subdivision 2 In camera proceedings

[3] Chapter 6, Part 5, Division 1, Subdivision 3

Insert after section 291C—

Subdivision 3 Directions to jury—consent

292 Directions in relation to consent

- (1) This Subdivision applies to a trial of a person for an offence, or attempt to commit an offence, against the *Crimes Act 1900*, section 61I, 61J, 61JA, 61KC, 61KD, 61KE or 61KF.
- (2) In a trial to which this Subdivision applies, the judge must give any 1 or more of the directions set out in sections 292A–292E (a **consent direction**)—
 - (a) if there is a good reason to give the consent direction, or
 - (b) if requested to give the consent direction by a party to the proceedings, unless there is a good reason not to give the direction.
- (3) A judge is not required to use a particular form of words in giving a consent direction.
- (4) A judge may, as the judge sees fit—
 - (a) give a consent direction at any time during a trial, and
 - (b) give the same consent direction on more than 1 occasion during a trial.

292A Circumstances in which non-consensual sexual activity occurs

Direction—

Non-consensual sexual activity can occur—

- (a) in many different circumstances, and
- (b) between different kinds of people including—
 - (i) people who know one another, or
 - (ii) people who are married to one another, or
 - (iii) people who are in an established relationship with one another.

292B Responses to non-consensual sexual activity

Direction—

- (a) there is no typical or normal response to non-consensual sexual activity, and

- (b) people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything, and
- (c) the jury must avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity.

292C Lack of physical injury, violence or threats

Direction—

- (a) people who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence, and
- (b) the absence of injury or violence, or threats of injury or violence, does not necessarily mean that a person is not telling the truth about an alleged sexual offence.

292D Responses to giving evidence

Direction—

- (a) trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence, but others may not, and
- (b) the presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth about an alleged sexual offence.

292E Behaviour and appearance of complainant

Direction—

It should not be assumed that a person consented to a sexual activity because the person—

- (a) wore particular clothing or had a particular appearance, or
- (b) consumed alcohol or another drug, or
- (c) was present in a particular location.

[4] Section 293

Re-number as section 294CB and relocate after section 294CA.

[5] Chapter 6, Part 5, Division 1, Subdivision 4, heading

Insert before section 293A—

Subdivision 4 Directions to jury—other

[6] Section 293A, heading

Omit “**Warning**”. Insert instead “**Direction**”.

[7] Section 293A(2)

Omit “inform”. Insert instead “direct”.

[8] Section 293A(2A)

Insert after section 293A(2)—

- (2A) A judge may, as the judge sees fit—
 - (a) give a direction in this section at any time during a trial, and

(b) give the same direction on more than 1 occasion during a trial.

[9] Section 294, heading

Omit “**Warning**”. Insert instead “**Direction**”.

[10] Section 294(2)(a) and (c)

Omit “warn” wherever occurring. Insert instead “direct”.

[11] Section 294(2)(b)

Omit “inform”. Insert instead “direct”.

[12] Section 294(2)(c)

Omit “warning”. Insert instead “direction”.

[13] Section 294(2A)

Insert after section 294(2)—

(2A) A judge may, as the judge sees fit—

(a) give a direction in this section at any time during a trial, and

(b) give the same direction on more than 1 occasion during a trial.

[14] Section 294AA, heading

Omit “**Warning**”. Insert instead “**Direction**”.

[15] Section 294AA(1)

Omit “warn”. Insert instead “direct”.

[16] Section 294AA(2)

Omit “warning”. Insert instead “direction”.

[17] Chapter 6, Part 5, Division 1, Subdivision 5, heading

Insert after section 294AA—

Subdivision 5 Giving of evidence

[18] Chapter 6, Part 5 Division 1, Subdivision 6, heading

Insert after section 294CA—

Subdivision 6 Protections extend to tendency witnesses

[19] Chapter 7, Part 6

Insert after Part 5—

Part 6 Review of provisions

368 Review of certain provisions relating to consent

(1) The Minister must conduct reviews of the reviewable provisions to identify if—

(a) the policy objectives of the reviewable provisions remain valid, and

(b) the terms of the reviewable provisions remain appropriate for securing

the objectives.

- (2) In conducting the review, the Minister must consider the transcripts of criminal trials—
 - (a) conducted during the review period, and
 - (b) in which a consent direction set out in sections 292A–292E was—
 - (i) given, or
 - (ii) requested by a party to the proceedings to be given.
- (3) The first review must be commenced within 6 months after the period of 3 years after the commencement date.
- (4) Subsequent reviews must be commenced every 5 years after the end of the 6-month period.
- (5) A report on the outcome of each review must be tabled in each House of Parliament within 1 year after the last day by which the review must be commenced.
- (6) In this section—

commencement date means the date on which the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* commences.

reviewable provisions means—

 - (a) sections 292–292E, 293A, 294 and 294AA, and
 - (b) section 294CB, including its relationship with the *Crimes Act 1900*, section 61HJ(1)(a).

[20] Schedule 2 Savings, transitional and other provisions

Insert at the end of the Schedule with appropriate Part and clause numbering—

Part Provisions consequent on enactment of Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021

Application of amendments

An amendment made to this Act by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* extends to proceedings for an offence committed, or alleged to have been committed, before the commencement of the amendment but not if the hearing of the proceedings began before the commencement of the amendment.

[Second reading speech made in—

Legislative Assembly on 20 October 2021

Legislative Council on 19 November 2021]