

CRIMES (AMENDMENT) ACT 1989 No. 198

NEW SOUTH WALES



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CRIMES (AMENDMENT) ACT 1989 No. 198

NEW SOUTH WALES



Act No. 198, 1989

An Act to amend the Crimes Act 1900 in relation to sexual assault and monetary penalties; and for other purposes. [Assented to 21 December 1989]

See also *Inclosed Lands Protection (Amendment) Act 1989*.

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Crimes (Amendment) Act 1989.

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 Schedules 1 and 2.

**SCHEDULE 1 - AMENDMENTS RELATING TO SEXUAL
ASSAULT**

(Sec. 3)

- (1) Section 4 (**Definitions**):
 - (a) Definition of "Personal violence offence" in section 4 (1):
In paragraph (a), omit "or 61E", insert instead ", 61E, 61I, 61J, 61K, 61L, 61M, 61N or 61O".
 - (b) Definition of "Prescribed sexual offence" in section 4 (1):
In paragraph (a), after "61E,", insert "61I, 61J, 61K, 61L, 61M, 61N, 61O,".
 - (c) Definition of "Prescribed sexual offence" in section 4 (1):
In paragraph (a), omit "or 78L", insert instead ", 78L or 80A".
- (2) Sections 61A-61G:
Omit the sections.
- (3) Sections 61H-61U:
Before section 62, insert:

Definition of sexual intercourse etc.

61H. (1) For the purposes of sections 61H-66F, "sexual intercourse" means:

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SCHEDULE 1 - AMENDMENTS RELATING TO SEXUAL
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- (a) sexual connection occasioned by the penetration of the vagina of any person or anus of any person by:
 - (i) any part of the body of another person; or
 - (ii) an object manipulated by another person, except where the penetration is carried out for proper medical purposes; or
- (b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person; or
- (c) cunnilingus; or
- (d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

(2) For the purposes of sections 61H-66F, 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.

(3) For the purposes of this Act, a person who incites a person under the age of 16 years to an act of indecency, as referred to in section 61N or 61O, is to be taken to commit an offence on the person under the age of 16 years.

Sexual assault

61I. Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to penal servitude for 14 years.

Aggravated sexual assault

61J. (1) Any person who has sexual intercourse with another person without the consent of the other person and in circumstances of aggravation and who knows that the other person does not consent to the sexual intercourse is liable to penal servitude for 20 years.

(2) In this section, "**circumstances of aggravation**" means circumstances in which:

SCHEDULE 1 - AMENDMENTS RELATING TO SEXUAL
ASSAULT - *continued*

- (a) at the time of, or immediately before or after, the commission of the offence, the alleged offender maliciously inflicts actual bodily harm on the alleged victim or any other person who is present or nearby; or
- (b) at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument; or
- (c) the alleged offender is in the company of another person or persons; or
- (d) the alleged victim is under the age of 16 years; or
- (e) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender; or
- (f) the alleged victim has a serious physical disability; or
- (g) the alleged victim has a serious intellectual disability.

Assault with intent to have sexual intercourse

61K. Any person who, with intent to have sexual intercourse with another person:

- (a) maliciously inflicts actual bodily harm on the other person or a third person who is present or nearby; or
- (b) threatens to inflict actual bodily harm on the other person or a third person who is present or nearby by means of an offensive weapon or instrument,

is liable to penal servitude for 20 years.

Indecent assault

61L. Any person who assaults another person and, at the time of, or immediately before or after, the assault,

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SCHEDULE 1 - AMENDMENTS RELATING TO SEXUAL
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commits an act of indecency on or in the presence of the other person, is liable to imprisonment for 5 years.

Aggravated indecent assault

61M. (1) Any person who assaults another person in circumstances of aggravation, and, at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, is liable to imprisonment for 7 years.

(2) Any person who assaults another person, and, at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, is liable to imprisonment for 10 years, if the other person is under the age of 10 years.

(3) In this section, "**circumstances of aggravation**" means circumstances in which:

- (a) the alleged offender is in the company of another person or persons; or
- (b) the alleged victim is under the age of 16 years; or
- (c) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender; or
- (d) the alleged victim has a serious physical disability; or
- (e) the alleged victim has a serious intellectual disability.

Act of indecency

61N. Any person who commits an act of indecency with or towards a person under the age of 16 years, or incites a person under that age to an act of indecency with that or another person, is liable to imprisonment for 2 years.

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Aggravated act of indecency

61O. (1) Any person who commits an act of indecency with or towards a person under the age of 16 years, or incites a person under that age to an act of indecency with that or another person, in either case in circumstances of aggravation, is liable to imprisonment for 5 years.

(2) Any person who commits an act of indecency with or towards a person under the age of 10 years, or incites a person under that age to an act of indecency with that or another person, is liable to imprisonment for 7 years.

(3) In this section, "**circumstances of aggravation**" means circumstances in which:

- (a) the alleged offender is in the company of another person or persons; or
- (b) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender; or
- (c) the alleged victim has a serious physical disability; or
- (d) the alleged victim has a serious intellectual disability.

Attempt to commit offence under secs. 61I-61O

61P. Any person who attempts to commit an offence under section 61I, 61J, 61K, 61L, 61M, 61N or 61O is liable to the penalty provided for the commission of the offence.

Alternative verdicts

61Q. (1) **Question of aggravation.** If on the trial of a person for an offence under section 61J, 61M or 61O the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied on the evidence that the accused is guilty of an offence under section 61I, 61L or 61N, it may find the accused not guilty of the offence charged but guilty

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of the latter offence, and the accused is liable to punishment accordingly.

(2) **Question of consent regarding alleged victim under 16.** If on the trial of a person for an offence under section 61I the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied on the evidence that the accused is guilty of an offence under section 66C (1) or 66C (2), it may find the accused not guilty of the offence charged but guilty of the latter offence, and the accused is liable to punishment accordingly.

(3) **Question of consent or authority regarding alleged victim under 16.** If on the trial of a person for an offence under section 61J the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied on the evidence that the accused is guilty of an offence under section 66A, 66C (1) or 66C (2), it may find the accused not guilty of the offence charged but guilty of the latter offence, and the accused is liable to punishment accordingly.

(4) **Question of consent regarding incest.** If on the trial of a person for an offence under section 61I or 61J the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied on the evidence that the accused is guilty of an offence under section 78A or 78B, it may find the accused not guilty of the offence charged but guilty of the latter offence, and the accused is liable to punishment accordingly.

Consent

61R. (1) For the purposes of sections 61I and 61J, a person who has sexual intercourse with another person without the consent of the other person and who is reckless as to whether the other person consents to the sexual intercourse is to be taken to know that the other person does not consent to the sexual intercourse.

(2) For the purposes of sections 61I and 61J and without limiting the grounds on which it may be established that consent to sexual intercourse is vitiated:

SCHEDULE 1 - AMENDMENTS RELATING TO SEXUAL
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- (a) a person who consents to sexual intercourse with another person:
 - (i) under a mistaken belief as to the identity of the other person; or
 - (ii) under a mistaken belief that the other person is married to the person,
is to be taken not to consent to the sexual intercourse; and
- (b) a person who knows that another person consents to sexual intercourse under a mistaken belief referred to in paragraph (a) is to be taken to know that the other person does not consent to the sexual intercourse; and
- (c) a person who submits to sexual intercourse with another person as a result of threats or terror, whether the threats are against, or the terror is instilled in, the person who submits to the sexual intercourse or any other person, is to be regarded as not consenting to the sexual intercourse; and
- (d) a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse.

Offenders who are minors

61S. (1) For the purposes of sections 61H-61U, a person is not, by reason only of age, to be presumed incapable of having sexual intercourse with another person or of having an intent to have sexual intercourse with another person.

(2) Subsection (1) does not affect the operation of any law relating to the age at which a child can be convicted of an offence.

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SCHEDULE 1 - AMENDMENTS RELATING TO SEXUAL
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Offender married to victim

- 61T. The fact that a person is married to a person:
- (a) upon whom an offence under section 61I, 61J or 61K is alleged to have been committed is no bar to the firstmentioned person being convicted of the offence; or
 - (b) upon whom an offence under any of those sections is alleged to have been attempted is no bar to the firstmentioned person being convicted of the attempt.

Circumstances of certain sexual offences to be considered in passing sentence

- 61U. Where a person is convicted of:
- (a) both an offence under section 61I and an offence under section 61K; or
 - (b) both an offence under section 61J and an offence under section 61K,

whether at the same time or at different times, the Judge passing sentence on the person in respect of the two convictions or the later of the two convictions is required, if it appears that the two offences arose substantially out of the one set of circumstances, to take that fact into account in passing sentence.

(4) Section 66E (Alternative verdicts):

After section 66E (2), insert:

(3) Where on the trial of a person for an offence under section 66A the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied on the evidence that the accused is guilty of an offence under section 66B, it may find the accused not guilty of the offence charged but guilty of the latter offence, and the accused is liable to punishment accordingly.

SCHEDULE 1 - AMENDMENTS RELATING TO SEXUAL
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(4) Where on the trial of a person for an offence under section 66C the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied on the evidence that the accused is guilty of an offence under section 66D, it may find the accused not guilty of the offence charged but guilty of the latter offence, and the accused is liable to punishment accordingly.

(5) Section 77 (**Consent no defence in certain cases**):

(a) Section 77 (1):

After "(2A)", insert "61M (2), 61N or 61O,".

(b) Section 77 (1):

After "61E (1)", insert ", 61L, 61M (1)".

(c) Section 77 (2):

After "(2A)", insert "61N, 61O,".

(d) Section 77 (2):

After "61E (1)", insert ", 61L, 61M (1)".

(6) Section 80A:

After section 80, insert:

Sexual assault by forced self-manipulation

80A. (1) In this section:

"self-manipulation" means the penetration of the vagina of any person or anus of any person by an object manipulated by the person, except where the penetration is carried out for proper medical or other proper purposes;

"threat" means:

(a) a threat of physical force; or

(b) intimidatory or coercive conduct, or other threat, which does not involve a threat of physical force.

(2) Any person who compels, by means of a threat, another person to engage in self-manipulation and the

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SCHEDULE 1 - AMENDMENTS RELATING TO SEXUAL
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other person could not in the circumstances be reasonably expected to resist the threat, is liable to penal servitude for 14 years or, if the other person is under the age of 10 years, to penal servitude for 20 years.

(3) A person does not commit an offence under this section unless the person knows that the other person engages in the self-manipulation as a result of the threat.

- (7) Section 91C (**Definitions of "act of child prostitution", "child"**):
Omit "61A", insert instead "61H".
- (8) Section 407AA (**Compellability of spouses to give evidence in certain proceedings**):
- (a) Section 407AA (1) (c) (i):
After "61E,", insert "61I, 61J, 61K, 61L, 61M, 61N, 61O,".
- (b) Section 407AA (1) (c) (i):
After "66D,", insert "80A,".
- (9) Section 409B (**Admissibility of evidence relating to sexual experience etc.**):
Section 409B (3) (c) (i):
Omit "61A", insert instead "61H".

SCHEDULE 1 - AMENDMENTS RELATING TO SEXUAL
ASSAULT - *continued*

- (10) Section 476 (**Indictable offences punishable summarily with consent of accused**):
- (a) Section 476 (6) (ba):
After section 476 (6) (b), insert:
 - (ba) any offence mentioned in section 61L, 61M, 61N or 61O;
 - (b) Section 476 (6) (i):
After "(b)", insert "(ba)".
- (11) Section 495 (**Indictable offences punishable summarily without consent of accused: assaults**):
- (a) Section 495 (1):
Omit "or 61", insert instead ", 61, 61L, 61N or 61O (1)".
 - (b) Section 495 (2):
Omit "or 61", insert instead ", 61 or 61N".
 - (c) Section 495 (3):
Omit "or 59", insert instead ", 59, 61L or 61O (1)".
- (12) Section 578 (**Publication of evidence may be forbidden in certain cases**):
- (a) Section 578 (1):
After "61E", insert "61I, 61J, 61K, 61L, 61M, 61N, 61O,".
 - (b) Section 578 (1):
After "80", insert "80A,".
- (13) Section 581:
After section 580, insert:
- Savings and transitional provisions**
581. The Eleventh Schedule has effect.
- (14) Eleventh Schedule:
After the Tenth Schedule, insert:

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SCHEDULE 1 - AMENDMENTS RELATING TO SEXUAL
ASSAULT - *continued*

**ELEVENTH SCHEDULE -
SAVINGS AND TRANSITIONAL PROVISIONS**

(Sec. 581)

Part 1 - Crimes (Amendment) Act 1989

References in legislation

1. (1) In any other Act, in any instrument made under any Act or in any document of any kind:

- (a) a reference (however expressed) to sexual intercourse within the meaning of section 61 A is to be taken to be a reference to sexual intercourse within the meaning of section 61 H; and
- (b) a reference to an offence under section 61 B or 61 C is to be taken to include a reference to an offence under section 61 K; and
- (c) a reference to an offence under section 61 D is to be taken to include a reference to an offence under section 61 I or 61 J; and
- (d) a reference to an offence under section 61 E is to be taken to include a reference to an offence under section 61 L, 61 M, 61 N or 61 O; and
- (e) a reference to an attempt referred to in section 61 F is to be taken to include a reference to an attempt referred to in section 61 P.

(2) Subclause (1) does not apply in relation to offences committed or alleged to have been committed before the commencement of Schedule 1 (2) to the Crimes (Amendment) Act 1989.

Omitted provisions

2. Sections 61 A-61 G as in force before their repeal by the Crimes (Amendment) Act 1989 continue to apply to offences committed or alleged to have been committed before the repeal.

SCHEDULE 2 - AMENDMENTS RELATING TO PENALTIES

(Sec. 3)

(1) Section 360A (**Indictment &c. of corporations**):

Omit section 360A (6), insert instead:

(6) Where the penalty in respect of any offence is a term of imprisonment only, the court imposing punishment may, if it thinks fit, in the case of a body corporate, impose a pecuniary penalty not exceeding:

- (a) \$200,000 if the court is constituted by a Judge of the Supreme Court or District Court; or
- (b) \$10,000 if the court is not so constituted.

(2) Section 440A (**Power to fine in certain cases**):

Omit the section.

(3) Sections 440AA-440AC:

Before section 440B, insert:

Power to fine

440AA. (1) If a person is convicted on indictment of an offence, the Judge before whom the person is brought for sentencing may, in addition to or instead of imposing any other punishment, impose a fine not exceeding \$100,000.

(2) This section does not apply where:

- (a) another provision (other than section 440B) empowers the imposition of a fine for the offence; or
- (b) the offence was committed before the commencement of this section and a sentence of penal servitude or imprisonment is also being imposed for the offence.

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SCHEDULE 2 - AMENDMENTS RELATING TO PENALTIES -
continued

(3) Section 82 of the Justices Act 1902 does not apply to a fine imposed under this section.

(4) A fine imposed under this section may be recovered in a court of competent jurisdiction as a debt due to the Crown.

Consideration of accused's means to pay

440AB. In the exercise by a Judge of a discretion to fix the amount of any fine or monetary penalty, the Judge is required to consider:

- (a) such information regarding the means of the defendant as is reasonably and practicably available to the Judge for consideration; and
- (b) such other matters as, in the opinion of the Judge, are relevant to the fixing of that amount.

Instalments and time for payment

440AC. (1) A Judge imposing a fine or monetary penalty is required to allow time for the payment of the amount of the fine or penalty, unless:

- (a) the Judge is satisfied that the person liable to pay the amount has sufficient means to pay the whole amount immediately; or
- (b) the person requests that no time be allowed for payment; or
- (c) there are, in the opinion of the Judge, special reasons for not allowing any time for payment and the Judge has stated those reasons.

(2) A Judge imposing a fine or monetary penalty may direct payment of the fine or penalty to be made by instalments.

(3) The period of time allowed for the payment of an amount or for the payment of instalments must be not less than 21 days, unless:

SCHEDULE 2 - AMENDMENTS RELATING TO PENALTIES -
continued

- (a) the period is a shorter period requested by the person liable to pay the amount; or
- (b) there are, in the opinion of the Judge, special reasons for allowing a shorter period and the Judge has stated those reasons.

(4) If an amount is directed to be paid by instalments, and default is made in the payment of any one instalment, the same proceedings may be taken as if default had been made in payment of all the instalments then remaining unpaid.

(5) A Judge directing the payment of an amount or of an instalment of an amount may direct payment to be made at such time or times, and in such place or places, and to such person or persons, as the Judge specifies.

- (4) **Section 440B (Imposition of fine on sentence being deferred or suspended):**

Section 440B (1):

Omit "\$10,000", insert instead "\$20,000".

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

Section 476 (7) and (7A):

Omit "\$2,000" wherever occurring, insert instead "\$10,000".

- (6) **Section 495 (Indictable offences punishable summarily without consent of accused: assaults):**

Section 495 (2):

Omit "\$1,000", insert instead "\$2,000".

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SCHEDULE 2 - AMENDMENTS RELATING TO PENALTIES -
continued

- (7) Section 496 (**Indictable offences punishable summarily without consent of accused: larceny**):
- (a) Section 496 (1):
Omit "\$2,000", insert instead "\$5,000".
 - (b) After section 496 (1), insert:
(1A) If the amount of money or the value of the property does not exceed \$2,000, the maximum monetary penalty is \$2,000.
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[*Minister's second reading speech made in -
Legislative Assembly on 28 November 1989
Legislative Council on 8 December 1989*]