

CRIMES (CHILD ASSAULT) AMENDMENT BILL 1985

EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The following Bills are cognate with this Bill:

Community Welfare (Child Assault) Amendment Bill 1985;

Oaths (Children) Amendment Bill 1985;

Evidence (Children) Amendment Bill 1985;

Pre-Trial Diversion of Offenders Bill 1985.

The objects of this Bill are—

- (a) to make it an offence to have sexual intercourse (in its broadest sense) with any child under the age of 16 years, instead of the offence currently relating only to carnal knowledge of a girl under that age;
- (b) to omit provisions in the Principal Act relating to the giving of evidence by children in cases such as carnal knowledge, which provisions will be unnecessary upon the insertion into the Oaths Act 1900 of provisions relating to evidence by children;
- (c) to extend the application of certain procedural and evidentiary provisions in the Principal Act (which presently apply to cases of sexual assault of adults) to cases of child sexual assault;
- (d) to make the spouse of an accused compellable to give evidence in cases of child assault as well as in cases of domestic violence;
- (e) to make it clear that the needs of a child are to be considered in a determination to close the court in child sexual assault proceedings, including the need of the child to have a "support" person exempted from the court's direction; and
- (f) to ensure that provisions of the Child Welfare Act 1939 (and, when commenced, the Community Welfare Act 1982) prohibiting the publication of material which may identify a child will prevail over any request by an accused to make evidence available for publication.

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides that the proposed Act will, with minor exceptions, commence on a day or days to be appointed by the Governor-in-Council.

Clause 3 is a formal provision dealing with references to the Crimes Act 1900.

Clause 4 is a formal provision specifying the Schedules contained in the proposed Act.

Clause 5 is a formal provision that gives effect to those Schedules.

Schedule 1 contains amendments to the Principal Act in relation to procedure in cases of child assault.

Schedule 1 (1) amends section 77A of the Principal Act (which allows certain sexual assault proceedings to be held in camera). The amendment makes it clear that a court making a direction under the section may exempt a person (such as a "support" person for a child giving evidence) from the direction. The amendment also requires a court to take certain matters, particularly the needs of the child victim, into account in determining whether to close the court.

Schedule 1 (2) omits section 333 of the Principal Act. The section deals with false evidence by children and will be unnecessary as a consequence of the proposed insertion into the Oaths Act 1900 of provisions relating to evidence by children.

Schedule 1 (3) extends the definition of "prescribed sexual offence" in section 405B of the Principal Act to include child sexual assault offences as well as adult sexual assault offences. As a result of this amendment—

- (a) pursuant to section 405B of the Principal Act, a Judge on the trial of a person for a child sexual assault offence will, if there is a suggestion that the child delayed in making a complaint about the offence or did not make such a complaint, be required to warn the jury that absence of complaint or delay in complaining does not indicate that the allegation is false and that there may be good reasons for hesitation or delay in making a complaint;
- (b) pursuant to section 405C of the Principal Act, a Judge on the trial of a person for a child sexual assault offence may in an appropriate case, but will no longer be required to, warn the jury of the danger of convicting the accused on the uncorroborated evidence of the victim;
- (c) pursuant to section 409A of the Principal Act, in committal proceedings relating to a child sexual assault, any depositions of the child from previous connected proceedings (for example, in a case involving multiple assaults) may be read as evidence and the child need not be examined on the evidence given in the previous proceedings;
- (d) pursuant to section 409B of the Principal Act, evidence relating to the sexual reputation of the victim of a child sexual assault will be inadmissible and evidence relating to any sexual experience by the victim will be admissible only in limited circumstances; and

- (e) pursuant to section 409C of the Principal Act, an accused may not, in a dock statement, refer to any matter which is inadmissible as referred to in paragraph (d).

Schedule 1 (4) is a consequential amendment to section 405C of the Principal Act resulting from the amendment made by Schedule 1 (3).

Schedule 1 (5) amends section 407AA of the Principal Act so as to make the spouse of an accused compellable to give evidence in a case where a child in the accused's household or a child of the accused and the spouse is assaulted in the same way as the spouse of an accused is now compellable in a domestic violence case. Under that section, a spouse may only be excused from giving evidence in limited circumstances. The amendment also clarifies the grounds upon which a spouse may be excused from giving evidence.

Schedule 1 (6) omits section 418 of the Principal Act. The section deals with the giving of evidence by children not on oath and the corroboration of that evidence and is omitted as a consequence of the proposed insertion into the Oaths Act 1900 of provisions relating to evidence by children.

Schedule 1 (7) amends section 578 of the Principal Act so as to ensure that the provisions of the Child Welfare Act 1939 (and, when commenced, the Community Welfare Act 1982) prohibiting the publication of the name of a child involved in court proceedings or of any information which may identify the child will prevail over any request by an accused under that section to make evidence available for publication.

Schedule 2 contains amendments to the Principal Act in relation to offences.

Schedule 2 (1) (a) and (b) extend the application of provisions in section 61A of the Principal Act (including the definition of "sexual intercourse") to provisions relating to children. "Sexual intercourse" is defined in that section as including vaginal, anal or oral intercourse, fellatio, cunnilingus and the insertion of objects.

Schedule 2 (1) (c) inserts a provision into section 61A of the Principal Act which makes it clear that, for the purposes of the provisions relating to children, a reference to a child's being under the authority of a person is a reference to the child's being in the care or under the supervision or authority of the person.

Schedule 2 (2) amends section 61D of the Principal Act which creates the offence of sexual intercourse without consent (sexual assault category 3). The amendment inserts a provision creating an additional offence where the person with whom the sexual intercourse is had is under the age of 16 years and is under the authority of the offender. The penalty for the offence is penal servitude for 12 years.

Schedule 2 (3) amends section 61E of the Principal Act which creates the offences of indecent assault and act of indecency (sexual assault category 4). The amendment inserts 2 provisions creating additional offences where—

- (a) an indecent assault is committed on a person under the age of 16 years who is under the authority of the offender (penalty: penal servitude for 6 years); and

- (b) an act of indecency is committed with or towards a person under the age of 16 years who is under the authority of the offender (penalty: imprisonment for 4 years).

Schedule 2 (4) amends section 61G of the Principal Act (which deals with alternative verdicts) as a consequence of the amendments made by Schedule 2 (2) and (3).

Schedule 2 (5) inserts into the Principal Act the following provisions:

Proposed section 66A creates an offence of having sexual intercourse with a person under the age of 10 years. The penalty for the offence is penal servitude for 20 years.

Proposed section 66B provides for attempts to commit an offence under proposed section 66A. The penalty for the offence is penal servitude for 20 years.

Proposed section 66C creates the following offences:

- (a) the offence of sexual intercourse with a person over 10 years, but under 16 years of age (penalty: penal servitude for 8 years);
- (b) the offence of sexual intercourse with such a person where the person was under the authority of the offender (penalty: penal servitude for 10 years).

Proposed section 66D provides for attempts to commit an offence under proposed section 66C. The penalty for attempting to commit the offence is the penalty provided for the offence.

Proposed section 66E provides for alternative verdicts where—

- (a) the jury is not satisfied that a child is under 10 years; or
- (b) the jury is only satisfied that sexual intercourse was attempted.

Schedule 2 (6) omits section 67 of the Principal Act which makes it an offence to have carnal knowledge of a girl under 10 years.

Schedule 2 (7) omits section 68 of the Principal Act which makes it an offence to attempt to have carnal knowledge of a girl under 10 years.

Schedule 2 (8) and (9) amend sections 69 and 70 of the Principal Act which deal with alternative verdicts on a trial for the offence of carnally knowing a girl under 10 years. The amendments are consequential upon the repeal of those offences.

Schedule 2 (10) and (11) omit sections 71 and 72 of the Principal Act which make it an offence to have carnal knowledge of a girl over 10 years but under 16 years, or to attempt to have carnal knowledge of such a girl.

Schedule 2 (12) and (13) amend sections 73 and 74 of the Principal Act so that the offences of carnal knowledge by a teacher, etc., and attempts to commit those offences relate only to girls of 16 years. (Where a girl is under that age, the offence may be prosecuted under proposed section 66C or 66D of the Principal Act.) The penalty for an offence under either of those sections will be 8 years imprisonment.

Schedule 2 (14) amends section 75 of the Principal Act which deals with an alternative charge for the offence of carnally knowing a girl over 10 years but under 16 years. The amendment is consequential upon the other amendments made by Schedule 2.

Schedule 2 (15) substitutes section 77 of the Principal Act which provides that consent is no defence except in certain cases where the child is over 14 years and is believed to be over 16 years. The proposed section, as substituted, re-enacts those provisions with changes necessary as a consequence of the other amendments made by Schedule 2.

Schedule 2 (16) makes consequential amendments to section 77A of the Principal Act which allows certain proceedings to be held in camera. The amendments are necessary as a result of the other amendments made by Schedule 2.

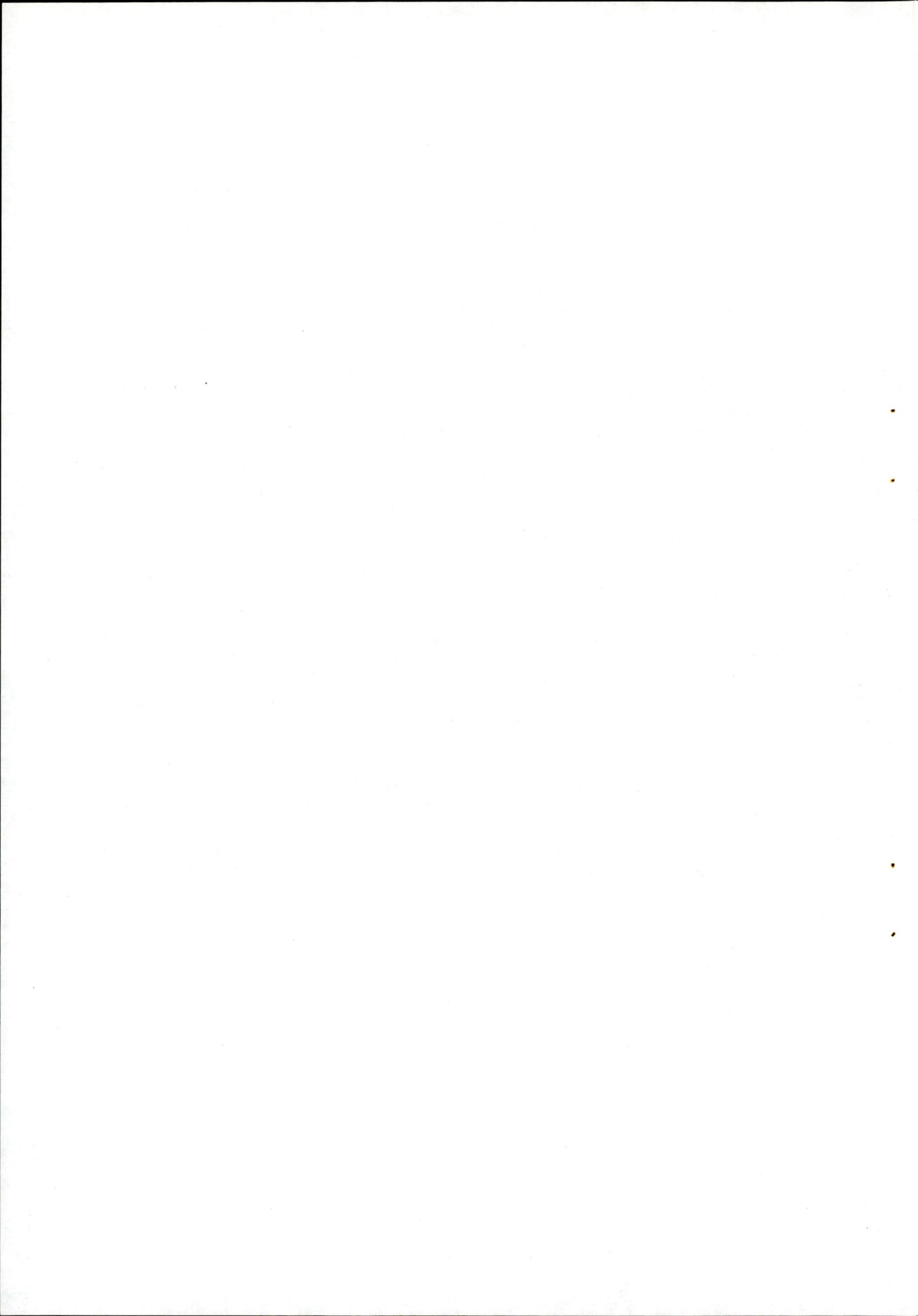
Schedule 2 (17) makes consequential amendments to section 78 of the Principal Act which prevents a prosecution for an offence of carnally knowing a girl under 16 years being commenced after 12 months. The amendments are necessary as a consequence of the repeal of that offence and the creation of the offence of having sexual intercourse with a person under 16 years.

Schedule 2 (18) amends section 78A of the Principal Act which deals with the offence of incest. (The amendment prevents a prosecution under that section in a case which could be prosecuted under proposed section 66A or 66C.)

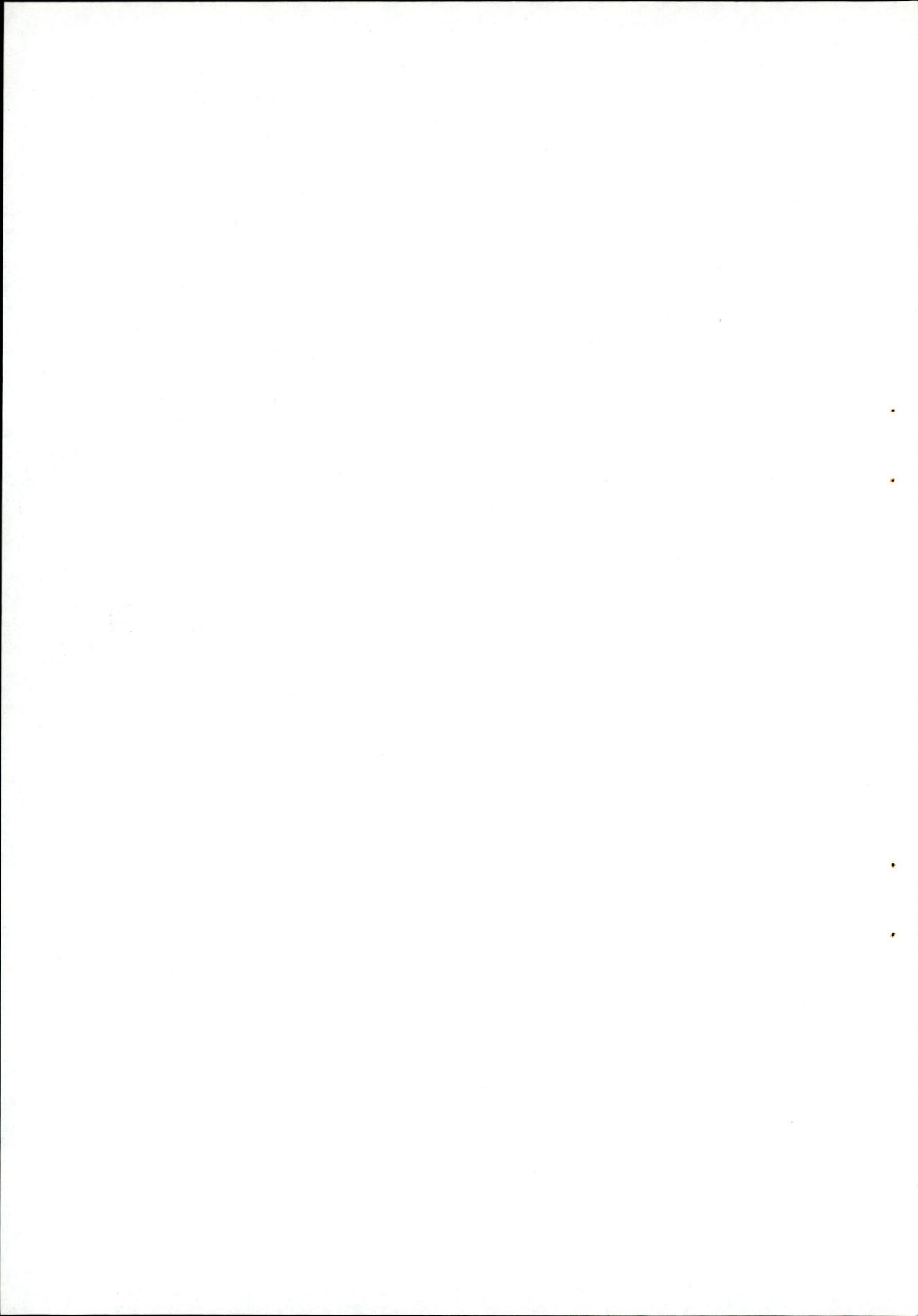
Schedule 2 (19) amends section 78E of the Principal Act by way of statute law revision consequentially upon the other amendments made by Schedule 2.

Schedule 2 (20) amends section 476 of the Principal Act which makes provision for certain indictable offences to be disposed of summarily with the accused's consent. The amendment is consequential upon the repeal of offences relating to carnal knowledge of a girl under 16 years and the creation of offences relating to sexual intercourse of a person under that age.

Schedule 2 (21) amends section 578 of the Principal Act which allows a Judge to prohibit the publication of certain evidence. The amendment is consequential upon the other amendments made by Schedule 2.







CRIMES (CHILD ASSAULT) AMENDMENT BILL 1985

No. , 1985

A BILL FOR

An Act to amend the Crimes Act 1900 in relation to children who are sexually assaulted, and in other respects.

See also Community Welfare (Child Assault) Amendment Bill 1985; Oaths (Children) Amendment Bill 1985; Evidence (Children) Amendment Bill 1985; Pre-Trial Diversion of Offenders Bill 1985.

Crimes (Child Assault) Amendment 1985

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:

5 Short title

1. This Act may be cited as the "Crimes (Child Assault) Amendment Act 1985".

Commencement

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

10 (2) Except as provided by subsection (1), the several provisions of this Act shall commence on such day or days as may be appointed by the Governor and notified by proclamation published in the Gazette.

Principal Act

3. The Crimes Act 1900 is referred to in this Act as the Principal Act.

15 Schedules

4. This Act contains the following Schedules:

SCHEDULE 1—AMENDMENTS TO THE PRINCIPAL ACT IN
RELATION TO PROCEDURE IN CASES OF CHILD
ASSAULT

20 SCHEDULE 2—AMENDMENTS TO THE PRINCIPAL ACT IN
RELATION TO OFFENCES

Amendment of Act No. 40, 1900

5. The Principal Act is amended in the manner set forth in Schedules 1 and 2.

Crimes (Child Assault) Amendment 1985

SCHEDULE 1

(Sec. 5)

AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
PROCEDURE IN CASES OF CHILD ASSAULT

5 (1) Section 77A (**Proceedings in camera in certain cases**)—

At the end of section 77A, insert:

10 (3) Where, under this section, the Court directs that proceedings or a part of any proceedings be held in camera, it may, either absolutely or subject to conditions, exempt any person from that direction to the extent necessary to allow that person to be present as a support for a person giving evidence or for any other purpose which the Court thinks fit.

15 (4) A Court may make a direction under this section on its own motion or at the request of any party and, in determining whether to make such a direction in proceedings in respect of an offence alleged to have been committed upon a child under the age of 18 years, the Court shall consider—

- 20 (a) the need of the child to have any person excluded from those proceedings;
- (b) the need of the child to have any person present in those proceedings;
- (c) the interests of justice; and
- (d) any other matter which the Court thinks relevant.

(2) Section 333 (**False evidence by child not on oath**)—

25 Omit the section.

(3) Section 405B (**Warning to be given by Judge in relation to lack of complaint in certain sexual offence proceedings**)—

Omit subsection (1), insert instead:

(1) In this section—

30 “prescribed sexual offence” means—

- (a) an offence under section 61B, 61C, 61D, 61E, 66A, 66B, 66C or 66D; or

*Crimes (Child Assault) Amendment 1985*SCHEDULE 1—*continued*AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
PROCEDURE IN CASES OF CHILD ASSAULT—*continued*

(b) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraph (a).

5 (4) Section 405C (**Judge not required to warn jury against convicting person of certain sexual offences**)—

(a) At the end of subsection (3) (a), insert “or”.

(b) From subsection (3) (b), omit “or”.

(c) Omit subsection (3) (c).

10 (5) Section 407AA (**Compellability of spouses to give evidence in certain proceedings**)—

(a) From subsection (1) (a), omit “and”.

(b) At the end of subsection (1) (b), insert:

; and

(c) a reference to a child assault offence is a reference to—

15 (i) an offence under, or mentioned in, section 19, 24, 27, 28, 29, 30, 33, 33A, 35, 39, 41, 42, 43, 44, 46, 47, 48, 49, 58, 59, 61, 61B, 61C, 61D, 61E, 66A, 66B, 66C, 66D, 493 or 494 committed upon a child under the age of 18 years; or

20 (ii) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in subparagraph (i).

(c) After subsection (2), insert:

25 (2A) Except as provided in subsection (3), the husband or wife of an accused person in a criminal proceeding shall, where the offence charged is a child assault offence (other than an offence constituted by a negligent act or omission) committed upon—

(a) a child living in the household of the accused person; or

*Crimes (Child Assault) Amendment 1985*SCHEDULE 1—*continued*AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
PROCEDURE IN CASES OF CHILD ASSAULT—*continued*

(b) a child who, although not living in the household of the accused person, is a child of the accused person and that husband or wife,

5 be compellable to give evidence in the proceeding in every Court, either for the prosecution or for the defence, and without the consent of the accused person.

(d) In subsection (3), after “(2)”, insert “or (2A)”.

(e) Omit subsection (4), insert instead:

10 (4) A Judge or Justice may excuse the husband or wife of an accused person from giving evidence for the prosecution as referred to in subsection (2) or (2A) if satisfied that the application to be excused is made by that husband or wife freely and independently of threat or any other improper influence by any person and that—

15 (a) it is relatively unimportant to the case to establish the facts in relation to which it appears that that husband or wife is to be asked to give evidence or there is other evidence available to establish those facts; and

20 (b) the offence with which the accused person is charged is of a minor nature.

(6) Section 418 (**On hearing of a charge for certain offences, evidence not on oath may be received in case of children of tender years, but such evidence must be corroborated**)—

Omit the section.

*Crimes (Child Assault) Amendment 1985*SCHEDULE 1—*continued*AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
PROCEDURE IN CASES OF CHILD ASSAULT—*continued*(7) Section 578 (**Publication of evidence may be forbidden in certain cases**)—

After subsection (2), insert:

(3) The provisions of this section are subject to any Act or law under which evidence relating to a child under the age of 18 years, or a report or account of that evidence, may not be published.

SCHEDULE 2

(Sec. 5)

AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
OFFENCES(1) Section 61A (**Definition of sexual intercourse, etc.**)—

(a) From subsection (1), omit “this section and sections 61B, 61C and 61D”, insert instead “sections 61A–66E”.

(b) From subsection (2), omit “61B, 61C and 61D”, insert instead “61B–66E”.

(c) After subsection (4), insert:

(5) For the purposes of sections 61D–66E, a person is under the authority of another person if the person is in the care, or under the supervision or authority, of the other person.

20 (2) Section 61D (**Sexual assault category 3—sexual intercourse without consent**)—

(a) After subsection (1), insert:

(1A) Any person who has sexual intercourse with another person who—

(a) is under the age of 16 years; and

*Crimes (Child Assault) Amendment 1985*SCHEDULE 2—*continued*AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
OFFENCES—*continued*

- (b) is (whether generally or at the time of the sexual intercourse only) under the authority of the 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 12 years.
- (b) From subsections (2) and (3), omit “subsection (1)” wherever occurring, insert instead “subsections (1) and (1A)”.
- (3) Section 61E (**Sexual assault category 4—indecent assault and act of indecency**)—
- (a) From subsection (1), omit “or, if the other person is under the age of 16 years, to penal servitude for 6 years”.
- (b) After subsection (1), insert:
- (1A) Any person who assaults another person who—
- (a) is under the age of 16 years; and
- (b) is (whether generally or at the time of the assault only) under the authority of the 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 penal servitude for 6 years.
- (c) After subsection (2), insert:
- (2A) Any person who commits an act of indecency with or towards a person who—
- (a) is under the age of 16 years; and
- (b) is (whether generally or at the time the act is committed only) under the authority of the firstmentioned person,

*Crimes (Child Assault) Amendment 1985*SCHEDULE 2—*continued*AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
OFFENCES—*continued*

or who incites any such person to an act of indecency with that or another person shall be liable to imprisonment for 4 years.

(4) Section 61G (**Alternative verdicts**)—

5 (a) In subsection (2), after “section 61D”, insert “committed before the commencement of Schedule 2 to the Crimes (Child Assault) Amendment Act 1985”.

(b) After subsection (2), insert:

10 (2A) Where on the trial of a person for an offence under section 61D (1) committed on or after the commencement of Schedule 2 to the Crimes (Child Assault) Amendment Act 1985 the jury is satisfied that the person upon whom the offence was alleged to have been committed was under the age of 16 years, but above the age of 10 years, and that the accused had sexual intercourse with the person but is not satisfied that the sexual intercourse was had without the person’s consent, it may find the accused not guilty of the offence charged but guilty of an offence under section 66C (1), and the accused shall be liable to punishment accordingly.

20 (2B) Where on the trial of a person for an offence under section 61D (1A) the jury is not satisfied that the accused had sexual intercourse without the consent of the other person but is satisfied that the accused is guilty of an offence under section 66C (2), it may find the accused not guilty of the offence charged but guilty of an offence under section 66C (2), and the accused shall be liable to punishment accordingly.

25 (2C) Where on the trial of a person for an offence under section 61D (1A) or 61E (1A) or (2A) 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 61D (1) or 61E (1) or (2), as the case may require, it may find the accused not guilty of the offence charged but guilty of an offence under section 61D (1) or 61E (1) or (2), as the case may be, and the accused shall be liable to punishment accordingly.

30

Crimes (Child Assault) Amendment 1985

SCHEDULE 2—*continued*

AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
OFFENCES—*continued*

(5) Sections 66A–66E—

After section 66, insert:

Sexual intercourse—child under 10

5 66A. Any person who has sexual intercourse with another person who is under the age of 10 years shall be liable to penal servitude for 20 years.

Attempting, or assaulting with intent, to have sexual intercourse with child under 10

10 66B. Any person who attempts to have sexual intercourse with another person who is under the age of 10 years, or assaults any such person with intent to have sexual intercourse, shall be liable to penal servitude for 20 years.

Sexual intercourse—child between 10 and 16

15 66C. (1) Any person who has sexual intercourse with another person who is of or above the age of 10 years, and under the age of 16 years, shall be liable to penal servitude for 8 years.

(2) Any person who has sexual intercourse with another person who—

20 (a) is of or above the age of 10 years, and under the age of 16 years; and

(b) is (whether generally or at the time of the sexual intercourse only) under the authority of the person,

shall be liable to penal servitude for 10 years.

25 **Attempting, or assaulting with intent, to have sexual intercourse with child between 10 and 16**

30 66D. Any person who attempts to commit an offence under section 66C upon another person who is of or above the age of 10 years, and under the age of 16 years, or assaults any such person with intent to commit such an offence, shall be liable to the penalty provided for the commission of the offence.

*Crimes (Child Assault) Amendment 1985*SCHEDULE 2—*continued*AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
OFFENCES—*continued***Alternative verdicts**

5 66E. (1) Where on the trial of a person for an offence under section 66A the jury is not satisfied that the other person upon whom the offence was alleged to have been committed was under the age of 10 years, but is satisfied that—

- (a) the other person was under the age of 16 years; and
- (b) the accused had sexual intercourse with the other person,

10 it may find the accused not guilty of the offence charged but guilty of an offence under section 66C (1), and the accused shall be liable to punishment accordingly.

15 (2) Where on the trial of a person for an offence under section 66A the jury is not satisfied that the other person upon whom the offence was alleged to have been committed was under the age of 10 years or that the accused had sexual intercourse with the other person, but is satisfied that—

- (a) the other person was under the age of 16 years; and
- (b) the accused is guilty of an offence under section 66D,

20 it may find the accused not guilty of the offence charged but guilty of an offence under section 66D, and the accused shall be liable to punishment accordingly.

(6) Section 67 (**Carnally knowing girl under 10**)—

Omit the section.

25 (7) Section 68 (**Attempting, or assaulting with intent, to carnally know girl under 10**)—

Omit the section.

(8) Section 69 (**Trial for carnal knowledge—girl in fact over 10**)—

(a) Omit “carnally knowing a girl under the age of ten years”, insert instead “an offence under section 67”.

30 (b) Omit “she was of or above that age”, insert instead “the girl was of or above the age of ten years”.

*Crimes (Child Assault) Amendment 1985*SCHEDULE 2—*continued*AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
OFFENCES—*continued*

- (9) Section 70 (**Trial for carnal knowledge—verdict of assault with intent**)—
- (a) Omit “carnally knowing a girl under the age of ten years”, insert instead “an offence under section 67”.
- (b) Omit “she was of or above that age”, insert instead “the girl was
5 of or above the age of ten years”.
- (10) Section 71 (**Carnally knowing girl between 10 and 16**)—
Omit the section.
- (11) Section 72 (**Attempts**)—
Omit the section.
- 10 (12) Section 73 (**Carnal knowledge by teacher, etc.**)—
- (a) Omit “of or above the age of ten years, and under the age of
seventeen years”, insert instead “of the age of 16 years”.
- (b) Omit “fourteen years”, insert instead “8 years”.
- (13) Section 74 (**Attempts**)—
- 15 (a) Omit “of or above the age of ten years, and under the age of
seventeen years”, insert instead “of the age of 16 years”.
- (b) Omit “seven years”, insert instead “8 years”.
- (14) Section 75 (**Alternative charge**)—
- 20 After “section 74”, insert “as respectively in force before the
commencement of Schedule 2 to the Crimes (Child Assault)
Amendment Act 1985”.
- (15) Section 77—
Omit the section, insert instead:
- Consent no defence in certain cases**
- 25 77. (1) Except as provided by subsection (2), the consent of
the child or other person to whom the charge relates shall be no
defence to a charge under section 61E (1A), (2) or (2A), 66A, 66B,
66C, 66D, 67, 68, 71, 72, 72A, 73, 74 or 76A or, if the child to
whom the charge relates was under the age of 16 years at the
30 time the offence is alleged to have been committed, to a charge
under section 61E (1) or 76.

*Crimes (Child Assault) Amendment 1985*SCHEDULE 2—*continued*AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
OFFENCES—*continued*

(2) It shall be a sufficient defence to a charge which renders a person liable to be found guilty of an offence under section 61E (1A), (2) or (2A), 66C, 66D, 71, 72 or 76A or, if the child to whom the charge relates was under the age of 16 years at the time the offence is alleged to have been committed, to a charge under section 61E (1) or 76 if the person charged and the child to whom the charge relates are not both male and it is made to appear to the court or to the jury before whom the charge is brought that—

(a) the child to whom the charge relates was over the age of 14 years at the time the offence is alleged to have been committed;

(b) the child to whom the charge relates consented to the commission of the offence; and

(c) the person so charged had, at the time the offence is alleged to have been committed, reasonable cause to believe, and did in fact believe, that the child to whom the charge relates was of or above the age of 16 years.

(16) Section 77A (**Proceedings in camera in certain cases**)—

(a) From subsection (1), omit “66,”, insert instead “63, 65, 66, 66A, 66B, 66C, 66D,”.

(b) From subsection (1), omit “73 or 74”, insert instead “73, 74, 76 or 76A”.

(c) Omit subsection (2).

(17) Section 78 (**Limitation**)—

Omit “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,”, insert instead “66C (1), 66D, 71, 72 or 76”.

(18) Section 78A (**Incest**)—

Before “his mother”, insert “a female of or above the age of 16 years who is”.

Crimes (Child Assault) Amendment 1985

SCHEDULE 2—*continued*

AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
OFFENCES—*continued*

(19) Section 78E (**Rape or attempt—verdict of incest or attempt**)—

Omit “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,” insert instead “or 65”.

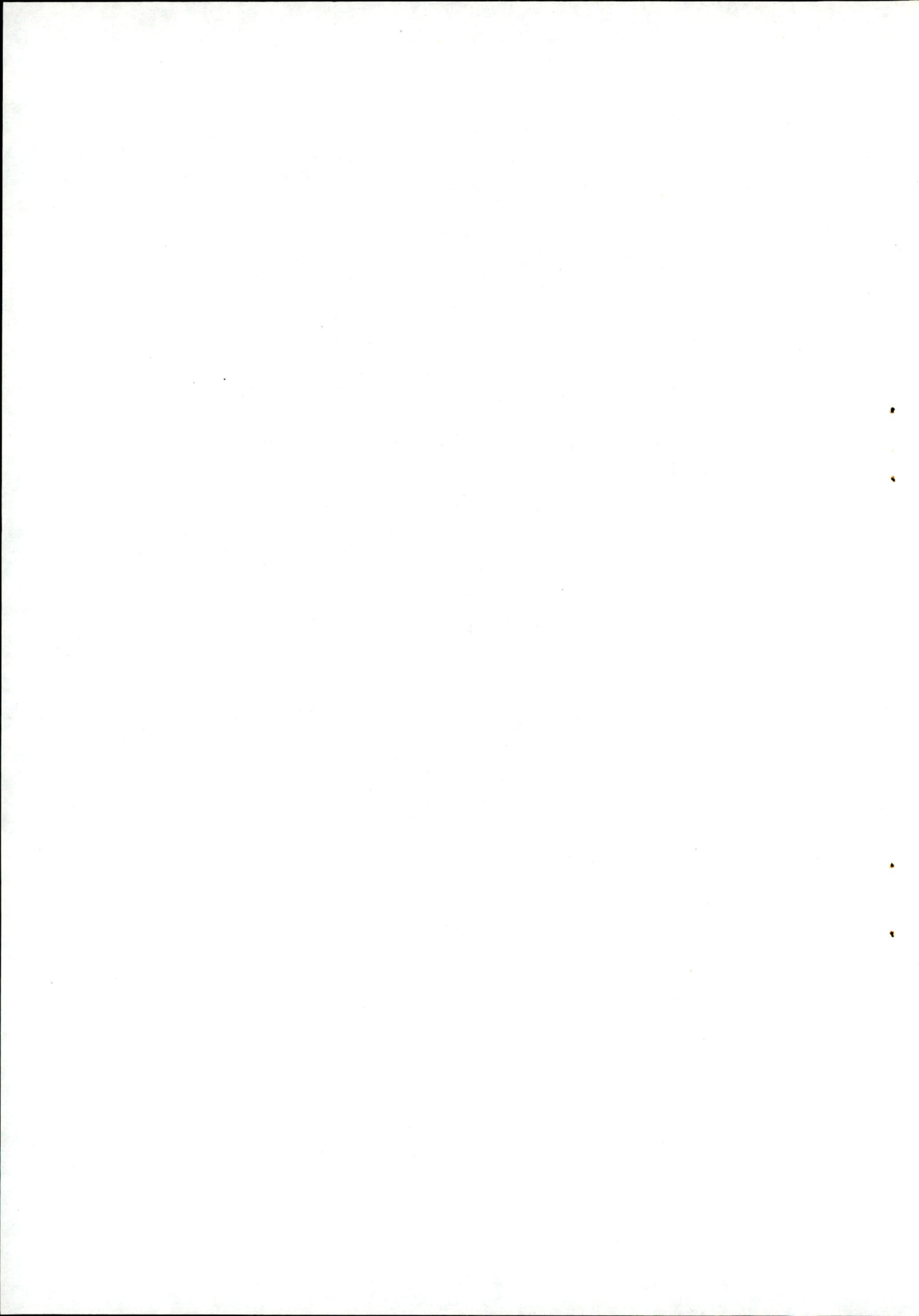
5 (20) Section 476 (**Indictable offences punishable summarily with consent of accused**)—

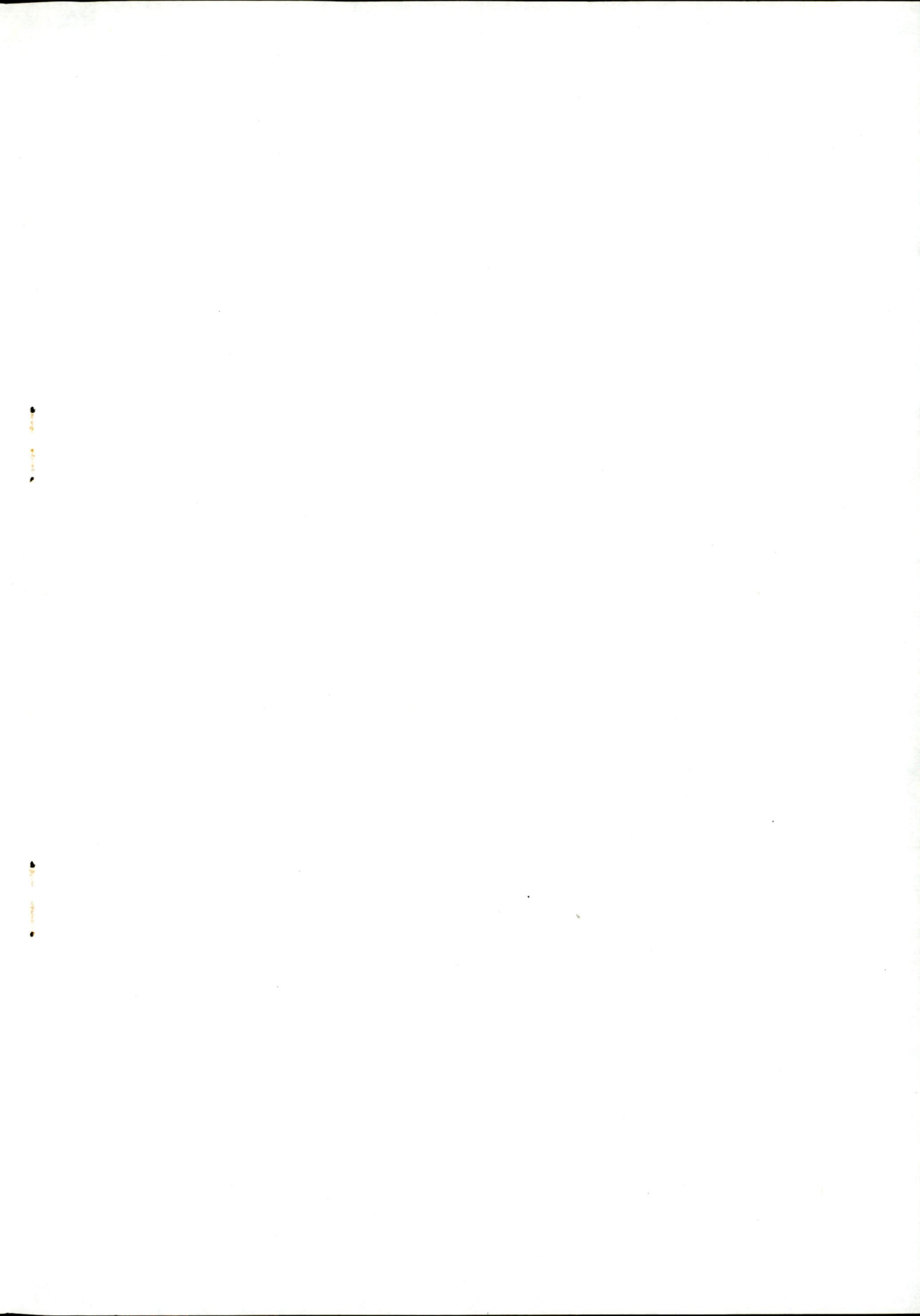
Omit subsection (6) (b), insert instead:

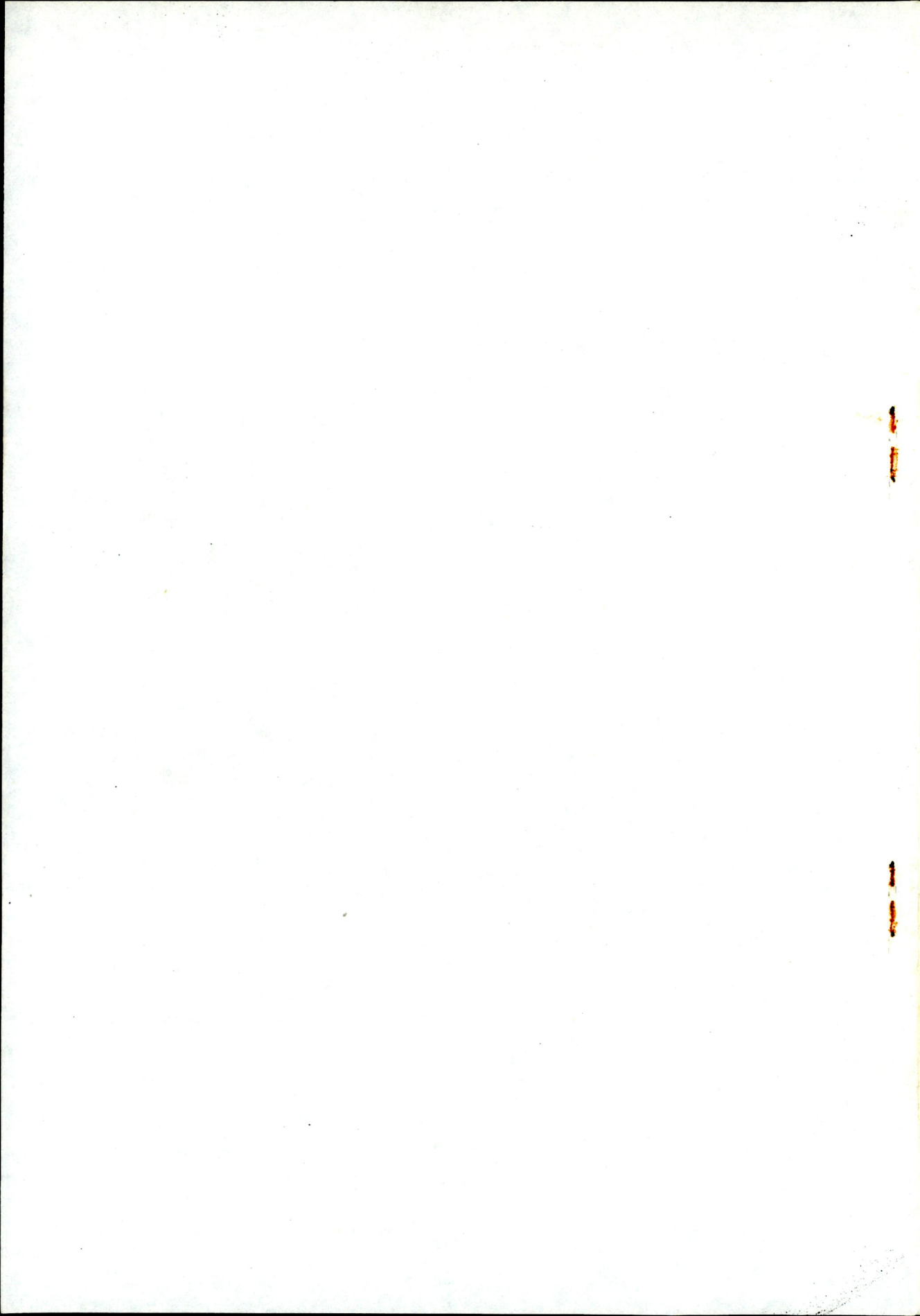
- 10 (b) any offence mentioned in section 61E, 66C (1), 66D, 71, 72, 76 or 76A, where the person upon whom the offence was committed was at the time of the commission of the offence of or above the age of 14 years;

(21) Section 578 (**Publication of evidence may be forbidden in certain cases**)—

- 15 (a) From subsection (1), omit “66,” insert instead “63, 65, 66, 66A, 66B, 66C, 66D,”.
- (b) In subsection (1), after “74,” insert “76, 76A,”.
- (c) Omit subsection (1A).







CRIMES (CHILD ASSAULT) AMENDMENT ACT 1985 No. 149

New South Wales



ANNO TRICESIMO QUARTO

ELIZABETHÆ II REGINÆ

* * * * *

Act No. 149, 1985

An Act to amend the Crimes Act 1900 in relation to children who are sexually assaulted, and in other respects. [Assented to, 28th November, 1985.]

See also Community Welfare (Child Assault) Amendment Act 1985; Oaths (Children) Amendment Act 1985; Evidence (Children) Amendment Act 1985; Pre-Trial Diversion of Offenders Act 1985.

Crimes (Child Assault) Amendment 1985

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 (Child Assault) Amendment Act 1985".

Commencement

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

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

Principal Act

3. The Crimes Act 1900 is referred to in this Act as the Principal Act.

Schedules

4. This Act contains the following Schedules:

SCHEDULE 1—AMENDMENTS TO THE PRINCIPAL ACT IN
RELATION TO PROCEDURE IN CASES OF CHILD
ASSAULT

SCHEDULE 2—AMENDMENTS TO THE PRINCIPAL ACT IN
RELATION TO OFFENCES

Amendment of Act No. 40, 1900

5. The Principal Act is amended in the manner set forth in Schedules 1 and 2.

Crimes (Child Assault) Amendment 1985

SCHEDULE 1

(Sec. 5)

AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
PROCEDURE IN CASES OF CHILD ASSAULT(1) Section 77A (**Proceedings in camera in certain cases**)—

At the end of section 77A, insert:

(3) Where, under this section, the Court directs that proceedings or a part of any proceedings be held in camera, it may, either absolutely or subject to conditions, exempt any person from that direction to the extent necessary to allow that person to be present as a support for a person giving evidence or for any other purpose which the Court thinks fit.

(4) A Court may make a direction under this section on its own motion or at the request of any party and, in determining whether to make such a direction in proceedings in respect of an offence alleged to have been committed upon a child under the age of 18 years, the Court shall consider—

- (a) the need of the child to have any person excluded from those proceedings;
- (b) the need of the child to have any person present in those proceedings;
- (c) the interests of justice; and
- (d) any other matter which the Court thinks relevant.

(2) Section 333 (**False evidence by child not on oath**)—

Omit the section.

(3) Section 405B (**Warning to be given by Judge in relation to lack of complaint in certain sexual offence proceedings**)—

Omit subsection (1), insert instead:

(1) In this section—

“prescribed sexual offence” means—

- (a) an offence under section 61B, 61C, 61D, 61E, 66A, 66B, 66C or 66D; or

Crimes (Child Assault) Amendment 1985

SCHEDULE 1—*continued*

AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
PROCEDURE IN CASES OF CHILD ASSAULT—*continued*

- (b) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraph (a).
- (4) Section 405C (**Judge not required to warn jury against convicting person of certain sexual offences**)—
- (a) At the end of subsection (3) (a), insert “or”.
- (b) From subsection (3) (b), omit “or”.
- (c) Omit subsection (3) (c).
- (5) Section 407AA (**Compellability of spouses to give evidence in certain proceedings**)—
- (a) From subsection (1) (a), omit “and”.
- (b) At the end of subsection (1) (b), insert:
- ; and
- (c) a reference to a child assault offence is a reference to—
- (i) an offence under, or mentioned in, section 19, 24, 27, 28, 29, 30, 33, 33A, 35, 39, 41, 42, 43, 44, 46, 47, 48, 49, 58, 59, 61, 61B, 61C, 61D, 61E, 66A, 66B, 66C, 66D, 493 or 494 committed upon a child under the age of 18 years; or
- (ii) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in subparagraph (i).
- (c) After subsection (2), insert:
- (2A) Except as provided in subsection (3), the husband or wife of an accused person in a criminal proceeding shall, where the offence charged is a child assault offence (other than an offence constituted by a negligent act or omission) committed upon—
- (a) a child living in the household of the accused person; or

Crimes (Child Assault) Amendment 1985

SCHEDULE 1—*continued*

AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
PROCEDURE IN CASES OF CHILD ASSAULT—*continued*

- (b) a child who, although not living in the household of the accused person, is a child of the accused person and that husband or wife,

be compellable to give evidence in the proceeding in every Court, either for the prosecution or for the defence, and without the consent of the accused person.

- (d) In subsection (3), after “(2)”, insert “or (2A)”.

- (e) Omit subsection (4), insert instead:

(4) A Judge or Justice may excuse the husband or wife of an accused person from giving evidence for the prosecution as referred to in subsection (2) or (2A) if satisfied that the application to be excused is made by that husband or wife freely and independently of threat or any other improper influence by any person and that—

- (a) it is relatively unimportant to the case to establish the facts in relation to which it appears that that husband or wife is to be asked to give evidence or there is other evidence available to establish those facts; and

- (b) the offence with which the accused person is charged is of a minor nature.

- (6) Section 418 (**On hearing of a charge for certain offences, evidence not on oath may be received in case of children of tender years, but such evidence must be corroborated**)—

Omit the section.

Crimes (Child Assault) Amendment 1985

SCHEDULE 1—*continued*

AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
PROCEDURE IN CASES OF CHILD ASSAULT—*continued*

(7) Section 578 (**Publication of evidence may be forbidden in certain cases**)—

After subsection (2), insert:

(3) The provisions of this section are subject to any Act or law under which evidence relating to a child under the age of 18 years, or a report or account of that evidence, may not be published.

SCHEDULE 2

(Sec. 5)

AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
OFFENCES

(1) Section 61A (**Definition of sexual intercourse, etc.**)—

(a) From subsection (1), omit “this section and sections 61B, 61C and 61D”, insert instead “sections 61A–66E”.

(b) From subsection (2), omit “61B, 61C and 61D”, insert instead “61B–66E”.

(c) After subsection (4), insert:

(5) For the purposes of sections 61D–66E, a person is under the authority of another person if the person is in the care, or under the supervision or authority, of the other person.

(2) Section 61D (**Sexual assault category 3—sexual intercourse without consent**)—

(a) After subsection (1), insert:

(1A) Any person who has sexual intercourse with another person who—

(a) is under the age of 16 years; and

Crimes (Child Assault) Amendment 1985

SCHEDULE 2—*continued*

AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
OFFENCES—*continued*

(b) is (whether generally or at the time of the sexual intercourse only) under the authority of the 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 12 years.

(b) From subsections (2) and (3), omit “subsection (1)” wherever occurring, insert instead “subsections (1) and (1A)”.

(3) Section 61E (**Sexual assault category 4—indecent assault and act of indecency**)—

(a) From subsection (1), omit “or, if the other person is under the age of 16 years, to penal servitude for 6 years”.

(b) After subsection (1), insert:

(1A) Any person who assaults another person who—

(a) is under the age of 16 years; and

(b) is (whether generally or at the time of the assault only) under the authority of the 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 penal servitude for 6 years.

(c) After subsection (2), insert:

(2A) Any person who commits an act of indecency with or towards a person who—

(a) is under the age of 16 years; and

(b) is (whether generally or at the time the act is committed only) under the authority of the firstmentioned person,

Crimes (Child Assault) Amendment 1985

SCHEDULE 2—*continued*

AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
OFFENCES—*continued*

or who incites any such person to an act of indecency with that or another person shall be liable to imprisonment for 4 years.

(4) Section 61G (**Alternative verdicts**)—

(a) In subsection (2), after “section 61D”, insert “committed before the commencement of Schedule 2 to the Crimes (Child Assault) Amendment Act 1985”.

(b) After subsection (2), insert:

(2A) Where on the trial of a person for an offence under section 61D (1) committed on or after the commencement of Schedule 2 to the Crimes (Child Assault) Amendment Act 1985 the jury is satisfied that the person upon whom the offence was alleged to have been committed was under the age of 16 years, but above the age of 10 years, and that the accused had sexual intercourse with the person but is not satisfied that the sexual intercourse was had without the person’s consent, it may find the accused not guilty of the offence charged but guilty of an offence under section 66C (1), and the accused shall be liable to punishment accordingly.

(2B) Where on the trial of a person for an offence under section 61D (1A) the jury is not satisfied that the accused had sexual intercourse without the consent of the other person but is satisfied that the accused is guilty of an offence under section 66C (2), it may find the accused not guilty of the offence charged but guilty of an offence under section 66C (2), and the accused shall be liable to punishment accordingly.

(2C) Where on the trial of a person for an offence under section 61D (1A) or 61E (1A) or (2A) 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 61D (1) or 61E (1) or (2), as the case may require, it may find the accused not guilty of the offence charged but guilty of an offence under section 61D (1) or 61E (1) or (2), as the case may be, and the accused shall be liable to punishment accordingly.

Crimes (Child Assault) Amendment 1985

SCHEDULE 2—*continued*

AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
OFFENCES—*continued*

(5) Sections 66A–66E—

After section 66, insert:

Sexual intercourse—child under 10

66A. Any person who has sexual intercourse with another person who is under the age of 10 years shall be liable to penal servitude for 20 years.

Attempting, or assaulting with intent, to have sexual intercourse with child under 10

66B. Any person who attempts to have sexual intercourse with another person who is under the age of 10 years, or assaults any such person with intent to have sexual intercourse, shall be liable to penal servitude for 20 years.

Sexual intercourse—child between 10 and 16

66C. (1) Any person who has sexual intercourse with another person who is of or above the age of 10 years, and under the age of 16 years, shall be liable to penal servitude for 8 years.

(2) Any person who has sexual intercourse with another person who—

- (a) is of or above the age of 10 years, and under the age of 16 years; and
- (b) is (whether generally or at the time of the sexual intercourse only) under the authority of the person,

shall be liable to penal servitude for 10 years.

Attempting, or assaulting with intent, to have sexual intercourse with child between 10 and 16

66D. Any person who attempts to commit an offence under section 66C upon another person who is of or above the age of 10 years, and under the age of 16 years, or assaults any such person with intent to commit such an offence, shall be liable to the penalty provided for the commission of the offence.

SCHEDULE 2—*continued*AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
OFFENCES—*continued***Alternative verdicts**

66E. (1) Where on the trial of a person for an offence under section 66A the jury is not satisfied that the other person upon whom the offence was alleged to have been committed was under the age of 10 years, but is satisfied that—

- (a) the other person was under the age of 16 years; and
- (b) the accused had sexual intercourse with the other person,

it may find the accused not guilty of the offence charged but guilty of an offence under section 66C (1), and the accused shall be liable to punishment accordingly.

(2) Where on the trial of a person for an offence under section 66A the jury is not satisfied that the other person upon whom the offence was alleged to have been committed was under the age of 10 years or that the accused had sexual intercourse with the other person, but is satisfied that—

- (a) the other person was under the age of 16 years; and
- (b) the accused is guilty of an offence under section 66D,

it may find the accused not guilty of the offence charged but guilty of an offence under section 66D, and the accused shall be liable to punishment accordingly.

(6) Section 67 (**Carnally knowing girl under 10**)—

Omit the section.

(7) Section 68 (**Attempting, or assaulting with intent, to carnally know girl under 10**)—

Omit the section.

(8) Section 69 (**Trial for carnal knowledge—girl in fact over 10**)—

- (a) Omit “carnally knowing a girl under the age of ten years”, insert instead “an offence under section 67”.
- (b) Omit “she was of or above that age”, insert instead “the girl was of or above the age of ten years”.

Crimes (Child Assault) Amendment 1985

SCHEDULE 2—*continued*

AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
OFFENCES—*continued*

- (9) Section 70 (**Trial for carnal knowledge—verdict of assault with intent**)—
- (a) Omit “carnally knowing a girl under the age of ten years”, insert instead “an offence under section 67”.
 - (b) Omit “she was of or above that age”, insert instead “the girl was of or above the age of ten years”.
- (10) Section 71 (**Carnally knowing girl between 10 and 16**)—
- Omit the section.
- (11) Section 72 (**Attempts**)—
- Omit the section.
- (12) Section 73 (**Carnal knowledge by teacher, etc.**)—
- (a) Omit “of or above the age of ten years, and under the age of seventeen years”, insert instead “of the age of 16 years”.
 - (b) Omit “fourteen years”, insert instead “8 years”.
- (13) Section 74 (**Attempts**)—
- (a) Omit “of or above the age of ten years, and under the age of seventeen years”, insert instead “of the age of 16 years”.
 - (b) Omit “seven years”, insert instead “8 years”.
- (14) Section 75 (**Alternative charge**)—
- After “section 74”, insert “as respectively in force before the commencement of Schedule 2 to the Crimes (Child Assault) Amendment Act 1985”.
- (15) Section 77—
- Omit the section, insert instead:

Consent no defence in certain cases

77. (1) Except as provided by subsection (2), the consent of the child or other person to whom the charge relates shall be no defence to a charge under section 61E (1A), (2) or (2A), 66A, 66B, 66C, 66D, 67, 68, 71, 72, 72A, 73, 74 or 76A or, if the child to whom the charge relates was under the age of 16 years at the time the offence is alleged to have been committed, to a charge under section 61E (1) or 76.

Crimes (Child Assault) Amendment 1985

SCHEDULE 2—*continued*

AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
OFFENCES—*continued*

(2) It shall be a sufficient defence to a charge which renders a person liable to be found guilty of an offence under section 61E (1A), (2) or (2A), 66C, 66D, 71, 72 or 76A or, if the child to whom the charge relates was under the age of 16 years at the time the offence is alleged to have been committed, to a charge under section 61E (1) or 76 if the person charged and the child to whom the charge relates are not both male and it is made to appear to the court or to the jury before whom the charge is brought that—

- (a) the child to whom the charge relates was over the age of 14 years at the time the offence is alleged to have been committed;
- (b) the child to whom the charge relates consented to the commission of the offence; and
- (c) the person so charged had, at the time the offence is alleged to have been committed, reasonable cause to believe, and did in fact believe, that the child to whom the charge relates was of or above the age of 16 years.

(16) Section 77A (**Proceedings in camera in certain cases**)—

- (a) From subsection (1), omit “66,” insert instead “63, 65, 66, 66A, 66B, 66C, 66D,”.
- (b) From subsection (1), omit “73 or 74”, insert instead “73, 74, 76 or 76A”.
- (c) Omit subsection (2).

(17) Section 78 (**Limitation**)—

Omit “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,” insert instead “66C (1), 66D, 71, 72 or 76”.

(18) Section 78A (**Incest**)—

Before “his mother”, insert “a female of or above the age of 16 years who is”.

Crimes (Child Assault) Amendment 1985

SCHEDULE 2—*continued*

AMENDMENTS TO THE PRINCIPAL ACT IN RELATION TO
OFFENCES—*continued*

(19) Section 78E (**Rape or attempt—verdict of incest or attempt**)—

Omit “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,” insert instead “or 65”.

(20) Section 476 (**Indictable offences punishable summarily with consent of accused**)—

Omit subsection (6) (b), insert instead:

(b) any offence mentioned in section 61E, 66C (1), 66D, 71, 72, 76 or 76A, where the person upon whom the offence was committed was at the time of the commission of the offence of or above the age of 14 years;

(21) Section 578 (**Publication of evidence may be forbidden in certain cases**)—

(a) From subsection (1), omit “66,” insert instead “63, 65, 66, 66A, 66B, 66C, 66D,”.

(b) In subsection (1), after “74,” insert “76, 76A,”.

(c) Omit subsection (1A).



