



New South Wales

# Crimes Amendment (Cognitive Impairment—Sexual Offences) Bill 2008

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The object of this Bill is to amend the *Crimes Act 1900* to provide additional protection to persons with a cognitive impairment by clarifying and extending the nature of sexual offences committed against persons who have a cognitive impairment (current offences deal with persons who have an intellectual disability). In particular, the Bill:

- (a) replaces “intellectual disability” with “cognitive impairment” and provides a detailed definition of *cognitive impairment*, and
- (b) revises the elements of such sexual offences and removes the lack of consent as an element of the offences of indecent assault or acts of indecency in addition to sexual intercourse offences, and
- (c) extends the circumstances in which a person is taken to be responsible for the care of a person with a cognitive impairment to include persons providing voluntary or home-based care to cognitively impaired persons at facilities or under programs for the cognitively impaired.

The Bill also amends the *Criminal Procedure Act 1986* in relation to the giving of evidence in criminal proceedings by cognitively impaired persons.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

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

**Clause 3** is a formal provision that gives effect to the amendments to the *Crimes Act 1900* set out in Schedule 1.

**Clause 4** is a formal provision that gives effect to the amendments to the *Criminal Procedure Act 1986* set out in Schedule 2.

**Clause 5** provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

## Schedule 1 Amendment of Crimes Act 1900

**Schedule 1 [1]** amends section 61H of the *Crimes Act 1900* to insert a new definition of ***cognitive impairment*** for the purposes of Division 10 of Part 3 of that Act (which deals with sexual offences). At present, a victim’s “serious intellectual disability” (undefined) is a factor of aggravation that increases the maximum penalty for sexual assault and other sexual offences, and “intellectual disability” (defined as an appreciably below average general intellectual function that results in the person requiring supervision or social habilitation in connection with daily life activities) is the basis of the specific offences in section 66F relating to sexual intercourse with persons with an intellectual disability. The proposed Act replaces those references with the new term “cognitive impairment”. The new term covers all impairments of cognitive capacity (whether a disability, disorder, illness or injury), but excludes minor impairments by maintaining the requirement currently in section 66F that the impairment is such that the person requires supervision or social habilitation in connection with daily life activities. **Schedule 1 [2] and [6]** make consequential amendments.

**Schedule 1 [3]** amends section 61Q of the *Crimes Act 1900* to enable a jury, in a trial for an offence of non-consensual sexual intercourse with a cognitively impaired person, to bring in an alternative verdict for an offence under section 66F of sexual intercourse with person who has a cognitive impairment (in cases where the jury is not satisfied that the victim did not consent and that the offender was aware of that fact).

**Schedule 1 [4]** substitutes section 66F of the *Crimes Act 1900*. Currently, section 66F contains offences in relation to sexual intercourse with intellectually disabled persons in which consent is not relevant. A maximum penalty of 10 years imprisonment is applicable where the victim is under the authority of the offender in connection with any facility or program, and a maximum penalty of 8 years imprisonment is applicable in the case of other offenders who take advantage of the intellectually disabled person’s vulnerability to sexual exploitation. The amendment

revises section 66F to provide additional protections against the sexual exploitation of persons with a cognitive impairment.

Firstly, the conduct that is subject to the offences is extended by the new definition of “cognitive impairment” (Schedule 1 [1]) and the extension of the offences to voluntary and home-care arrangements by the new definition of persons who are “responsible for the care” of a person with a cognitive impairment. Because of the extension of the offences, a defence is provided to exclude the married or established de facto partners of cognitively impaired persons, anyone who is not aware that the person has a cognitive impairment or any proper medical or hygienic act. The applicable maximum penalties for sexual intercourse with persons with a cognitive impairment remain the same (10 years and 8 years, respectively). In the case of sexual intercourse without the consent of a cognitively impaired person, higher maximum penalties apply as the offender may be prosecuted for sexual assault (s 61I maximum penalty: 14 years imprisonment) or aggravated sexual assault (s 61J maximum penalty: 20 years imprisonment). Section 61HA (6) (c) of the *Crimes Act 1900* (inserted by the *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007*) makes provision relating to the issue of consent (including when a lack of consent can be established because of cognitive incapacity or an abuse of a position of trust or authority).

Secondly, the revised section removes consent as a defence in prosecutions for offences of indecent assault of, and acts of indecency with or towards, persons with a cognitive impairment. Currently, section 77 of the *Crimes Act 1900* provides that the consent of a child to indecent conduct by an accused (or consent to sexual intercourse) is not a defence. In the case of a cognitively impaired person who is not a child, currently consent is not a defence only in relation to the sexual intercourse offences under section 66F. This is now included in the revised section rather than in section 77 (subsection (5)). The revised section also removes consent as a defence in relation to indecent assault or acts of indecency in relation to a cognitively impaired person (who is not a child) where the prosecution is based on the offender being the person responsible for the care of the cognitively impaired person or the offender taking advantage of the cognitive impairment (subsection (6)).

As a consequence of subsection (6) of the revised section, the range of applicable maximum penalties in any such prosecution will be as follows:

- (a) 7 years for indecent assault of a cognitively impaired person (s 61M (1))—compared to 5 years for indecent assault of a non-impaired person (s 61L),
- (b) 5 years for an act of indecency with or towards a cognitively impaired child under 16 years of age (s 61O (1))—compared to 2 years for an act of indecency with or towards a non-impaired child under 16 years of age (s 61N (1)),
- (c) 3 years for an act of indecency with or towards a cognitively impaired person over 16 years of age (s 61O (1A))—compared to 18 months for an act of indecency with or towards a non-impaired person over that age (s 61N (2)).

The existing requirement for the approval of the Attorney General to a prosecution under section 66F relating to sexual intercourse with the cognitively impaired has

also been applied to the extended offences relating to indecent assault or acts of indecency.

**Schedule 1 [5]** is consequential on the provision in proposed section 66F (5) that consent is not a defence for sexual intercourse offences against cognitively impaired persons (as transferred from section 77 of the *Crimes Act 1900*).

**Schedule 1 [7]** inserts a savings and transitional provision into the *Crimes Act 1900* to ensure that the changes to offences against cognitively impaired persons apply only to conduct occurring after the changes take effect.

## **Schedule 2      Amendment of Criminal Procedure Act 1986**

The *Criminal Procedure Act 1986* enables evidence to be given in certain proceedings by vulnerable persons (currently defined as children and intellectually impaired persons) in the form of recordings of previous representations and by closed-circuit television in court proceedings. To bring the definition of *vulnerable persons* into line with the amendments made to the *Crimes Act 1900* by Schedule 1 to the proposed Act, **Schedule 2 [1]–[12]** replace references to “intellectually impaired persons” in the *Criminal Procedure Act 1986* with “cognitively impaired persons” and provide for a corresponding meaning of that expression.

**Schedule 2 [13]** enables savings and transitional regulations to be made as a consequence of the proposed Act.



New South Wales

# Crimes Amendment (Cognitive Impairment—Sexual Offences) Bill 2008

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New South Wales

# Crimes Amendment (Cognitive Impairment—Sexual Offences) Bill 2008

No. , 2008

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## A Bill for

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.

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<b>The Legislature of New South Wales enacts:</b>	1
<b>1 Name of Act</b>	2
This Act is the <i>Crimes Amendment (Cognitive Impairment—Sexual Offences) Act 2008</i> .	3 4
<b>2 Commencement</b>	5
This Act commences on a day or days to be appointed by proclamation.	6
<b>3 Amendment of Crimes Act 1900 No 40</b>	7
The <i>Crimes Act 1900</i> is amended as set out in Schedule 1.	8
<b>4 Amendment of Criminal Procedure Act 1986 No 209</b>	9
The <i>Criminal Procedure Act 1986</i> is amended as set out in Schedule 2.	10
<b>5 Repeal of Act</b>	11
(1) This Act is repealed on the day following the day on which all of the provisions of the Act have commenced.	12 13
(2) The repeal of this Act does not, because of the operation of section 30 of the <i>Interpretation Act 1987</i> , affect any amendment made by this Act.	14 15

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## Schedule 1 Amendment of Crimes Act 1900

	(Section 3)	1
<b>[1] Section 61H Definition of “sexual intercourse” and other terms</b>		2
Insert after section 61H (1):		3
(1A) For the purposes of this Division, a person has a <i>cognitive impairment</i> if the person has:		4
(a) an intellectual disability, or		5
(b) a developmental disorder (including an autistic spectrum disorder), or		6
(c) a neurological disorder, or		7
(d) dementia, or		8
(e) a severe mental illness, or		9
(f) a brain injury,		10
that results in the person requiring supervision or social habilitation in connection with daily life activities.		11
<b>[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”)</b>		12
Omit “serious intellectual disability” wherever occurring.		13
Insert instead “cognitive impairment”.		14
<b>[3] Section 61Q Alternative verdicts</b>		15
Insert after section 61Q (4):		16
(5) <b>Question of consent regarding cognitive impairment</b>		17
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.		18
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<b>[4] Section 66F</b>	1
Omit the section. Insert instead:	2
<b>66F Sexual offences—cognitive impairment</b>	3
<b>(1) Meaning of “person responsible for care”</b>	4
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:	5
(a) at a facility at which persons with a cognitive impairment are detained, reside or attend, or	6
(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.	7
The care of a person with a cognitive impairment includes voluntary care, health professional care, education, home care and supervision.	8
<b>(2) Sexual intercourse: person responsible for care</b>	9
A person:	10
(a) who has sexual intercourse with a person who has a cognitive impairment, and	11
(b) who is responsible for the care of that person (whether generally or at the time of the sexual intercourse),	12
is guilty of an offence.	13
Maximum penalty: imprisonment for 10 years.	14
<b>(3) Sexual intercourse: taking advantage of impairment</b>	15
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.	16
Maximum penalty: imprisonment for 8 years.	17
<b>(4) Attempts</b>	18
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.	19
<b>(5) Consent not a defence for sexual intercourse</b>	20
The consent of a person who has a cognitive impairment is not a defence to a charge for an offence under subsection (2)–(4).	21
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<b>(6) Consent not a defence for indecent assault or act of indecency</b>	1
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:	2
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(a) the accused was responsible for the care of that person (whether generally or at the time of the conduct constituting the offence), or	6
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(b) the accused engaged in the conduct constituting the offence with the intention of taking advantage of that person's cognitive impairment.	9
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<b>(7) Defences</b>	12
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:	13
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(a) if, at the time of the conduct constituting the offence:	16
(i) the accused did not know the person to whom the charge relates had a cognitive impairment, or	17
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(ii) the accused was married to the person to whom the charge relates or was an established de facto partner of that person, or	19
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(b) if the act constituting the offence was carried out for any proper medical or hygienic purpose.	22
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<b>(8) Approval of Attorney General for prosecution</b>	24
A prosecution for any of the following offences may not be commenced without the approval of the Attorney General:	25
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(a) an offence under subsection (2)–(4),	27
(b) an offence referred to in subsection (6) in which the prosecution relies on the operation of that subsection.	28
	29
<b>[5] Section 77 Consent no defence in certain cases</b>	30
Omit “66F,” from section 77 (1).	31
<b>[6] Section 80C Meaning of “circumstances of aggravation”</b>	32
Omit “serious intellectual disability” from section 80C (b).	33
Insert instead “cognitive impairment (within the meaning of Division 10)”.	34

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<b>[7] Schedule 11 Savings and transitional provisions</b>	1
Insert at the end of the Schedule with appropriate Part and clause numbering:	2
<b>Part      Crimes Amendment (Cognitive Impairment—Sexual Offences) Act 2008</b>	3 4
<b>Amendments</b>	5
An amendment made to this Act by the <i>Crimes Amendment (Cognitive Impairment—Sexual Offences) Act 2008</i> does not apply in respect of an offence committed before the commencement of the amendment.	6 7 8 9

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<b>Schedule 2</b>	<b>Amendment of Criminal Procedure Act 1986</b>	1
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	(Section 4)	3
<b>[1]</b>	<b>Section 76 Recordings of interviews with vulnerable persons</b>	4
	Omit “intellectually impaired persons” from the note to the section.	5
	Insert instead “cognitively impaired persons”.	6
<b>[2]</b>	<b>Section 91 Witness may be directed to attend</b>	7
	Omit “an intellectually impaired person” from section 91 (7A).	8
	Insert instead “a cognitively impaired person”.	9
<b>[3]</b>	<b>Section 185 Recording of interviews with vulnerable persons</b>	10
	Omit “intellectually impaired persons” from the note to the section.	11
	Insert instead “cognitively impaired persons”.	12
<b>[4]</b>	<b>Section 306M Definitions</b>	13
	Insert in alphabetical order in section 306M (1):	14
	<i>cognitively impaired person</i> means a person who has a cognitive impairment.	15
		16
<b>[5]</b>	<b>Section 306M (1), definition of “intellectually impaired person”</b>	17
	Omit the definition.	18
<b>[6]</b>	<b>Section 306M (1), definition of “vulnerable person”</b>	19
	Omit “an intellectually impaired person”.	20
	Insert instead “a cognitively impaired person”.	21
<b>[7]</b>	<b>Section 306M (2) (including the note)</b>	22
	Omit the subsection. Insert instead:	23
	(2) For the purposes of this Part, a <i>cognitive impairment</i> includes any of the following:	24
		25
	(a) an intellectual disability,	26
	(b) a developmental disorder (including an autistic spectrum disorder),	27
		28
	(c) a neurological disorder,	29
	(d) dementia,	30

	(e) a severe mental illness,	1
	(f) a brain injury.	2
	<b>Note.</b> See section 306P as to the application of this Part to the giving of evidence by cognitively impaired persons.	3 4
<b>[8]</b>	<b>Section 306P Application of Part</b>	5
	Omit “intellectually impaired persons” from section 306P (2).	6
	Insert instead “cognitively impaired persons”.	7
<b>[9]</b>	<b>Section 306P (2)</b>	8
	Omit “an intellectually impaired person”.	9
	Insert instead “a cognitively impaired person”.	10
<b>[10]</b>	<b>Section 306R Evidence to which this Division applies</b>	11
	Omit “intellectually impaired persons” from section 306R (2).	12
	Insert instead “cognitively impaired persons”.	13
<b>[11]</b>	<b>Section 306T Wishes of vulnerable person to be taken into account</b>	14
	Omit section 306T (1) (b). Insert instead:	15
	(b) in the case of a cognitively impaired person—the person’s cognitive impairment.	16 17
<b>[12]</b>	<b>Section 306ZK Vulnerable persons have a right to presence of a supportive person while giving evidence</b>	18 19
	Omit “intellectually impaired person” from the note to the section, wherever occurring.	20 21
	Insert instead “cognitively impaired person”.	22
<b>[13]</b>	<b>Schedule 2 Savings, transitional and other provisions</b>	23
	Insert at the end of clause 1 (1) of the Schedule:	24
	<i>Crimes Amendment (Cognitive Impairment—Sexual Offences) Act 2008</i> , but only to the extent to which it amends this Act	25 26