



New South Wales

Crimes Amendment (Cognitive Impairment—Sexual Offences) Act 2008 No 74

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Crimes Amendment (Cognitive Impairment—Sexual Offences) Act 2008 No 74

Act No 74, 2008

An Act to amend the *Crimes Act 1900* with respect to offences of a sexual nature committed against persons who have a cognitive impairment; and to amend the *Criminal Procedure Act 1986* in relation to the giving of evidence by cognitively impaired persons. [Assented to 28 October 2008]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Crimes Amendment (Cognitive Impairment—Sexual Offences) Act 2008*.

2 Commencement

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

3 Amendment of Crimes Act 1900 No 40

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

4 Amendment of Criminal Procedure Act 1986 No 209

The *Criminal Procedure Act 1986* is amended as set out in Schedule 2.

5 Repeal of Act

- (1) This Act is repealed on the day following the day on which all of the provisions of the Act have commenced.
- (2) The repeal of this Act does not, because of the operation of section 30 of the *Interpretation Act 1987*, affect any amendment made by this Act.

Schedule 1 Amendment of Crimes Act 1900

(Section 3)

[1] Section 61H Definition of “sexual intercourse” and other terms

Insert after section 61H (1):

- (1A) For the purposes of this Division, a person has a *cognitive impairment* if the person has:
- (a) an intellectual disability, or
 - (b) a developmental disorder (including an autistic spectrum disorder), or
 - (c) a neurological disorder, or
 - (d) dementia, or
 - (e) a severe mental illness, or
 - (f) a brain injury,
- that results in the person requiring supervision or social habilitation in connection with daily life activities.

[2] Sections 61J (2) (g), 61M (3) (e), 61O (3) (d), 66C (5) (f) and 80A (1) (paragraph (g) of the definition of “circumstances of aggravation”)

Omit “serious intellectual disability” wherever occurring.

Insert instead “cognitive impairment”.

[3] Section 61Q Alternative verdicts

Insert after section 61Q (4):

(5) **Question of consent regarding cognitive impairment**

If on the trial of a person for an offence under section 61I, 61J or 61JA, 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 66F, 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] Section 66F

Omit the section. Insert instead:

66F Sexual offences—cognitive impairment

(1) Meaning of “person responsible for care”

For the purposes of this section, a person is responsible for the care of a person who has a cognitive impairment if the person provides care to that person:

- (a) at a facility at which persons with a cognitive impairment are detained, reside or attend, or
- (b) at the home of that person in the course of a program under which any such facility or other government or community organisation provides care to persons with a cognitive impairment.

The care of a person with a cognitive impairment includes voluntary care, health professional care, education, home care and supervision.

(2) Sexual intercourse: person responsible for care

A person:

- (a) who has sexual intercourse with a person who has a cognitive impairment, and
- (b) who is responsible for the care of that person (whether generally or at the time of the sexual intercourse),

is guilty of an offence.

Maximum penalty: imprisonment for 10 years.

(3) Sexual intercourse: taking advantage of impairment

A person who has sexual intercourse with a person who has a cognitive impairment, with the intention of taking advantage of that person’s cognitive impairment, is guilty of an offence.

Maximum penalty: imprisonment for 8 years.

(4) Attempts

A person who attempts to commit an offence under subsection (2) or (3) is guilty of an offence and liable to the penalty provided for the commission of the offence.

(5) Consent not a defence for sexual intercourse

The consent of a person who has a cognitive impairment is not a defence to a charge for an offence under subsection (2)–(4).

(6) **Consent not a defence for indecent assault or act of indecency**

The consent of a person who has a cognitive impairment is not a defence to a charge for an offence under section 61L, 61M (1), 61N (2) or 61O (1A) (or under section 61P in connection with such an offence) if:

- (a) the accused was responsible for the care of that person (whether generally or at the time of the conduct constituting the offence), or
- (b) the accused engaged in the conduct constituting the offence with the intention of taking advantage of that person's cognitive impairment.

(7) **Defences**

It is a defence to a charge for an offence under subsection (2)–(4) or an offence referred to in subsection (6) in which the prosecution relies on the operation of that subsection:

- (a) if, at the time of the conduct constituting the offence:
 - (i) the accused did not know the person to whom the charge relates had a cognitive impairment, or
 - (ii) the accused was married to the person to whom the charge relates or was an established de facto partner of that person, or
- (b) if the act constituting the offence was carried out for any proper medical or hygienic purpose.

(8) **Approval of Attorney General for prosecution**

A prosecution for any of the following offences may not be commenced without the approval of the Attorney General:

- (a) an offence under subsection (2)–(4),
- (b) an offence referred to in subsection (6) in which the prosecution relies on the operation of that subsection.

[5] Section 77 Consent no defence in certain cases

Omit “66F,” from section 77 (1).

[6] Section 80C Meaning of “circumstances of aggravation”

Omit “serious intellectual disability” from section 80C (b).

Insert instead “cognitive impairment (within the meaning of Division 10)”.

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Schedule 1 Amendment of Crimes Act 1900

[7] Schedule 11 Savings and transitional provisions

Insert at the end of the Schedule with appropriate Part and clause numbering:

**Part Crimes Amendment (Cognitive
Impairment—Sexual Offences) Act 2008**

Amendments

An amendment made to this Act by the *Crimes Amendment (Cognitive Impairment—Sexual Offences) Act 2008* does not apply in respect of an offence committed before the commencement of the amendment.

Schedule 2 Amendment of Criminal Procedure Act 1986

(Section 4)

- [1] **Section 76 Recordings of interviews with vulnerable persons**
Omit “intellectually impaired persons” from the note to the section.
Insert instead “cognitively impaired persons”.
- [2] **Section 91 Witness may be directed to attend**
Omit “an intellectually impaired person” from section 91 (7A).
Insert instead “a cognitively impaired person”.
- [3] **Section 185 Recording of interviews with vulnerable persons**
Omit “intellectually impaired persons” from the note to the section.
Insert instead “cognitively impaired persons”.
- [4] **Section 306M Definitions**
Insert in alphabetical order in section 306M (1):
 cognitively impaired person means a person who has a cognitive
 impairment.
- [5] **Section 306M (1), definition of “intellectually impaired person”**
Omit the definition.
- [6] **Section 306M (1), definition of “vulnerable person”**
Omit “an intellectually impaired person”.
Insert instead “a cognitively impaired person”.
- [7] **Section 306M (2) (including the note)**
Omit the subsection. Insert instead:
- (2) For the purposes of this Part, a *cognitive impairment* includes
any of the following:
- (a) an intellectual disability,
 - (b) a developmental disorder (including an autistic spectrum
disorder),
 - (c) a neurological disorder,
 - (d) dementia,

(e) a severe mental illness,

(f) a brain injury.

Note. See section 306P as to the application of this Part to the giving of evidence by cognitively impaired persons.

[8] Section 306P Application of Part

Omit “intellectually impaired persons” from section 306P (2).

Insert instead “cognitively impaired persons”.

[9] Section 306P (2)

Omit “an intellectually impaired person”.

Insert instead “a cognitively impaired person”.

[10] Section 306R Evidence to which this Division applies

Omit “intellectually impaired persons” from section 306R (2).

Insert instead “cognitively impaired persons”.

[11] Section 306T Wishes of vulnerable person to be taken into account

Omit section 306T (1) (b). Insert instead:

(b) in the case of a cognitively impaired person—the person’s cognitive impairment.

[12] Section 306ZK Vulnerable persons have a right to presence of a supportive person while giving evidence

Omit “intellectually impaired person” from the note to the section, wherever occurring.

Insert instead “cognitively impaired person”.

[13] Schedule 2 Savings, transitional and other provisions

Insert at the end of clause 1 (1) of the Schedule:

Crimes Amendment (Cognitive Impairment—Sexual Offences) Act 2008, but only to the extent to which it amends this Act

[Second reading speech made in Legislative Council on 26 June 2008

Agreement in principle speech made in Legislative Assembly on 21 October 2008]

BY AUTHORITY