FIRST PRINT

CRIMINAL LEGISLATION (AMENDMENT) BILL 1992

NEW SOUTH WALES

EXPLANATORY NOTE

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

The objects of this Bill are:

(a) to clarify the meaning of "sexual intercourse" for the purposes of sexual assault offences; and

(b) to vitiate consent given to an act of sexual intercourse under a mistaken belief that it was for medical or hygienic purposes; and

(c) to remove time limits on the prosecution of certain sexual offences; and

(d) to make the language of offences relating to acts of indecency consistent; and

(e) to restrict the determination of bail applications by Justices to Justices who are employees of the Department of Courts Administration; and

(f) to enable a statement tendered as evidence in committal proceedings on a plea of guilty to be used as evidence in the trial of the defendant if the person who made the statement is unavailable and the defendant changes the plea to not guilty; and

(g) to make provision for the reduction of sentences where an offender provides, or undertakes to provide, assistance to law enforcement authorities; and

(h) to broaden provisions relating to inquiries into the guilt of convicted persons; and

(i) to enable the offence of taking a conveyance to be dealt with summarily without the consent of the accused; and

(j) to require a court which is deciding whether to make an apprehended violence order restricting the defendant's access to his or her residence to consider the effect of not making the order on the person being protected and any children living in the residence; and

(k) to enable the Crown to appeal against a sentence where assistance has not been given to law enforcement authorities as promised; and

(l) to enable a Judge to determine a person's unfitness to plead, and to determine special hearings, in the place of a jury; and

(m) to make it an offence to climb up or down or jump from buildings and other structures and risk the safety of any other person; and

(n) to make other necessary consequential amendments to the relevant legislation.

A detailed explanation of each amendment is set out in the Bill after the amendment concerned.

FIRST PRINT

CRIMINAL LEGISLATION (AMENDMENT) BILL 1992

NEW SOUTH WALES

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CRIMINAL LEGISLATION (AMENDMENT) BILL 1992

NEW SOUTH WALES

No. , 1992

A BILL FOR

An Act to amend the Crimes Act 1900, the Bail Act 1978, the Criminal Appeal Act 1912, the Mental Health (Criminal Procedure) Act 1990 and the Summary Offences Act 1988 with respect to sexual offences, bail applications, reduction of sentences, apprehended violence orders, appeals against sentences, judges instead of juries determining unfitness to plead and special hearings and other matters; and for other purposes.

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Criminal Legislation (Amendment) Act 1992.

Commencement

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

Amendments

3. Each Act specified in Schedules 1–5 is amended as set out in those Schedules.

Explanatory notes

4. Matter appearing under the heading "Explanatory note" in Schedules 1–5 does not form part of this Act.

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40

Amendments—consequential

(1) Section 1 (**Short title and contents of Act**):

(a) From the matter relating to Part 12, omit ", 442A", insert instead "– 442B".

(b) From the matter relating to Part 14, omit "(4A) *Unlawfully using vehicle or boat—s.* 526A".

Explanatory note—item (1)

Item (1) (a) is consequential on the proposed amendment contained in item (10) inserting section 442B.

Item (1) (b) is consequential on the proposed amendment contained in item (14) omitting section 526A.

Amendment—definition of "sexual intercourse"

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

Omit section 61H (1) (a), 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:

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

(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

Explanatory note—item (2)

The definition of "sexual intercourse" currently found in section 61H 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. (This argument was considered and rejected in *R v Randall* by the South Australian Court of Criminal Appeal in June 1991.) 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.

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 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". 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 McGuiness* (1988) 17 NSWLR 158.)

Amendments—acts of indecency

(3) Section 61N (**Act of indecency**):

After "with" where secondly occurring, insert "or towards".

Explanatory note—item (3)

Item (3) amends section 61N to make the language of the provision relating to incitement to an act of indecency consistent with the language relating to the offence of committing an act of indecency.

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

Amendments—consent to sexual intercourse

(4) Section 61R (**Consent**):

(a) After section 61R (2) (a), insert:

(a1) a person who consents to sexual intercourse with another person under a mistaken belief that the sexual intercourse is for medical or hygienic purposes is taken not to consent to the sexual intercourse; and

(b) Section 61R (2) (b):

After "paragraph (a)", insert "or (a1)".

Explanatory note—item (4)

Item (4) provides that consent to sexual intercourse that is given under a mistaken belief that it is for medical or hygienic purposes is taken not to be consent. The purpose of the amendment is to provide that such an act of sexual intercourse will amount to sexual assault in such circumstances, even though the act is consented to. This will overcome the possible effect in New South Wales of the decision in *R v Mobilio* in 1990 in which the Victorian Court of Criminal Appeal held there was consent to an act of sexual intercourse even though the victims concerned might have believed the act was required for diagnostic purposes.

Amendment—time limit on prosecution of certain offences

(5) Section 78 (**Limitation**):

Omit the section.

Explanatory note—item (5)

Item (5) removes the 12 month limit for commencing prosecutions for offences under sections 61E (1), 66C (1), 66D, 71, 72 and 76 (relating to sexual assault) if the child on whom the offence was alleged to have been committed was at the time of the alleged offence between 14 and 16 years of age.

Amendment—acts of gross indecency

(6) Section 78Q (**Acts of gross indecency**):

After "with" wherever occurring, insert "or towards".

Explanatory note—item (6)

Item (6) amends section 78Q to make the language of the provision more consistent with section 61N and other provisions relating to acts of indecency.

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

Amendment—time limit on prosecution of certain offences

(7) Section 78T (**Limitations (cf. ss. 78, 78F)**):

Omit section 78T (1).

Explanatory note—item (7)

Item (7) removes the 12 month time limit for commencing prosecutions for offences under sections 78K and 78L (relating to homosexual intercourse with males) if the male on whom the offence was alleged to have been committed was at the time of the alleged offence between 16 and 18 years of age.

Amendments—apprehension of offenders

(8) Section 352 (**Person in act of committing or having committed offence**):

(a) Section 352 (1), (2) and (3):

Omit "a Justice" wherever occurring, insert instead "an authorised Justice".

(b) Omit section 352 (5), insert instead:

(5) In this section:

"authorised Justice" means:

(a) a Magistrate; or

(b) a Justice employed in the Department of Courts Administration;

"telegraph" includes telephone, radio, telex, facsimile transmission, computer used to relay information and any other communication device.

Explanatory note—item (8)

Item (8) restricts the Justices before whom an apprehended offender may be brought to be dealt with according to law to Magistrates or Justices employed in the Department of Courts Administration. The effect of this and other amendments to the Bail Act 1978 will be to confine the determination of bail applications to such Justices.

Amendment—witness statements

(9) Section 409 (**Depositions may be read as evidence for prosecution etc.**):

Omit section 409 (11), insert instead:

(11) In this section, **"prescribed statement"** means:

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

(a) a written statement the whole or a part of which was admitted as evidence under section 48A of the Justices Act 1902 and includes a part of any such statement rejected under section 48F of that Act; or

(b) a written statement the whole or a part of which was tendered as evidence on a plea of guilty under section 51A of the Justices Act 1902.

Explanatory note—item (9)

Item (9) allows statements tendered as evidence on a plea of guilty in committal proceedings to be used, if the maker of the statement is unavailable, as evidence if the plea of guilty is reversed.

Amendment—reduction of sentences

(10) 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 reduce the sentence it would otherwise impose, having regard to the degree to which the person has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence or other offences.

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

(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 or undertaken to be rendered;

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

(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 or promised assistance;

(e) the timeliness of the assistance or undertaking to assist;

(f) any benefits that the offender has gained or may gain by reason of the assistance or undertaking to assist;

(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 or the undertaking to assist;

(i) whether the assistance or promised 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.

(5) In this section, a reference to a court includes a reference to a Judge and a Magistrate (whether exercising jurisdiction in respect of an indictable offence or a summary offence).

Explanatory note—item (10)

Item (10) inserts a new section 442B. 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 discounting sentences where the offender has assisted or undertakes to assist 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.

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

Amendments—inquiries into guilt subsequent to conviction

(11) Section 475 (**Governor or Judge may direct inquiry etc.**):

(a) After "conviction" in section 475 (1), insert "in any court".

(b) After "Supreme Court" in section 475 (1), insert "on application by or on behalf of the person or".

(c) From section 475, omit "Justice" wherever occurring, insert instead "prescribed person".

(d) After section 475 (4), insert:

(5) In this section:

"prescribed person" means a Justice or a judicial officer within the meaning of the Judicial Officers Act 1986.

Explanatory note—item (11)

Item (11) amends a provision which currently enables the Governor on petition of a convicted person or the Supreme Court on its own motion to direct a Justice to inquire into any doubt or question arising as to the guilt of the convicted person, or any mitigating circumstances or evidence in the case.

The proposed amendments will enable the Supreme Court to give such a direction on application by or on behalf of any convicted person, make it clear that such a direction may be given in respect of a conviction in any court and enable such a direction to be given to any judicial officer.

Amendments—indictable offences punishable summarily

(12) Section 476 (**Indictable offences punishable summarily with consent of accused**):

(a) After "offence" in section 476 (6) (a) (i), insert "(other than an offence mentioned in section 154A)";

(b) From section 476 (6) (d), omit "154A,".

Explanatory note—item (12)

Item (12) is consequential on the proposed amendment contained in item (13).

Amendments—taking conveyance

(13) Section 496A (**Additional indictable offences punishable summarily without consent of accused**):

Omit section 496A (1), insert instead:

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

(1) Proceedings for an offence under section 93G, 93H or 154A may be disposed of in a summary manner before a Local Court constituted by a Magistrate sitting alone.

Explanatory note—item (13)

Item (13) inserts a provision enabling offences under section 154A (taking a conveyance without consent of owner) to be dealt with summarily without the consent of the accused whatever the value of the conveyance. The penalty that may be imposed is imprisonment for a maximum period of 2 years, or a fine not exceeding $5,000, or both.

(14) Section 526A (**Taking a conveyance without the consent of the owner**):

Omit the section and the short heading before the section.

Explanatory note—item (14)

Item (14) is consequential on the proposed amendment contained in item (13) which makes it no longer necessary to have a separate summary offence of taking a conveyance without consent.

Amendment—apprehended violence orders

(15) Section 562D (**Prohibitions and restrictions imposed by orders**):

Omit section 562D (2), insert instead:

(2) In deciding whether or not to make an order which prohibits or restricts access to the defendant's residence, the court is to consider:

(a) the accommodation needs of all relevant parties; and

(b) the effect of making an order on any children living or ordinarily living at the residence; and

(c) the consequences for the person for whose protection the order would be made and any children living or ordinarily living at the residence if an order restricting access by the defendant to the residence is not made.

Explanatory note—item (15)

Item (15) includes among the matters a court must take into consideration in deciding whether or not to make an apprehended violence order restricting access to a defendant's residence the consequences for the person for whose protection the order would be made, and for children living or ordinarily living at the residence, if the order is not made.

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

Amendment—savings and transitional provisions

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

After Part 1, insert:

Part 2—Criminal Legislation (Amendment) Act 1992

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 commencement of the amendment made by the Criminal Legislation (Amendment) Act 1992 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 Criminal Legislation (Amendment) Act 1992.

Consent to sexual intercourse

4. The amendments to section 61R made by the Criminal Legislation (Amendment) Act 1992 apply only in respect of offences committed after the commencement of the amendments.

Application of amendment to section 409

5. The amendment made by the Criminal Legislation (Amendment) Act 1992 to section 409, to the extent to which it applies to a written statement the whole or a part of which was tendered as evidence on a plea of guilty under section 51A of the Justices Act 1902, applies to such a statement tendered after the commencement of the amendment.

Operation of amendments relating to taking of vehicles without consent and other indictable offences

6. (1) The amendments to sections 476 and 496A made by the Criminal Legislation (Amendment) Act 1992 apply only in respect of proceedings for offences committed after the commencement of the amendments.

(2) This Act applies in respect of proceedings for offences committed before the commencement of any such amendments as if the amendments had not been made.

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

(3) Section 526A continues to apply to offences committed before that section was repealed as if the section is still in force.

Reduction of sentences for assistance to authorities

7. Section 442B of this Act and section 5DA of the Criminal Appeal Act 1912, as inserted by the Criminal Legislation (Amendment) Act 1992, apply only to a sentence imposed after the commencement of the section concerned, but so apply whether the offence in relation to which the sentence is imposed was committed before or after that commencement.

Explanatory note—item (16)

Item (16) inserts the following savings and transitional provisions, relating to amendments made by the proposed Act:

- a provision applying the new definition of "sexual intercourse" to sexual assault offences which occurred after 14 July 1981
- a provision that makes it clear that amendments relating to consent in sexual offences apply only in respect of offences committed after the commencement of the amendments
- a provision that applies amendments enabling the use of previous witnesses' statements in the trial of a person who has previously pleaded guilty to statements first used after the commencement of the amendment
- a provision that makes it clear that amendments in relation to the summary disposal of offences apply only in respect of proceedings for offences committed after the amendments commence
- a provision applying the section enabling sentences to be reduced for assistance or promised assistance to law enforcement authorities, and the section enabling appeals against such sentences in the event of a failure to assist, to sentences imposed after the section commences whether or not the offence was committed before or after the commencement

SCHEDULE 2—AMENDMENT OF BAIL ACT 1978 No. 161

Amendments—bail determinations

(1) Section 23 (**Power of magistrates and justices to grant bail**):

After "justice", insert "(being a justice employed in the Department of Courts Administration)".

(2) Section 50 (**Arrest for absconding or breaching condition**):

After section 50 (4), insert:

(5) In this section, **"court"** does not include a justice who is not a justice employed in the Department of Courts Administration.

Explanatory note—items (1) and (2)

Items (1) and (2) provide that the only justices who may make bail determinations are justices employed in the Department of Courts Administration.

SCHEDULE 3—AMENDMENT OF CRIMINAL APPEAL ACT 1912 No. 16

Amendments—appeals by Crown against sentence

(1) Section 5D (**Appeal by Crown against sentence**):

After section 5D (2), insert:

(3) This section does not apply to an appeal referred to in section 5DA.

(2) Section 5DA:

After section 5D, insert:

Appeal by Crown against reduced sentence for assistance to authorities

5DA. (1) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence imposed on a person that was reduced because the person undertook to assist law enforcement authorities if the person fails wholly or partly to fulfil the undertaking.

(2) On an appeal the Court of Criminal Appeal may, if it is satisfied that the person has failed wholly or partly to fulfil the undertaking, vary the sentence and impose such sentence as it thinks fit.

SCHEDULE 3—AMENDMENT OF CRIMINAL APPEAL ACT 1912 No. 16—*continued*

Explanatory note—items (1) and (2)

Item (2) inserts a provision that enables the Crown to appeal against a reduced sentence where the sentence has been reduced because of assistance to be given to law enforcement authorities and that assistance has not been given.

Item (1) makes an amendment consequential on the amendment made by item (2).

SCHEDULE 4—AMENDMENT OF MENTAL HEALTH (CRIMINAL PROCEDURE) ACT 1990 No. 10

Amendments—determination of question of unfitness

(1) Section 11 (**Determination of question of unfitness**):

After "purpose" in section 11 (1), insert ", except as provided by section 11A".

(2) Section 11A:

After section 11, insert:

Determination of question of unfitness by judge

11A. (1) The question of a person's unfitness to be tried for an offence is to be determined by the Judge alone if the person so elects in accordance with this section and the Judge is satisfied that the person, before making the election, sought and received advice in relation to the election from a barrister or solicitor.

(2) An election may be made only with the consent of the prosecutor.

(3) A person who elects to have the question determined by the Judge alone may, at any time before the date fixed for the determination of the person's unfitness to be tried, subsequently elect to have the question determined by a jury.

(4) The Judge may make any finding that could have been made by a jury on the question of the person's unfitness to be tried. Any such finding has, for all purposes, the same effect as a finding of a jury.

SCHEDULE 4—AMENDMENT OF MENTAL HEALTH (CRIMINAL PROCEDURE) ACT 1990 No. 10—*continued*

(5) Any determination by the Judge under this section must include the principles of law applied by the Judge and the findings of fact on which the Judge relied.

(6) Rules of court may be made with respect to elections under this section.

Explanatory note—items (1) and (2)

Item (2) enables the question of whether a person is unfit to be tried for an offence to be determined by a Judge instead of a jury with the consent of the person and the prosecutor.

Item (1) is consequential on the proposed amendment contained in item (2).

Amendments—determination of special hearings

(3) Section 19 (**Court to hold special hearing on direction of Attorney General**):

After "is" in section 19 (2), insert ", except as provided by section 21A,".

(4) Sections 21A, 21B:

After section 21, insert:

Judge may try special hearing

21A. (1) At a special hearing, the question whether an accused person has committed an offence charged or any other offence available as an alternative to an offence charged is to be determined by the Judge alone if the person so elects in accordance with this section and the Judge is satisfied that the person, before making the election, sought and received advice in relation to the election from a barrister or solicitor.

(2) An election may be made only with the consent of the prosecutor.

(3) An election must be made before the date fixed for the person's special hearing in the Supreme Court or District Court.

(4) An accused person who elects to have a special hearing determined by the Judge alone may, at any time before the date fixed for the person's special hearing, subsequently elect to have the matter determined by a jury.

SCHEDULE 4—AMENDMENT OF MENTAL HEALTH (CRIMINAL PROCEDURE) ACT 1990 No. 10—*continued*

(5) Rules of court may be made with respect to elections under this section.

Verdict of Judge

21B. (1) The verdicts available to a Judge who determines a special hearing without a jury are the verdicts available to a jury under section 22. Any such verdict has, for all purposes, the same effect as a verdict of a jury.

(2) A determination by a Judge in any such special hearing must include the principles of law applied by the Judge and the findings of fact on which the Judge relied.

(5) Section 25 (**Special verdict of not guilty by reason of mental illness**):

After "jury" wherever occurring, insert "or Judge, as the case may be,".

Explanatory note—items (3)–(5)

Item (4) enables a special hearing of an accused person who is unfit to be tried for an offence to be determined by a judge instead of a jury, with the consent of the person and the prosecutor.

Items (3) and (5) are consequential on the proposed amendment contained in item (4).

SCHEDULE 5—AMENDMENT OF SUMMARY OFFENCES ACT 1988 No. 25

Amendment—Climbing on or jumping from buildings and other structures

Section 8A:

After section 8, insert:

Climbing on or jumping from buildings and other structures

8A. (1) A person who risks the safety of any other person as a consequence of:

(a) abseiling, jumping or parachuting from any part of a building or other structure; or

SCHEDULE 5—AMENDMENT OF SUMMARY OFFENCES ACT 1988 No. 25—*continued*

(b) climbing down or up or on or otherwise descending (except as referred to in paragraph (a)) or ascending any part of a building or other structure, except by use of the stairs, lifts or other means provided for ascent or descent of it,

is guilty of an offence.

Maximum penalty: 10 penalty units or imprisonment for 3 months, or both.

(2) A person is not guilty of an offence under this section for doing anything if the person establishes that he or she had some reasonable excuse for doing it or did it for a lawful purpose.

(3) In this section:

"structure" includes a bridge, crane (whether mobile or not) and tower, but does not include a structure provided for climbing or jumping for recreational purposes.

Explanatory note

Proposed section 8A makes it an offence (with a maximum penalty of 10 penalty units (currently $1,000) or 3 months imprisonment, or both) to risk the safety of another person as a result of climbing or jumping from or abseiling, parachuting etc. down a building or other structure. A person who does so for a lawful purpose or with reasonable excuse will not be guilty of an offence.

CRIMINAL LEGISLATION (AMENDMENT) BILL 1992

SECOND READING SPEECH
LEGISLATIVE COUNCIL

MR PICKERING TO SAY

Mr President -

I move that this Bill be now read a second time.

DELIVER SPEECH

This Bill contains a number of important amendments to the criminal law, some of which have already been presented to Parliament. It may be helpful if I outline the history of some of the reforms.

The Crimes Legislation (Further Amendment) Bill 1990 was introduced to Parliament by my predecessor the Hon J R A Dowd, QC. The Bill

included a comprehensive scheme regarding police powers to obtain forensic samples from persons charged with offences. Debate on the Bill was adjourned in the Legislative Council towards the end of the Autumn session in 1990.

It is the Government's intention to introduce separate legislation with respect to forensic sampling at the earliest opportunity. The Criminal Law Officers' Committee is currently working to develop a uniform scheme for forensic sampling throughout Australia.

The other reforms contained in the Crimes Legislation (Further Amendment) Bill 1990 are being presented to Parliament again in the current Bill. The aims of those provisions are:-

* To repeal section 526A of the Crimes Act 1900 (which created the summary offence of taking a conveyance without the consent of the owner) and to enable the corresponding indictable offence under section 154A of the Crimes Act 1900 to be dealt with summarily without the defendant's consent being required.

* To clarify the operation of section 475 of the Crimes Act 1900 which deals with judicial inquiries subsequent to the person's conviction.

* To amend the Crimes Act 1900 to expand the matters to be taken into account in deciding whether to make an apprehended violence order which prohibits or restricts access by the defendant to the family home.

* To amend the Summary Offences Act 1988 to create offences of climbing on and jumping from buildings and other structures in a manner involving risk to the safety of others.

I trust Honourable Members will excuse me if I do not discuss in detail the reasons for the amendments I have just referred to. My predecessor detailed the reasons for the amendments when the Crimes Legislation (Further Amendment) Bill 1990 was introduced.

One other matter contained in this Bill has been presented to Parliament before, in the Crimes (Amendment) Bill 1991. This amendment passed through this House in the Autumn session last year but lapsed when Parliament was prorogued for the election.

This provision amendments the Crimes Act 1900 to clarify the definition of "Sexual Intercourse" for the purposes of sexual assault. Again I am sure honourable members will excuse me for not detailing the reasons for this amendment as it was dealt with in Mr Dowd's second reading speech when introducing the Bill.

The Bill also includes an amendment to the Crimes Act 1900 to provide guidance to the courts when sentencing offenders who have assisted authorities, or given an undertaking to assist authorities. Honourable members would be aware that the former Attorney introduced a similar amendment in the Crimes (Amendment) Bill 1991 which also failed to complete its passage through Parliament because of the election.

I shall not reiterate the reasons for the introduction of this amendment. However, I will comment briefly on the additional part of the amendment, namely the phrase "or given an undertaking to assist law enforcement authorities". This reflects the fact that a prisoner may be willing to assist authorities by testifying in a future trial. It would be undesirable if a court was unable to sentence that prisoner until he or she had finished giving the promised assistance to authorities.

Whilst acknowledging this reality, the Government also acknowledges that there may be situations where a prisoner has received a reduced sentence on an undertaking to assist authorities and thereafter failed to do so. Therefore this Bill also contains an amendment to the Criminal Appeal Act 1912 giving the Crown a right of appeal in such cases. I shall discuss this amendment in detail later.

There are a number of new matters being presented to Parliament for the first time, with which I will now deal.

In June, 1991 the Full Court of the Supreme Court of Victoria in Mobilio (unreported 1st June, 1990) acquitted a person on appeal against convictions for three counts of sexual assault.

Mr Mobilio was a radiographer employed to undertake ultrasound examinations. In 1989 a number of women were referred for ultrasound examination to Mr Mobilio. During the examination he manipulated the ultrasound transducer in such a way that it penetrated the women's vaginas.

The women apparently consented to the penetration on the understanding that it was an accepted part of the ultrasound examination. However, it was open to the jury to find that the penetration was done

for the gratification of Mr Mobilio and that there was no medical justification for what he did.

He was convicted on a number of counts of sexual assault. The Victorian Supreme Court examined the question as to whether the women had actually consented in law, to what took place. They found that each of the women had consented to being penetrated and that it mattered not that their consent was obtained on the understanding that the penetration was medically justified. The court said that "no mistake as to the man's purpose deprives her consent of reality".

The decision fails to recognise that penetration for medical purposes is different from penetration for sexual gratification, even if the actual acts done are the same. Thus, many women may be willing to allow intimate examination by doctors when it is necessary for their health, but would obviously not consent to the same action if it were done for sexual gratification.

Victoria has already legislated to overcome the decision in Mobilio and I believe that New South Wales, and indeed all Australian jurisdictions, should do likewise. The amendment contained in this Bill achieves that result. It provides that a person who consents to sexual intercourse with another person under the mistaken belief that the sexual intercourse is for medical or hygienic purposes, is taken not to have consented. This amendment will obviously cover medical procedures that may be therapeutic in nature such as may be received from a psychotherapist.

Another amendment in this Bill concerns the indecent assault provisions of the Crimes Act.

Section 78 of the Crimes Act 1900 currently provides a 12 month time limit for commencing prosecutions in respect of offences under sections 61E(1), 66C(1), 66D, 71, 72, and 76,

where the child upon whom the offence was alleged to have been committed, was, at the relevant time, over the age of 14 years and under the age of 16 years.

A recent High Court decision - Saraswati -v- The Queen (~~unreported~~, 5th June, 1991) - has highlighted significant problems which can result from the operation of this section.

The historical basis of the section was to protect the accused by limiting the time for commencement of certain sexual assault prosecutions to 6 months after the date of the offence. This was designed to prevent the possibility of a complainant blackmailing an innocent man. The time limit was later extended to 12 months.

As we are now aware, there may be many reasons why a victim might fail to complain within 12 months of the offence. Often too, victims will not initially disclose all of the offences that have occurred, but may do so over a period of time. Section 405B of the Crimes Act 1900 provides that a jury is

to be warned that the absence of complaint or delay in complaining does not necessarily indicate that the allegation is false. The jury must also be informed that there may be good reasons why a victim of sexual assault may hesitate in making or refrain from making a complaint about the assault.

To allow offenders to avoid prosecution because of the lack of early complaint of a child of 14 years or over is therefore unjustifiable and section 78 will be repealed under this Bill. Similarly, the limitations in section 78T(1) will also be removed.

A further amendment in this Bill concerns sexual assault.

Section 78Q of the Crimes Act 1900 makes it an offence for any male person to commit or take part in the commission of an act of gross indecency with a male under 18 years of age, or to solicit, procure, incite or advise a male under 18 years to commit or take part in the commission of such an act.

The wording of section 78Q, however, is inconsistent with similar sections of the Crimes Act 1900 which relate to acts of indecency. This inconsistency was discussed recently in the Court of Criminal Appeal decision of Page (unreported 25th November, 1991).

Furthermore, the language of section 61N of the Crimes Act 1900, which makes it an offence to commit an act of indecency with or towards a person under the age of 16 years, also contains an inconsistency with regard to the conduct covered.

It is therefore considered necessary to make minor amendments to these sections to avoid potential problems with their interpretation.

I turn to another amendment in the Bill.

In a recent case in the Court of Criminal Appeal (Nguyen, unreported, 29th May, 1991)

the issue arose as to whether the Crown had a right of appeal against the leniency of a sentence where anticipated co-operation with the police did not eventuate.

It appears the current law is that if a person receives a discounted sentence because of a genuine intention to give evidence and thereby assist the prosecuting authorities, yet later, for whatever reason, decides not to give that evidence, then the original sentence stands. The person has then received a benefit which later circumstances have shown he or she was not entitled to.

If the Crown is unable to appeal when a person genuinely changes his or her mind, or when a person deliberately misstates an intention to assist, then there is some incentive for persons to falsely claim that they are able to assist the authorities. They may then receive a reduced sentence in anticipation of that assistance, safe in the knowledge that their evidence will never have to be tested by cross-examination and their

sentence cannot be increased. To get a reduced sentence a person facing sentencing need only invent some plausible possibility of assistance and need never actually provide that assistance. In my view this amendment is necessary to ensure that this does not occur.

The Bill also contains a procedural amendment to allow statements tendered at committal proceedings to be used at a later trial where the maker of the statement is unavailable and the accused changes a plea of guilty to not guilty.

Currently, the Crimes Act 1900 provides that the evidence of a witness which was given at committal proceedings can be read as evidence at a later trial upon proof that the witness is dead, ill, or absent from Australia.

There are some limitations to this to ensure that no injustice is caused to the accused by the lack of opportunity to cross-examine the

witness at the trial. The primary protection is that the accused must have had the opportunity to cross-examine the witness at the committal proceedings.

This provision also covers the situation where the written statement of a witness is tendered in the committal proceedings under the paper committal procedure.

Such statements are "prescribed statements" for the purposes of section 409 of the Crimes Act 1900. Section 409(7) provides that the prescribed statements may be read as evidence in the trial. However, where a person pleads guilty under section 51A of the Justices Act 1902, and the statements of witnesses are tendered as part of the committal for sentence, there is no provision for those statements to be read as evidence where the person later reverses his or her plea and the matter has to go to trial. This amendment rectifies this anomaly.

I turn now to the amendment contained in Schedule 2 of the Bill which restricts the determination of bail applications by justices to justices who are employees of the Department of Courts Administration.

Section 352 of the Crimes Act 1900 deals with the powers of police to arrest. That section provides that a police officer who has arrested a person without a warrant must taken that person "before a justice to be dealt with according to law". This must be done without delay.

The Court of Criminal Appeal decision of R -v- Walsh (unreported 18th October, 1990) made it clear that the generally accepted view that police satisfied their obligations under section 352 by taking the person before the next available sittings of a Local Court was wrong. In that decision, Samuels JA held that section 352 did not authorise the police to confine themselves to bringing an arrested person before a Local Court. He said that

the police should seek out a Justice of the Peace if they arrest a person whilst a Magistrate is not available, and arrange for that Justice of the Peace to determine the question of bail.

This decision means that any one of the many Justices of the Peace in New South Wales is able to determine difficult questions of bail. The persons currently holding the office of Justice of the Peace vary enormously in background, education and attitudes.

The power to issue search warrants has similarly been limited recently by withdrawing powers from the Justices of the Peace and giving them to a more limited number of persons as was done in the Search Warrants Act 1985.

It is considered necessary to implement these amendments as it is important that these difficult questions which relate to a person's liberty be determined by persons both properly trained and accountable.

The final amendments about which I wish to draw Honourable Members' attention to concern the amendments to the Mental Health (Criminal Procedure) Act 1990 which are contained in Schedule 4 of the Bill. These amendments relate to determinations of questions of unfitness and determinations of special hearings. Sections 11 and 21 of the Mental Health (Criminal Procedure) Act 1990 provide that the question of a person's unfitness to be tried for an offence is to be determined by a jury constituted for that purpose, and that a special hearing is to be conducted as nearly as possible as if it were a trial of criminal proceedings.

Many determinations of a person's fitness to stand trial are uncontested with both the Crown and the defence tendering evidence attesting to the accused's unfitness. The empanelling of a jury in such a situation becomes pointless and is time consuming and costly. It is therefore sensible that the recent provisions which allow a person to

elect to be tried by a Judge alone be extended to cover the determination of a person's fitness to be tried.

If the Mental Health Review Tribunal determines that a person will not become fit to be tried during the 12 months after the finding of unfitness, the Mental Health (Criminal Procedure) Act 1990 provides that the Attorney General may direct that a "special hearing" be conducted in respect of the offence with which the person is charged. A special hearing is a hearing to determine whether, on the limited evidence available, the person committed the offence charged. If that is found to be so, the person is sentenced to a limiting term.

The amendments contained in the Bill bring the Mental Health (Criminal Procedure) Act 1990 into line with recent amendments to the Criminal Procedure Act 1986 enabling accused persons to elect to have their guilt determined by a Judge alone.

In both fitness hearings and special hearings, protections similar to those in the existing provisions in the Criminal Procedure Act 1986 will apply. For example, the Judge must be satisfied that the person has received advice from a barrister or a solicitor prior to electing to have the matter determined by a Judge. Consent of the prosecution will be required, and the accused person may reverse his or her election and thereafter be tried by a jury. Any determination by the Judge must include the principles of law applied and the findings of fact upon which the Judge relied.

As I mentioned at the outset, this Bill contains a number of important amendments to the criminal law each of which has a beneficial impact on the system of criminal justice in this State. I am confident that honourable members will support this Bill.

I commend the Bill to the House.

C.006
DEMOCRAT

LEGISLATIVE COUNCIL

Criminal Legislation (Amendment) Bill 1992

Amendment to be moved in Committee

No. 1 Page 10, Schedule 1 (16). Omit proposed clause 3 of the provisions to be inserted as Part 2 of the Eleventh Schedule to the Crimes Act 1900, insert instead:

Sexual intercourse

3. The amendment made to section 61H by the Criminal Legislation (Amendment) Act 1992 applies only in respect of offences committed after the commencement of the amendment.

CRIMINAL LEGISLATION (AMENDMENT) ACT 1992 No. 2

NEW SOUTH WALES

TABLE OF PROVISIONS

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CRIMINAL LEGISLATION (AMENDMENT) ACT 1992 No. 2

NEW SOUTH WALES

Act No. 2, 1992

An Act to amend the Crimes Act 1900, the Bail Act 1978, the Criminal Appeal Act 1912, the Mental Health (Criminal Procedure) Act 1990 and the Summary Offences Act 1988 with respect to sexual offences, bail applications, reduction of sentences, apprehended violence orders, appeals against sentences, judges instead of juries determining unfitness to plead and special hearings and other matters; and for other purposes. [Assented to 17 March 1992]

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Criminal Legislation (Amendment) Act 1992.

Commencement

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

Amendments

3. Each Act specified in Schedules 1–5 is amended as set out in those Schedules.

Explanatory notes

4. Matter appearing under the heading "Explanatory note" in Schedules 1–5 does not form part of this Act.

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40

Amendments—consequential

(1) Section 1 (**Short title and contents of Act**):

(a) From the matter relating to Part 12, omit ", 442A", insert instead "– 442B".

(b) From the matter relating to Part 14, omit "(4A) *Unlawfully using vehicle or boat—s.* 526A".

Explanatory note—item (1)

Item (1) (a) is consequential on the proposed amendment contained in item (10) inserting section 442B.

Item (1) (b) is consequential on the proposed amendment contained in item (14) omitting section 526A.

Amendment—definition of "sexual intercourse"

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

Omit section 61H (1) (a), 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:

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

(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

Explanatory note—item (2)

The definition of "sexual intercourse" currently found in section 61H 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. (This argument was considered and rejected in *R v Randall* by the South Australian Court of Criminal Appeal in June 1991.) 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.

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 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". 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 McGuiness* (1988) 17 NSWLR 158.)

Amendments—acts of indecency

(3) Section 61N (**Act of indecency**):

After "with" where secondly occurring, insert "or towards".

Explanatory note—item (3)

Item (3) amends section 61N to make the language of the provision relating to incitement to an act of indecency consistent with the language relating to the offence of committing an act of indecency.

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

Amendments—consent to sexual intercourse

(4) Section 61R (**Consent**):

(a) After section 61R (2) (a), insert:

(a1) a person who consents to sexual intercourse with another person under a mistaken belief that the sexual intercourse is for medical or hygienic purposes is taken not to consent to the sexual intercourse; and

(b) Section 61R (2) (b):

After "paragraph (a)", insert "or (a1)".

Explanatory note—item (4)

Item (4) provides that consent to sexual intercourse that is given under a mistaken belief that it is for medical or hygienic purposes is taken not to be consent. The purpose of the amendment is to provide that such an act of sexual intercourse will amount to sexual assault in such circumstances, even though the act is consented to. This will overcome the possible effect in New South Wales of the decision in *R v Mobilio* in 1990 in which the Victorian Court of Criminal Appeal held there was consent to an act of sexual intercourse even though the victims concerned might have believed the act was required for diagnostic purposes.

Amendment—time limit on prosecution of certain offences

(5) Section 78 (**Limitation**):

Omit the section.

Explanatory note—item (5)

Item (5) removes the 12 month limit for commencing prosecutions for offences under sections 61E (1), 66C (1), 66D, 71, 72 and 76 (relating to sexual assault) if the child on whom the offence was alleged to have been committed was at the time of the alleged offence between 14 and 16 years of age.

Amendment—acts of gross indecency

(6) Section 78Q (**Acts of gross indecency**):

After "with" wherever occurring, insert "or towards".

Explanatory note—item (6)

Item (6) amends section 78Q to make the language of the provision more consistent with section 61N and other provisions relating to acts of indecency.

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

Amendment—time limit on prosecution of certain offences

(7) Section 78T (**Limitations (cf. ss. 78, 78F)**):

Omit section 78T (1).

Explanatory note—item (7)

Item (7) removes the 12 month time limit for commencing prosecutions for offences under sections 78K and 78L (relating to homosexual intercourse with males) if the male on whom the offence was alleged to have been committed was at the time of the alleged offence between 16 and 18 years of age.

Amendments—apprehension of offenders

(8) Section 352 (**Person in act of committing or having committed offence**):

(a) Section 352 (1), (2) and (3):

Omit "a Justice" wherever occurring, insert instead "an authorised Justice".

(b) Omit section 352 (5), insert instead:

(5) In this section:

"authorised Justice" means:

(a) a Magistrate; or

(b) a Justice employed in the Department of Courts Administration;

"telegraph" includes telephone, radio, telex, facsimile transmission, computer used to relay information and any other communication device.

Explanatory note—item (8)

Item (8) restricts the Justices before whom an apprehended offender may be brought to be dealt with according to law to Magistrates or Justices employed in the Department of Courts Administration. The effect of this and other amendments to the Bail Act 1978 will be to confine the determination of bail applications to such Justices.

Amendment—witness statements

(9) Section 409 (**Depositions may be read as evidence for prosecution etc.**):

Omit section 409 (11), insert instead:

(11) In this section, **"prescribed statement"** means:

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

(a) a written statement the whole or a part of which was admitted as evidence under section 48A of the Justices Act 1902 and includes a part of any such statement rejected under section 48F of that Act; or

(b) a written statement the whole or a part of which was tendered as evidence on a plea of guilty under section 51A of the Justices Act 1902.

Explanatory note—item (9)

Item (9) allows statements tendered as evidence on a plea of guilty in committal proceedings to be used, if the maker of the statement is unavailable, as evidence if the plea of guilty is reversed.

Amendment—reduction of sentences

(10) 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 reduce the sentence it would otherwise impose, having regard to the degree to which the person has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence or other offences.

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

(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 or undertaken to be rendered;

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

(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 or promised assistance;

(e) the timeliness of the assistance or undertaking to assist;

(f) any benefits that the offender has gained or may gain by reason of the assistance or undertaking to assist;

(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 or the undertaking to assist;

(i) whether the assistance or promised 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.

(5) In this section, a reference to a court includes a reference to a Judge and a Magistrate (whether exercising jurisdiction in respect of an indictable offence or a summary offence).

Explanatory note—item (10)

Item (10) inserts a new section 442B. 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 discounting sentences where the offender has assisted or undertakes to assist 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.

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

Amendments—inquiries into guilt subsequent to conviction

(11) Section 475 (**Governor or Judge may direct inquiry etc.**):

(a) After "conviction" in section 475 (1), insert "in any court".

(b) After "Supreme Court" in section 475 (1), insert "on application by or on behalf of the person or".

(c) From section 475, omit "Justice" wherever occurring, insert instead "prescribed person".

(d) After section 475 (4), insert:

(5) In this section:

"prescribed person" means a Justice or a judicial officer within the meaning of the Judicial Officers Act 1986.

Explanatory note—item (11)

Item (11) amends a provision which currently enables the Governor on petition of a convicted person or the Supreme Court on its own motion to direct a Justice to inquire into any doubt or question arising as to the guilt of the convicted person, or any mitigating circumstances or evidence in the case.

The proposed amendments will enable the Supreme Court to give such a direction on application by or on behalf of any convicted person, make it clear that such a direction may be given in respect of a conviction in any court and enable such a direction to be given to any judicial officer.

Amendments—indictable offences punishable summarily

(12) Section 476 (**Indictable offences punishable summarily with consent of accused**):

(a) After "offence" in section 476 (6) (a) (i), insert "(other than an offence mentioned in section 154A)";

(b) From section 476 (6) (d), omit "154A,".

Explanatory note—item (12)

Item (12) is consequential on the proposed amendment contained in item (13).

Amendments—taking conveyance

(13) Section 496A (**Additional indictable offences punishable summarily without consent of accused**):

Omit section 496A (1), insert instead:

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

(1) Proceedings for an offence under section 93G, 93H or 154A may be disposed of in a summary manner before a Local Court constituted by a Magistrate sitting alone.

Explanatory note—item (13)

Item (13) inserts a provision enabling offences under section 154A (taking a conveyance without consent of owner) to be dealt with summarily without the consent of the accused whatever the value of the conveyance. The penalty that may be imposed is imprisonment for a maximum period of 2 years, or a fine not exceeding $5,000, or both.

(14) Section 526A (**Taking a conveyance without the consent of the owner**):

Omit the section and the short heading before the section.

Explanatory note—item (14)

Item (14) is consequential on the proposed amendment contained in item (13) which makes it no longer necessary to have a separate summary offence of taking a conveyance without consent.

Amendment—apprehended violence orders

(15) Section 562D (**Prohibitions and restrictions imposed by orders**):

Omit section 562D (2), insert instead:

(2) In deciding whether or not to make an order which prohibits or restricts access to the defendant's residence, the court is to consider:

(a) the accommodation needs of all relevant parties; and

(b) the effect of making an order on any children living or ordinarily living at the residence; and

(c) the consequences for the person for whose protection the order would be made and any children living or ordinarily living at the residence if an order restricting access by the defendant to the residence is not made.

Explanatory note—item (15)

Item (15) includes among the matters a court must take into consideration in deciding whether or not to make an apprehended violence order restricting access to a defendant's residence the consequences for the person for whose protection the order would be made, and for children living or ordinarily living at the residence, if the order is not made.

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

Amendment—savings and transitional provisions

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

After Part 1, insert:

Part 2—Criminal Legislation (Amendment) Act 1992

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 commencement of the amendment made by the Criminal Legislation (Amendment) Act 1992 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 Criminal Legislation (Amendment) Act 1992.

Consent to sexual intercourse

4. The amendments to section 61R made by the Criminal Legislation (Amendment) Act 1992 apply only in respect of offences committed after the commencement of the amendments.

Application of amendment to section 409

5. The amendment made by the Criminal Legislation (Amendment) Act 1992 to section 409, to the extent to which it applies to a written statement the whole or a part of which was tendered as evidence on a plea of guilty under section 51A of the Justices Act 1902, applies to such a statement tendered after the commencement of the amendment.

Operation of amendments relating to taking of vehicles without consent and other indictable offences

6. (1) The amendments to sections 476 and 496A made by the Criminal Legislation (Amendment) Act 1992 apply only in respect of proceedings for offences committed after the commencement of the amendments.

(2) This Act applies in respect of proceedings for offences committed before the commencement of any such amendments as if the amendments had not been made.

SCHEDULE 1—AMENDMENT OF CRIMES ACT 1900 No. 40—*continued*

(3) Section 526A continues to apply to offences committed before that section was repealed as if the section is still in force.

Reduction of sentences for assistance to authorities

7. Section 442B of this Act and section 5DA of the Criminal Appeal Act 1912, as inserted by the Criminal Legislation (Amendment) Act 1992, apply only to a sentence imposed after the commencement of the section concerned, but so apply whether the offence in relation to which the sentence is imposed was committed before or after that commencement.

Explanatory note—item (16)

Item (16) inserts the following savings and transitional provisions, relating to amendments made by the proposed Act:

- a provision applying the new definition of "sexual intercourse" to sexual assault offences which occurred after 14 July 1981
- a provision that makes it clear that amendments relating to consent in sexual offences apply only in respect of offences committed after the commencement of the amendments
- a provision that applies amendments enabling the use of previous witnesses' statements in the trial of a person who has previously pleaded guilty to statements first used after the commencement of the amendment
- a provision that makes it clear that amendments in relation to the summary disposal of offences apply only in respect of proceedings for offences committed after the amendments commence
- a provision applying the section enabling sentences to be reduced for assistance or promised assistance to law enforcement authorities, and the section enabling appeals against such sentences in the event of a failure to assist, to sentences imposed after the section commences whether or not the offence was committed before or after the commencement

SCHEDULE 2—AMENDMENT OF BAIL ACT 1978 No. 161

Amendments—bail determinations

(1) Section 23 (**Power of magistrates and justices to grant bail**):

After "justice", insert "(being a justice employed in the Department of Courts Administration)".

(2) Section 50 (**Arrest for absconding or breaching condition**):

After section 50 (4), insert:

(5) In this section, **"court"** does not include a justice who is not a justice employed in the Department of Courts Administration.

Explanatory note—items (1) and (2)

Items (1) and (2) provide that the only justices who may make bail determinations are justices employed in the Department of Courts Administration.

SCHEDULE 3—AMENDMENT OF CRIMINAL APPEAL ACT 1912 No. 16

Amendments—appeals by Crown against sentence

(1) Section 5D (**Appeal by Crown against sentence**):

After section 5D (2), insert:

(3) This section does not apply to an appeal referred to in section 5DA.

(2) Section 5DA:

After section 5D, insert:

Appeal by Crown against reduced sentence for assistance to authorities

5DA. (1) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence imposed on a person that was reduced because the person undertook to assist law enforcement authorities if the person fails wholly or partly to fulfil the undertaking.

SCHEDULE 3—AMENDMENT OF CRIMINAL APPEAL ACT 1912 No. 16—*continued*

(2) On an appeal the Court of Criminal Appeal may, if it is satisfied that the person has failed wholly or partly to fulfil the undertaking, vary the sentence and impose such sentence as it thinks fit.

Explanatory note—items (1) and (2)

Item (2) inserts a provision that enables the Crown to appeal against a reduced sentence where the sentence has been reduced because of assistance to be given to law enforcement authorities and that assistance has not been given.

Item (1) makes an amendment consequential on the amendment made by item (2).

SCHEDULE 4—AMENDMENT OF MENTAL HEALTH (CRIMINAL PROCEDURE) ACT 1990 No. 10

Amendments—determination of question of unfitness

(1) Section 11 (**Determination of question of unfitness**):

After "purpose" in section 11 (1), insert ", except as provided by section 11A".

(2) Section 11A:

After section 11, insert:

Determination of question of unfitness by judge

11A. (1) The question of a person's unfitness to be tried for an offence is to be determined by the Judge alone if the person so elects in accordance with this section and the Judge is satisfied that the person, before making the election, sought and received advice in relation to the election from a barrister or solicitor.

(2) An election may be made only with the consent of the prosecutor.

(3) A person who elects to have the question determined by the Judge alone may, at any time before the date fixed for the determination of the person's unfitness to be tried, subsequently elect to have the question determined by a jury.

(4) The Judge may make any finding that could have been made by a jury on the question of the person's unfitness to be tried. Any such finding has, for all purposes, the same effect as a finding of a jury.

SCHEDULE 4—AMENDMENT OF MENTAL HEALTH (CRIMINAL PROCEDURE) ACT 1990 No. 10—*continued*

(5) Any determination by the Judge under this section must include the principles of law applied by the Judge and the findings of fact on which the Judge relied.

(6) Rules of court may be made with respect to elections under this section.

Explanatory note—items (1) and (2)

Item (2) enables the question of whether a person is unfit to be tried for an offence to be determined by a Judge instead of a jury with the consent of the person and the prosecutor.

Item (1) is consequential on the proposed amendment contained in item (2).

Amendments—determination of special hearings

(3) Section 19 (**Court to hold special hearing on direction of Attorney General**):

After "is" in section 19 (2), insert ", except as provided by section 21A,".

(4) Sections 21A, 21B:

After section 21, insert:

Judge may try special hearing

21A. (1) At a special hearing, the question whether an accused person has committed an offence charged or any other offence available as an alternative to an offence charged is to be determined by the Judge alone if the person so elects in accordance with this section and the Judge is satisfied that the person, before making the election, sought and received advice in relation to the election from a barrister or solicitor.

(2) An election may be made only with the consent of the prosecutor.

(3) An election must be made before the date fixed for the person's special hearing in the Supreme Court or District Court.

(4) An accused person who elects to have a special hearing determined by the Judge alone may, at any time before the date fixed for the person's special hearing, subsequently elect to have the matter determined by a jury.

SCHEDULE 4—AMENDMENT OF MENTAL HEALTH (CRIMINAL PROCEDURE) ACT 1990 No. 10—*continued*

(5) Rules of court may be made with respect to elections under this section.

Verdict of Judge

21B. (1) The verdicts available to a Judge who determines a special hearing without a jury are the verdicts available to a jury under section 22. Any such verdict has, for all purposes, the same effect as a verdict of a jury.

(2) A determination by a Judge in any such special hearing must include the principles of law applied by the Judge and the findings of fact on which the Judge relied.

(5) Section 25 (**Special verdict of not guilty by reason of mental illness**):

After "jury" wherever occurring, insert "or Judge, as the case may be,".

Explanatory note—items (3)–(5)

Item (4) enables a special hearing of an accused person who is unfit to be tried for an offence to be determined by a judge instead of a jury, with the consent of the person and the prosecutor.

Items (3) and (5) are consequential on the proposed amendment contained in item (4).

SCHEDULE 5—AMENDMENT OF SUMMARY OFFENCES ACT 1988 No. 25

Amendment—Climbing on or jumping from buildings and other structures

Section 8A:

After section 8, insert:

Climbing on or jumping from buildings and other structures

8A. (1) A person who risks the safety of any other person as a consequence of:

(a) abseiling, jumping or parachuting from any part of a building or other structure; or

SCHEDULE 5—AMENDMENT OF SUMMARY OFFENCES ACT 1988 No. 25—*continued*

(b) climbing down or up or on or otherwise descending (except as referred to in paragraph (a)) or ascending any part of a building or other structure, except by use of the stairs, lifts or other means provided for ascent or descent of it,

is guilty of an offence.

Maximum penalty: 10 penalty units or imprisonment for 3 months, or both.

(2) A person is not guilty of an offence under this section for doing anything if the person establishes that he or she had some reasonable excuse for doing it or did it for a lawful purpose.

(3) In this section:

"structure" includes a bridge, crane (whether mobile or not) and tower, but does not include a structure provided for climbing or jumping for recreational purposes.

Explanatory note

Proposed section 8A makes it an offence (with a maximum penalty of 10 penalty units (currently $1,000) or 3 months imprisonment, or both) to risk the safety of another person as a result of climbing or jumping from or abseiling, parachuting etc. down a building or other structure. A person who does so for a lawful purpose or with reasonable excuse will not be guilty of an offence.

[*Minister's second reading speech made in—*
Legislative Assembly on 25 February 1992
Legislative Council on 6 March 1992]

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