



New South Wales

# Crimes Amendment (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* and other criminal legislation as follows:

- (a) to provide for an aggravated offence of having sexual intercourse with a child under the age of 10 years, with a maximum penalty of imprisonment for life,
- (b) to make kidnapping (or deprivation of liberty) an additional circumstance in which sexual intercourse with a child aged between 10 and 16 years is treated as an aggravated offence,
- (c) to make breaking and entering, and kidnapping (or deprivation of liberty), additional circumstances in which sexual intercourse without a person's consent is treated as an aggravated offence,
- (d) to create a new offence of aggravated act of indecency, with a maximum penalty of 10 years imprisonment, where an act of indecency is committed with or towards a child under the age of 16 years and the offender knows that the act of indecency is being filmed for the purposes of the production of child pornography,

- (e) to increase the maximum penalty for the offence of indecent assault against a child aged between 10 and 16 years,
- (f) to create a new offence of meeting a child, or travelling to meet a child, following grooming that child for sexual purposes,
- (g) to increase the maximum penalty for the aggravated offence of causing a person to enter into or remain in sexual servitude,
- (h) to create a specific statutory offence of inciting a person to commit a sexual offence (carrying the same maximum penalty as the offence incited),
- (i) to increase the maximum penalty for the offence of receiving money or a material benefit derived from child prostitution, where the offence involves a child under the age of 14 years,
- (j) to increase the maximum penalty for possession of child pornography and make other changes to child pornography offences,
- (k) to create new offences of voyeurism and filming a person's private parts and to transfer to the *Crimes Act 1900* and extend the existing offence of filming a person engaged in a private act,
- (l) to make various changes with respect to the sentencing of sex offenders and young offenders,
- (m) to provide for other miscellaneous matters (including consequential and savings and transitional matters).

## 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. Most of the provisions of the proposed Act will commence 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 other Acts and instrument specified 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

### Aggravated sexual offences

**Schedule 1 [9]** creates a new aggravated offence of having sexual intercourse with a child under the age of 10 years. The existing (non-aggravated) offence carries a maximum penalty of 25 years imprisonment. The new offence will carry a maximum penalty of imprisonment for life. The circumstances that will make the offence an aggravated offence are as follows:

- (a) at the time of, or immediately before or after, the commission of the offence, the alleged offender intentionally or recklessly inflicts actual bodily harm on the alleged victim or any other person who is present or nearby,
- (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,
- (c) the alleged offender is in the company of another person or persons,
- (d) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender,
- (e) the alleged victim has a serious physical disability,
- (f) the alleged victim has a serious intellectual disability (or what is now referred to as a cognitive impairment),
- (g) the alleged offender took advantage of the alleged victim being under the influence of alcohol or a drug in order to commit the offence,
- (h) the alleged offender deprives the alleged victim of his or her liberty for a period before or after the commission of the offence.

These circumstances of aggravation are identical to the existing circumstances in which the offence of having sexual intercourse with a person aged between 10 and 16 years becomes an aggravated offence, with the addition of the last factor, namely, that the offender deprives the victim of his or her liberty before or after the commission of the offence. **Schedule 1 [11]** adds this additional circumstance of aggravation to the offence of having sexual intercourse with a person aged between 10 and 16 years, so that the circumstances of aggravation relating to the 2 offences remain consistent.

**Schedule 1 [1]** provides for additional circumstances in which the offence of having sexual intercourse with another person, without that person's consent, becomes an aggravated offence. The additional circumstances are:

- (a) the alleged offender breaks and enters into any dwelling-house or other building with the intention of committing the offence or any other serious indictable offence, or
- (b) the alleged offender deprives the alleged victim of his or her liberty for a period before or after the commission of the offence.

**Schedule 1 [5]** creates a new aggravated act of indecency offence of committing an act of indecency with or towards a child under the age of 16 years, or inciting a child under that age to an act of indecency, where the offender knows that the act of indecency is being filmed for the purposes of the production of child pornography. The maximum penalty for this offence is imprisonment for 10 years (consistent with the penalties for the production of child pornography).

**Schedule 1 [3]** increases the maximum penalty for the offence of indecent assault against a child aged between 10 and 16 years to 10 years imprisonment (so that it is the same as the maximum penalty for the offence of indecent assault against a child under the age of 10 years). At present the maximum penalty for this offence is 7 years imprisonment.

**Schedule 1 [2], [4], [6], [7], [8], [17] and [32]** make consequential and related amendments to the amendments described above.

### **Child grooming**

**Schedule 1 [14]** creates a new offence of intentionally meeting a child under the age of 16 years, or travelling to meet a child under the age of 16 years, after grooming the child for sexual purposes. A person grooms a child if the person engages in conduct (for example, by communication over the internet) that exposes the child to indecent material. Only adults can be convicted of this offence. The offence carries a higher penalty than the offence of grooming a child for sexual purposes. The maximum penalty for the offence will be imprisonment for 15 years (in the case of a child under the age of 14 years) or imprisonment for 12 years (in any other case).

**Schedule 1 [15] and [16]** are consequential amendments.

### **Causing sexual servitude**

**Schedule 1 [18]** increases the maximum penalty for the offence of causing a person to enter into or remain in sexual servitude from 19 years imprisonment to 20 years imprisonment. Circumstances of aggravation are that the victim is under the age of 18 years or has a cognitive impairment.

### **Incitement to commit sexual offence**

**Schedule 1 [19]** provides for a specific offence of inciting a person to commit a sexual offence. Sexual offences are offences against Division 10 of Part 3 of the *Crimes Act 1900* (such as sexual assault, sexual intercourse with children, indecent assault and acts of indecency), offences against Division 10A of that Part (sexual servitude) and offences against Division 15A of that Part (child pornography offences). The incitement offence will carry the same maximum penalty as the offence incited.

The offence of incitement will not apply to offences in the nature of attempt or offences that are themselves constituted by inciting another person to do something (such as inciting a person to commit an act of indecency).

### **Child prostitution**

**Schedule 1 [22]** increases the maximum penalty for receiving money or any other material benefit that is derived from an act of prostitution from 10 years imprisonment to 14 years imprisonment, if the offence involves a child under the age of 14 years. **Schedule 1 [23]** requires the age of the child to be set out in the charge for the offence, if the higher maximum penalty is sought.

### **Child pornography**

**Schedule 1 [27]** increases the maximum penalty for being in possession of child pornography from 5 years imprisonment to 10 years imprisonment. As the offence will now carry the same maximum penalty as producing or disseminating child pornography, the 2 child pornography offences (one being the offence of possession of child pornography, and the other being the offence of production or dissemination of child pornography) are merged into a single offence.

**Schedule 1 [25] and [30]** make amendments to clarify that the child pornography offence extends to material that appears to depict or describe a child (a person under the age of 16 years) in a pornographic manner. This includes where an image of a person is manipulated in a manner to make the person appear to be a child or appear to be engaged in a sexual activity, in a sexual context or a victim of torture, cruelty or physical abuse.

**Schedule 1 [26]** defines “produce”, for the purposes of the offences relating to production of child pornography, to include filming, photographing, printing or otherwise making child pornography, altering or manipulating an image for the purpose of making child pornography, or entering into an agreement or arrangement to do any of those things.

**Schedule 1 [24]** is a law revision amendment that creates a separate Division for the child pornography offences. Currently, the child pornography offences are contained in the same Division as child prostitution offences. The offences are placed in a separate Division as the child prostitution offences relate to persons under the age of 18 years, and the child pornography offences relate to persons under the age of 16 years.

**Schedule 1 [13], [20], [21], [28] and [29]** are consequential amendments to the amendments described above.

### **Voyeurism and related offences**

**Schedule 1 [31]** provides for new offences of observing or filming a person engaged in a private act. A person is engaged in a private act if:

- (a) the person is in a state of undress, using the toilet, showering or bathing, engaged in a sexual act of a kind not ordinarily done in public, or engaged in any other like activity, and
- (b) the circumstances are such that a reasonable person would reasonably expect to be afforded privacy.

The new offence of voyeurism is constituted by observing a person who is engaged in a private act without the consent of the person observed and knowing that the person observed does not consent. It will be necessary to prove that the person observing the private act did so for the purpose of obtaining sexual arousal or sexual gratification. The offence will be a summary offence punishable by a maximum penalty of 100 penalty units (currently \$11,000) or 2 years imprisonment, or both. There will also be an aggravated offence that may be prosecuted on indictment. The aggravated offence is committed if the person observed is a child under the age of 16 years or the offender constructs or adapts the fabric of a building for the purpose of facilitating the commission of the offence. The aggravated offence will carry a maximum penalty of 5 years imprisonment.

The amendments also provide for an offence of filming a person who is engaged in a private act. The offence is constituted by filming a person who is engaged in a private act without the consent of the person filmed and knowing that the person filmed does not consent. It will be necessary to prove the person filming did so for the purpose of obtaining sexual arousal or sexual gratification or enabling another person to obtain sexual arousal or sexual gratification. This behaviour is already an offence under the *Summary Offences Act 1988*, so the new offence is partly a re-enactment in the *Crimes Act 1900* of the existing summary offence. It will continue to be a summary offence with the same maximum penalty as it currently carries (100 penalty units or imprisonment for 2 years, or both). However, the amendments also create a new aggravated version of the offence that may be prosecuted on indictment. The aggravated offence is committed if the person filmed is a child under the age of 16 years or the offender constructs or adapts the fabric of a building for the purpose of facilitating the commission of the offence. The aggravated offence will carry a maximum penalty of 5 years imprisonment.

The amendments also create a new offence of filming a person's private parts (that is, the person's genital or anal area, whether bare or covered in underwear) in circumstances where a reasonable person would reasonably expect the person's private parts could not be filmed. Similar to the voyeurism and other filming offence described above, the offence will apply if the offender filmed the person's private parts for the purpose of obtaining, or enabling another person to obtain, sexual arousal or sexual gratification, and did so without the consent of the person filmed, and knowing that the person filmed did not consent. The offence will be a summary offence with a maximum penalty of 100 penalty units or imprisonment for 2 years, or both. There will also be an aggravated offence which may be prosecuted on indictment. The aggravated offence is committed if the person filmed is a child under the age of 16 years or the offender constructs or adapts the fabric of a building for the purpose of facilitating the commission of the offence. The aggravated offence will carry a maximum penalty of 5 years imprisonment.

The amendments also provide for an offence of installing a device, or constructing or adapting the fabric of a building, for the purpose of enabling a person to commit one of the above offences. This will be a summary offence with a maximum penalty of 100 penalty units or imprisonment for 2 years, or both.

## Miscellaneous

Schedule 1 [33] provides for savings and transitional matters.

## Schedule 2 Amendment of other Acts and instrument

Schedule 2 amends the following Acts and instrument:

- (a) the *Child Protection (Offenders Registration) Act 2000*,
- (b) the *Children (Criminal Proceedings) Act 1987*,
- (c) the *Commission for Children and Young People Act 1998*,
- (d) the *Crimes (Sentencing Procedure) Act 1999*,
- (e) the *Crimes (Serious Sex Offenders) Act 2006*,
- (f) the *Criminal Assets Recovery Act 1990*,
- (g) the *Criminal Procedure Act 1986*,
- (h) the *Firearms Regulation 2006*,
- (i) the *Pre-Trial Diversion of Offenders Act 1985*,
- (j) the *Summary Offences Act 1988*.

Some of the amendments relate to new proposals regarding sentencing, pre-trial diversion of offenders, and the prosecution of offences on indictment and some are consequential to the other amendments set out in this Bill.

## Sentencing

The amendments to the *Crimes (Sentencing Procedure) Act 1999* set out in **Schedule 2.4 [1] and [2]** provide that an offender's previous good character or lack of previous convictions is not to be regarded as a mitigating factor in sentencing, if the offender is found guilty of a child sexual offence and the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.

**Schedule 2.4 [3]** amends the *Crimes (Sentencing Procedure) Act 1999* to provide that a court must not take into account, as a mitigating factor in sentencing a sexual offender, the fact that the person has or may become the subject of the various requirements (such as reporting requirements) under the *Child Protection (Offenders Registration) Act 2000*, the *Child Protection (Offenders Prohibition Orders) Act 2004* or the *Crimes (Serious Sex Offenders) Act 2006*.

**Schedule 2.4 [4]** amends the *Crimes (Sentencing Procedure) Act 1999* to provide that the standard non-parole periods provided for by that Act do not apply to an offender under the age of 18 years. **Schedule 2.2** is a consequential amendment to the *Children (Criminal Proceedings) Act 1987*.

**Schedule 2.4 [7]** provides for the making of savings and transitional regulations under the *Crimes (Sentencing Procedure) Act 1999* as a consequence of the amendments and **Schedule 2.4 [8]** provides for savings and transitional matters.

#### **Pre-trial diversion of offenders**

**Schedule 2.9** amends the *Pre-Trial Diversion of Offenders Act 1985* to extend the scheme under that Act to the offence under the *Crimes Act 1900* of persistent sexual abuse of a child.

#### **Prosecution of offences on indictment**

**Schedule 2.7 [1] and [3]** amend the *Criminal Procedure Act 1986* so that the various child grooming offences contained in the *Crimes Act 1900*, including the new offence of meeting a child following grooming, may be tried on indictment on the election of the person charged. At present only the prosecutor may elect to have the offence tried on indictment.

#### **Consequential amendments**

The following amendments are consequential on the creation of the new offences in the *Crimes Act 1900* of voyeurism, filming a person engaged in a private act and filming a person's private parts:

- (a) the amendments to the *Child Protection (Offenders Registration) Act 2000* set out in **Schedule 2.1**,
- (b) the amendment to the *Commission for Children and Young People Act 1998* set out in **Schedule 2.3**,
- (c) the amendment to the *Crimes (Serious Sex Offenders) Act 2006* set out in **Schedule 2.5 [2]**,
- (d) the amendment to the *Criminal Procedure Act 1986* set out in **Schedule 2.7 [2]** (which provides that the offences are to be dealt with summarily unless the prosecutor or person charged elects otherwise).

**Schedule 2.10** repeals the offences relating to filming persons engaged in private acts that are contained in the *Summary Offences Act 1988* as these offences will now be contained in the *Crimes Act 1900*.

The amendment to standard non-parole periods in the *Crimes (Sentencing Procedure) Act 1999* set out in **Schedule 2.4 [5]** is consequential on the creation of a new aggravated offence of sexual intercourse with a child under the age of 10 years.

The amendment to the *Criminal Procedure Act 1986* set out in **Schedule 2.7 [1]**, relating to section 61O (2A) of the *Crimes Act 1900*, makes that offence (act of indecency committed for the purposes of the production of child pornography) an offence that is to be dealt with summarily unless the prosecutor or person charged elects otherwise.



Crimes Amendment (Sexual Offences) Bill 2008

Explanatory note

---

**Schedule 2.7 [4]** enables savings and transitional regulations to be made under the *Criminal Procedure Act 1986* as a consequence of the amendments made by the proposed Act.

**Schedule 2.5 [1], 2.6 and 2.8** make amendments to the *Crimes (Serious Sex Offenders) Act 2006*, the *Criminal Assets Recovery Act 1990* and the *Firearms Regulation 2006* that are consequential on the re-location of the child pornography offences in the *Crimes Act 1900* in a separate Division.

**Schedule 2.4 [6]** makes an amendment to the *Crimes (Sentencing Procedure) Act 1999* that is consequential on the creation of the new aggravated offence of sexual intercourse with a child under 10 years of age.