

FIRST PRINT

## CRIMES (AMENDMENT) BILL 1991

NEW SOUTH WALES



### EXPLANATORY NOTE

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

The objects of this Bill are to amend the Crimes Act 1900:

- (a) to clarify the definition of sexual intercourse; and
- (b) to specify the principles that are to apply to the reduction by a court of a sentence for an offence because of assistance given by the offender to law enforcement authorities.

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Clause 1 specifies the short title of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the Schedule of amendments to the Crimes Act 1900.

### SCHEDULE 1—AMENDMENTS

#### Definition of sexual intercourse—item (1)

The definition of “sexual intercourse” currently found in section 61H of the Crimes Act 1900 includes, as part of the definition, the phrase “sexual connection occasioned by the penetration of the vagina of any person”. This phrase is repeated from the definition previously inserted as section 61A by the Crimes (Sexual Assault) Amendment Act 1981.

There is the possibility that the identification of a particular part of the female genitalia, namely, the vagina, may lead to the conclusion that the penetration of those parts of the female genitalia which are external to the vagina would not be sufficient to constitute sexual intercourse. The technicality of the current definition could raise particular difficulties in child sexual assault cases where the evidence of the child is that penetration took place but is not at all specific as to the degree of penetration.

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

Part of the proposed amendment comprises the expression "genitalia of a female person". "Woman" has not been used as it may lead to an argument that it does not include "girls". Whether or not the expression applies to a transsexual can only be determined having regard to the circumstances of the transsexual. (See *R v Harris and McGuinness* (1988) 17 NSWLR 158.)

**Reduction of sentences for assistance given to law enforcement authorities—item (2)**

Item (2) inserts a new section 442B into the Crimes Act 1900. The purpose of this section is to provide guidance to sentencing courts when dealing with offenders who have assisted the authorities.

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

**Savings and transitional provisions—item (3)**

Item (3) amends the Eleventh Schedule to the Crimes Act 1900 which contains savings and transitional provisions.

Proposed clause 3 makes it clear that, even from the date of commencement of section 61A on 14 July 1981, the common law situation whereby the slightest degree of penetration of a woman's genitals was sufficient to constitute rape has not been affected by amendments made to the Crimes Act 1900.

Proposed clause 4 applies the provisions of proposed section 442B to sentences imposed after the commencement of the proposed section, whether the offence in relation to which the sentence is imposed was committed before or after that commencement.

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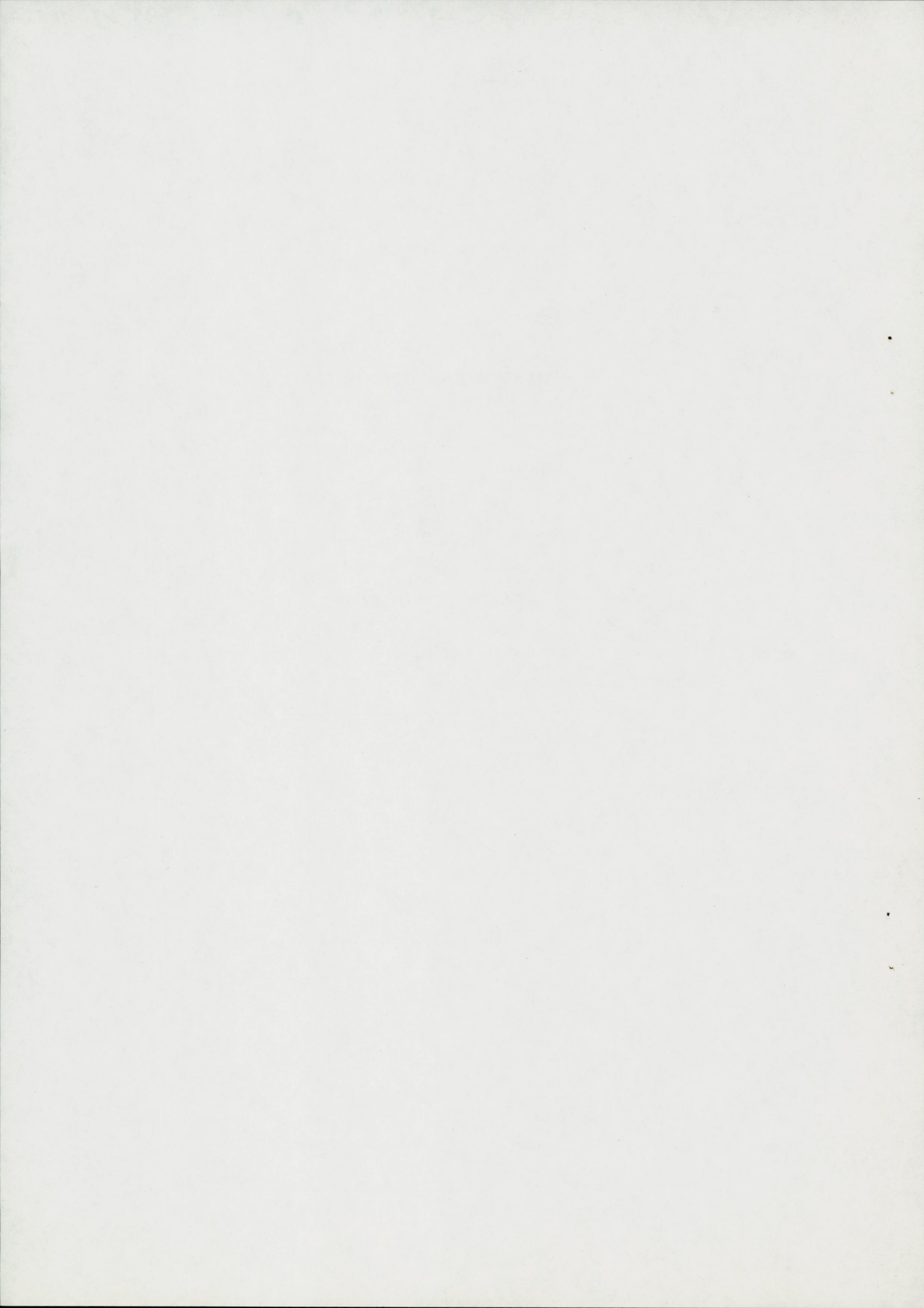


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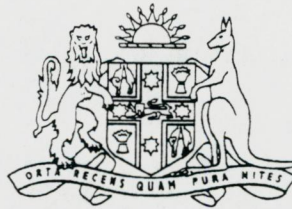
SCHEDULE 1—AMENDMENTS

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**CRIMES (AMENDMENT) BILL 1991**

NEW SOUTH WALES



No.       , 1991

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**A BILL FOR**

An Act to amend the Crimes Act 1900 with respect to the definition of sexual intercourse and the reduction of sentences.

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**The Legislature of New South Wales enacts:**

**Short title**

1. This Act may be cited as the Crimes (Amendment) Act 1991.

**Commencement**

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

**Amendment of Crimes Act 1900 No. 40**

3. The Crimes Act 1900 is amended as set out in Schedule 1.

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**SCHEDULE 1—AMENDMENTS**

(Sec. 3)

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

Omit paragraph (a) of the definition of "sexual intercourse" in section 61H (1), insert instead:

- (a) sexual connection occasioned by the penetration to any extent of the genitalia of a female person or the anus of any person by:
- (i) any part of the body of another person; or
  - (ii) any object manipulated by another person,
- except where the penetration is carried out for proper medical purposes; or

- (2) Section 442B:

After section 442A, insert:

**Reduction of sentences for assistance to authorities**

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

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

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SCHEDULE 1—AMENDMENTS—*continued*

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

- (a) the effect of the offence for which the offender is being sentenced on the victim or victims of the offence and the family or families of the victim or victims;
- (b) the significance and usefulness of the offender's assistance to the authority or authorities concerned, taking into consideration any evaluation by the authority or authorities of the assistance rendered;
- (c) the truthfulness, completeness and reliability of any information or evidence provided by the offender;
- (d) the nature and extent of the offender's assistance;
- (e) the timeliness of the assistance;
- (f) any benefits that the offender has gained or may gain by reason of the assistance;
- (g) whether the offender will suffer harsher custodial conditions;
- (h) any injury suffered by the offender or the offender's family, or any danger or risk of injury to the offender or the offender's family, resulting from the assistance;
- (i) whether the assistance concerns the offence for which the offender is being sentenced or an unrelated offence;
- (j) the likelihood that the offender will commit further offences after release.

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

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

After Part 1, insert:

**Part 2—Crimes (Amendment) Act 1991**

**Sexual intercourse**

3. It is declared that, from 14 July 1981 (being the date of commencement of the amendments made by the Crimes (Sexual Assault) Amendment Act 1981) until the

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SCHEDULE 1—AMENDMENTS—*continued*

commencement of the amendment made by the Crimes (Amendment) Act 1991 to section 61H, an act has been an act of sexual intercourse within the meaning of this Act at the relevant time if the act has comprised sexual intercourse within the meaning of section 61H, as amended by the Crimes (Amendment) Act 1991.

**Reduction of sentences for assistance to authorities**

4. Section 442B, as inserted by the Crimes (Amendment) Act 1991, applies only to a sentence imposed after the commencement of that section, but so applies whether the offence in relation to which the sentence is imposed was committed before or after that commencement.

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