



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.