



New South Wales

Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are as follows—

- (a) to recognise that—
 - (i) every person has a right to choose whether to participate in a sexual activity, and
 - (ii) consent to a sexual activity must not be presumed, and
 - (iii) consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity,
- (b) to update the language of provisions of the *Crimes Act 1900* relating to sexual offences,
- (c) to allow, and in some circumstances require, judges to make directions to juries about consent in trials relating to certain sexual offences under the *Crimes Act 1900*.

Outline of provisions

Clause 1 sets out the name, also called the short title, of the proposed Act.

Clause 2 provides for the commencement of the proposed Act.

Schedule 1 Amendment of Crimes Act 1900 No 40

Schedule 1[1] provides that, for the purposes of provisions of the *Crimes Act 1900* relating to sexual offences against adults and children, it is not relevant whether a body part referred to in the provisions is surgically constructed. **Schedule 1[20]** makes a consequential amendment.

Schedule 1[2] and [5] update the language of provisions relating to the definitions of sexual intercourse, sexual touching and sexual act to ensure the provisions apply regardless of a person's gender or sex.

Schedule 1[3] clarifies that penetration carried out solely for proper medical or hygienic purposes is not sexual intercourse. **Schedule 1[6] and [8]** make equivalent amendments for sexual touching and sexual act.

Schedule 1[4] clarifies that the continuation of sexual touching is sexual touching.

Schedule 1[7] clarifies that the continuation of a sexual act is a sexual act.

Schedule 1[9] inserts a Subdivision relating to consent and knowledge about consent into the *Crimes Act 1900*. In the Subdivision—

- (a) **proposed section 61HF** provides that an objective of the Subdivision is to recognise certain principles about consent, and
- (b) **proposed section 61HG** explains the application of the Subdivision, and
- (c) **proposed section 61HH** sets out definitions for the Subdivision, and
- (d) **proposed section 61HI** clarifies the definition of *consent* to a sexual activity, being free and voluntary agreement to a sexual activity at the time of the activity, by providing the following—
 - (i) a person may, by words or conduct, withdraw consent at any time,
 - (ii) if a person withdraws consent and the sexual activity continues, the activity then occurs without consent,
 - (iii) the absence of physical or verbal resistance is not, by itself, taken to be consent,
 - (iv) consent to a particular sexual activity is not, by itself, taken to be consent to other sexual activities,
 - (v) consent to a sexual activity with a person is not, by itself, taken to be consent to sexual activity with the person on other occasions or with other persons, and
- (e) **proposed section 61HJ** sets out a non-exhaustive list of the circumstances in which a person does not consent to a sexual activity, and
- (f) **proposed section 61HK** sets out the circumstances in which an accused person is taken to know that another person does not consent to a sexual activity. It also provides that an accused person's belief that another person consents to sexual activity is not reasonable if the accused person did not say or do anything to find out whether the other consents. This does not apply if the accused person did not say or do anything because of a cognitive or mental health impairment. The proposed section also provides that a trier of fact, when making a finding about a person's knowledge of consent, must consider all the circumstances of the case, but must not consider self-induced intoxication of the accused person.

Schedule 1[10]–[19] and [21]–[23] replace, in relation to sexual offences—

- (a) references to an “offender” with references to an “accused person”, and
- (b) references to a “victim” with references to a “complainant”.

Schedule 1[24] provides for certain provisions of the *Crimes Act 1900* relating to consent to be reviewed in 5 years.

Schedule 1[25] makes it clear that the amendments made by the proposed Act to the *Crimes Act 1900* apply only to offences committed on or after the commencement of the amendments.

Schedule 2 Amendment of Criminal Procedure Act 1986 No 209

Schedule 2[3] inserts a Subdivision relating to directions to juries about consent into the *Criminal Procedure Act 1986*. **Schedule 2[1], [2], [5], [17] and [18]** make consequential amendments. In the Subdivision—

- (a) **proposed section 292** allows, and in some circumstances requires, a judge to give directions about consent in a trial relating to certain sexual offences under the *Crimes Act 1900*, and
- (b) **proposed sections 292A–292E** set out the directions about consent, which relate to the following—
 - (i) how and between whom non-consensual sexual activity can occur,
 - (ii) how a person may respond to non-consensual sexual activity,
 - (iii) the absence of physical injury, violence or threats,
 - (iv) how a person may respond to giving evidence about an alleged sexual offence,
 - (v) how a person’s consent cannot be assumed because the person wore particular clothing or had a particular appearance, consumed alcohol or another drug or was at a particular location.

Schedule 2[4] relocates a provision about the admissibility of evidence relating to sexual experience.

Schedule 2[6], [7], [9]–[12] and [14]–[16] replace certain references to “warn” and “inform” with references to “direct”.

Schedule 2[8] and [13] provide that a judge may give and repeat certain directions at any time in a trial.

Schedule 2[19] provides for certain provisions of the *Criminal Procedure Act 1986* relating to consent to be reviewed in 5 years.

Schedule 2[20] provides that the amendments made by the proposed Act to the *Criminal Procedure Act 1986* extend to proceedings for offences committed before the amendments commence, but not if the hearing of the proceedings has already commenced.



New South Wales

Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021

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New South Wales

Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021

No. , 2021

A Bill for

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.

The Legislature of New South Wales enacts—

1

1 Name of Act

2

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

3

2 Commencement

4

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

5

Schedule 1	Amendment of Crimes Act 1900 No 40	1
[1] Section 61H Definitions		2
Insert after section 61H(3)—		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.		4 5
[2] Section 61HA Meaning of “sexual intercourse”		6
Omit section 61HA(a)–(c). Insert instead—		7
(a) the penetration to any extent of the genitalia or anus of a person by—		8
(i) any part of the body of another person, or		9
(ii) any object manipulated by another person, or		10
(b) the introduction of any part of the genitalia of a person into the mouth of another person, or		11 12
(c) the application of the mouth or tongue to the female genitalia, or		13
[3] Section 61HA(2)		14
Insert at the end of section 61HA—		15
(2) Penetration carried out solely for proper medical or hygienic purposes is not <i>sexual intercourse</i> for the purposes of this Division.		16 17
[4] Section 61HB Meaning of “sexual touching”		18
Insert after section 61HB(1)—		19
(1A) The continuation of sexual touching as defined in subsection (1) is also <i>sexual touching</i> for the purposes of this Division.		20 21
[5] Sections 61HB(2)(a) and 61HC(2)(a)		22
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.		23 24 25
Insert instead—		26
, anal area or breasts—		27
(i) whether or not the breasts are sexually developed, and		28
(ii) regardless of the person’s gender or sex, or		29
[6] Section 61HB(3)		30
Omit the subsection. Insert instead—		31
(3) Touching carried out solely for proper medical or hygienic purposes is not <i>sexual touching</i> for the purposes of this Division.		32 33
[7] Section 61HC Meaning of “sexual act”		34
Insert after section 61HC(1)—		35
(1A) The continuation of a sexual act as defined in subsection (1) is also a <i>sexual act</i> for the purposes of this Division.		36 37
[8] Section 61HC(3)		38
Omit the subsection. Insert instead—		39

(3)	An act carried out solely for proper medical or hygienic purposes is not a <i>sexual act</i> for the purposes of this Division.	1 2
[9]	Part 3, Division 10, Subdivision 1A	3
	Omit section 61HE. Insert instead—	4
	Subdivision 1A Consent and knowledge of consent	5
61HF	Objective	6
	An objective of this Subdivision is to recognise the following—	7
	(a) every person has a right to choose whether or not to participate in a sexual activity,	8 9
	(b) consent to a sexual activity is not to be presumed,	10
	(c) consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.	11 12 13
61HG	Application of Subdivision	14
	(1) This Subdivision applies to offences, or attempts to commit offences, against sections 61I, 61J, 61JA, 61KC, 61KD, 61KE and 61KF.	15 16
	(2) This Subdivision sets out—	17
	(a) the circumstances in which a person consents or does not consent to a sexual activity, and	18 19
	(b) the circumstances in which a person knows or is taken to know that another person does not consent to a sexual activity.	20 21
61HH	Definitions	22
	In this Subdivision—	23
	<i>consent</i> has the same meaning as in section 61HI.	24
	<i>sexual activity</i> means sexual intercourse, sexual touching or a sexual act.	25
61HI	Consent generally	26
	(1) A person <i>consents</i> to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.	27 28
	(2) A person may, by words or conduct, withdraw consent to a sexual activity at any time.	29 30
	(3) Sexual activity that occurs after consent has been withdrawn occurs without consent.	31 32
	(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.	33 34
	(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.	35 36
	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.	37 38 39
	(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—	40 41 42

(a)	that person on another occasion, or	1
(b)	another person on that or another occasion.	2
61HJ	Circumstances in which there is no consent	3
(1)	A person does not consent to a sexual activity if—	4
(a)	the person does not say or do anything to communicate consent, or	5
(b)	the person does not have the capacity to consent to the sexual activity, or	6
(c)	the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity, or	7 8
(d)	the person is unconscious or asleep, or	9
(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—	10 11 12
(i)	when the force or the conduct giving rise to the fear occurs, or	13
(ii)	whether it occurs as a single instance or as part of an ongoing pattern, or	14 15
(f)	the person participates in the sexual activity because of coercion, blackmail or intimidation, regardless of—	16 17
(i)	when the coercion, blackmail or intimidation occurs, or	18
(ii)	whether it occurs as a single instance or as part of an ongoing pattern, or	19 20
(g)	the person participates in the sexual activity because the person or another person is unlawfully detained, or	21 22
(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	23 24 25
(i)	the person participates in the sexual activity because the person is mistaken about—	26 27
(i)	the nature of the sexual activity, or	28
(ii)	the purpose of the sexual activity, including about whether the sexual activity is for health, hygienic or cosmetic purposes, or	29 30
(j)	the person participates in the sexual activity with another person because the person is mistaken—	31 32
(i)	about the identity of the other person, or	33
(ii)	that the person is married to the other person, or	34
(k)	the person participates in the sexual activity because of a fraudulent inducement.	35 36
(2)	This section does not limit the grounds on which it may be established that a person does not consent to a sexual activity.	37 38
(3)	In this section—	39
	<i>fraudulent inducement</i> does not include a misrepresentation about a person's income, wealth or feelings.	40 41
61HK	Knowledge about consent	42
(1)	A person (the <i>accused person</i>) is taken to know that another person does not consent to a sexual activity if—	43 44

(a)	the accused person actually knows the other person does not consent to the sexual activity, or	1 2
(b)	the accused person is reckless as to whether the other person consents to the sexual activity, or	3 4
(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.	5 6 7
(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.	8 9 10 11
(3)	Subsection (2) does not apply if the accused person shows that—	12
(a)	the accused person had at the time of the sexual activity—	13
(i)	a cognitive impairment within the meaning of section 23A(8) and (9), or	14 15
(ii)	a mental health impairment, and	16
(b)	the impairment was a cause of the accused person not saying or doing anything.	17 18
(4)	The onus of establishing a matter referred to in subsection (3) lies with the accused person on the balance of probabilities.	19 20
(5)	For the purposes of making any finding under this section, the trier of fact—	21
(a)	must consider all the circumstances of the case, including what, if anything, the accused person said or did, and	22 23
(b)	must not consider any self-induced intoxication of the accused person.	24
[10]	Sections 61J(2), 61KC(b), 61KD, 61KE(b), 61KF, 66C(5), 66DE(2) and 80A(1)	25
	Omit “alleged offender” wherever occurring. Insert instead “accused person”.	26
[11]	Section 61KA, heading	27
	Omit “Offender married to victim”.	28
	Insert instead “Accused person married to complainant”.	29
[12]	Sections 61KC, 61KD(1), 61KE and 61KF(1)	30
	Omit “(the <i>alleged offender</i>)” wherever occurring. Insert instead “(the <i>accused person</i>)”.	31
[13]	Sections 61J(2), 61JA(1)(c), 61KC, 61KD, 61KE, 61KF, 66C(5), 66DE(2), 80A(1), definition of “circumstances of aggravation” and 80AG	32 33
	Omit “alleged victim” wherever occurring. Insert instead “complainant”.	34
[14]	Sections 61KC, 61KD(1), 61KE and 61KF(1)	35
	Omit “(the <i>alleged victim</i>)” wherever occurring. Insert instead “(the <i>complainant</i>)”.	36
[15]	Sections 73(3) and 73A(3)	37
	Omit “(the <i>victim</i>)” wherever occurring. Insert instead “(the <i>complainant</i>)”.	38
[16]	Sections 73(3) and 73A(3)	39
	Omit “(the <i>offender</i>)” wherever occurring. Insert instead “(the <i>accused person</i>)”.	40

[17] Sections 73(3) and 73A(3)	1
Omit “offender” wherever occurring. Insert instead “accused person”.	2
[18] Sections 73(3), 73A(3) and 80AF(2A)(b)	3
Omit “victim” wherever occurring. Insert instead “complainant”.	4
[19] Sections 73(3)(b1) and 73A(3)(b1)	5
Omit “offender’s authority” wherever occurring. Insert instead “authority of the accused person”.	6 7
[20] Section 80A Sexual assault by forced self-manipulation	8
Omit “(including a surgically constructed vagina)” from section 80A(1), definition of <i>self-manipulation</i> .	9 10
[21] Section 80AB Alternative verdicts	11
Omit “alleged victim” wherever occurring in section 80AB(2) and (3).	12
Insert instead “complainant”.	13
[22] Section 80AC, heading	14
Omit “Offenders”. Insert instead “Accused persons”.	15
[23] Section 80AF Uncertainty about time when sexual offence against child occurred	16
Omit “victim of” from section 80AF(1)(b). Insert instead “complainant in relation to”.	17
[24] Section 583	18
Insert after section 582—	19
583 Review of certain provisions relating to consent	20
(1) The Minister must conduct a review (the <i>5 year review</i>) of the reviewable provisions to identify if—	21 22
(a) the policy objectives of the reviewable provisions remain valid, and	23
(b) the terms of the reviewable provisions remain appropriate for securing the objectives.	24 25
(2) The Minister must also, as part of the 5 year review, consider whether the reviewable provisions should be subject to a further review at a later date.	26 27
(3) The 5 year review must be commenced within 6 months after the period of 5 years after the commencement date.	28 29
(4) A report on the outcome of the 5 year review must be tabled in each House of Parliament within 1 year after the end of the 6 month period.	30 31
(5) In this section—	32
<i>commencement date</i> means the date on which the <i>Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021</i> commences.	33 34
<i>reviewable provisions</i> means—	35
(a) sections 61H, 61HA, 61HB and 61HC, and	36
(b) Part 3, Division 10, Subdivision 1A.	37
[25] Schedule 11 Savings, transitional and other provisions	38
Insert at the end of the Schedule with appropriate Part and clause numbering—	39

Part	Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021	1
		2
	Application of amendments	3
	An amendment made to this Act by the <i>Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021</i> applies only in relation to an offence committed, or alleged to have been committed, on or after the commencement of the amendment.	4
		5
		6
		7

Schedule 2	Amendment of Criminal Procedure Act 1986 No 209	1
		2
[1]	Chapter 6, Part 5, Division 1, Subdivision 1, heading	3
	Insert before section 290—	4
	Subdivision 1 Preliminary	5
[2]	Chapter 6, Part 5, Division 1, Subdivision 2, heading	6
	Insert after section 290A—	7
	Subdivision 2 In camera proceedings	8
[3]	Chapter 6, Part 5, Division 1, Subdivision 3	9
	Insert after section 291C—	10
	Subdivision 3 Directions to jury—consent	11
292	Directions in relation to consent	12
(1)	This Subdivision applies to a trial of a person for an offence, or attempt to commit an offence, against the <i>Crimes Act 1900</i> , section 61I, 61J, 61JA, 61KC, 61KD, 61KE or 61KF.	13 14 15
(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 <i>consent direction</i>)—	16 17
(a)	if there is a good reason to give the consent direction, or	18
(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.	19 20
(3)	A judge is not required to use a particular form of words in giving a consent direction.	21 22
(4)	A judge may, as the judge sees fit—	23
(a)	give a consent direction at any time during a trial, and	24
(b)	give the same consent direction on more than 1 occasion during a trial.	25
292A	Circumstances in which non-consensual sexual activity occurs	26
	Direction—	27
	Non-consensual sexual activity can occur—	28
(a)	in many different circumstances, and	29
(b)	between different kinds of people including—	30
(i)	people who know one another, or	31
(ii)	people who are married to one another, or	32
(iii)	people who are in an established relationship with one another.	33
292B	Responses to non-consensual sexual activity	34
	Direction—	35
(a)	there is no typical or normal response to non-consensual sexual activity, and	36 37

(b)	people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything, and	1 2
(c)	the jury must avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity.	3 4
292C	Lack of physical injury, violence or threats	5
	Direction—	6
(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	7 8 9
(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.	10 11 12
292D	Responses to giving evidence	13
	Direction—	14
(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	15 16 17
(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.	18 19 20
292E	Behaviour and appearance of complainant	21
	Direction—	22
	It should not be assumed that a person consented to a sexual activity because the person—	23 24
(a)	wore particular clothing or had a particular appearance, or	25
(b)	consumed alcohol or another drug, or	26
(c)	was present in a particular location.	27
[4]	Section 293	28
	Renumber as section 294CB and relocate after section 294CA.	29
[5]	Chapter 6, Part 5, Division 1, Subdivision 4, heading	30
	Insert before section 293A—	31
	Subdivision 4 Directions to jury—other	32
[6]	Section 293A, heading	33
	Omit “ Warning ”. Insert instead “ Direction ”.	34
[7]	Section 293A(2)	35
	Omit “inform”. Insert instead “direct”.	36
[8]	Section 293A(2A)	37
	Insert after section 293A(2)—	38
(2A)	A judge may, as the judge sees fit—	39
(a)	give a direction in this section at any time during a trial, and	40

(b)	give the same direction on more than 1 occasion during a trial.	1
[9]	Section 294, heading	2
	Omit “ Warning ”. Insert instead “ Direction ”.	3
[10]	Section 294(2)(a) and (c)	4
	Omit “warn” wherever occurring. Insert instead “direct”.	5
[11]	Section 294(2)(b)	6
	Omit “inform”. Insert instead “direct”.	7
[12]	Section 294(2)(c)	8
	Omit “warning”. Insert instead “direction”.	9
[13]	Section 294(2A)	10
	Insert after section 294(2)—	11
	(2A) A judge may, as the judge sees fit—	12
	(a) give a direction in this section at any time during a trial, and	13
	(b) give the same direction on more than 1 occasion during a trial.	14
[14]	Section 294AA, heading	15
	Omit “ Warning ”. Insert instead “ Direction ”.	16
[15]	Section 294AA(1)	17
	Omit “warn”. Insert instead “direct”.	18
[16]	Section 294AA(2)	19
	Omit “warning”. Insert instead “direction”.	20
[17]	Chapter 6, Part 5, Division 1, Subdivision 5, heading	21
	Insert after section 294AA—	22
	Subdivision 5 Giving of evidence	23
[18]	Chapter 6, Part 5 Division 1, Subdivision 6, heading	24
	Insert after section 294CA—	25
	Subdivision 6 Protections extend to tendency witnesses	26
[19]	Chapter 7, Part 6	27
	Insert after Part 5—	28
	Part 6 Review of provisions	29
368	Review of certain provisions relating to consent	30
(1)	The Minister must conduct a review (the <i>5 year review</i>) of the reviewable provisions to identify if—	31
	(a) the policy objectives of the reviewable provisions remain valid, and	32
		33

(b)	the terms of the reviewable provisions remain appropriate for securing the objectives.	1 2
(2)	The Minister may also, as part of the 5 year review, consider whether the reviewable provisions should be subject to a further review at a later date.	3 4
(3)	The 5 year review must be commenced within 6 months after the period of 5 years after the commencement date.	5 6
(4)	A report on the outcome of the 5 year review must be tabled in each House of Parliament within 1 year after the end of the 6 month period.	7 8
(5)	In this section—	9
	<i>commencement date</i> means the date on which the <i>Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021</i> commences.	10 11
	<i>reviewable provisions</i> means—	12
(a)	sections 292–292E, 293A, 294 and 294AA, and	13
(b)	section 294CB, including its relationship with the <i>Crimes Act 1900</i> , section 61HJ(1)(a).	14 15
[20]	Schedule 2 Savings, transitional and other provisions	16
	Insert at the end of the Schedule with appropriate Part and clause numbering—	17
Part	Provisions consequent on enactment of Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021	18 19 20
	Application of amendments	21
	An amendment made to this Act by the <i>Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021</i> 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.	22 23 24 25 26