

# Crimes (Sexual Offences) Act 2006

Act No. 2/2006

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Victoria

No. 2 of 2006

## Crimes (Sexual Offences) Act 2006<sup>†</sup>

[Assented to 7 March 2006]

The Parliament of Victoria enacts as follows:

### PART 1—PRELIMINARY

#### 1. Purpose

The main purpose of this Act is to amend the **Crimes Act 1958**, the **Crimes (Criminal Trials) Act 1999**, the **Evidence Act 1958** and the **Magistrates' Court Act 1989** to make further provision in relation to sexual offences, including the definition of offences and the giving of evidence in legal proceedings that relate to a charge for a sexual offence.

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**2. Commencement**

- (1) Subject to sub-section (2), this Act comes into operation on a day or days to be proclaimed.
  - (2) If a provision of this Act does not come into operation before 1 December 2006, it comes into operation on that day.
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**PART 2—AMENDMENT OF CRIMES ACT 1958**

**3. New definition inserted**

(1) In section 35(1) of the **Crimes Act 1958** insert the following definition—

' "**domestic partner**" of a person means a person to whom the person is not married but with whom the person is living as a couple on a genuine domestic basis (irrespective of gender);'

(2) After section 35(1) of the **Crimes Act 1958** insert—

'(1A) For the purposes of the definition of "domestic partner" in sub-section (1), in determining whether persons are domestic partners of each other, all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in section 275(2) of the **Property Law Act 1958** as may be relevant in a particular case.'

**4. Jury directions on consent**

For section 37(1)(a) of the **Crimes Act 1958** substitute—

"(a) the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement;"

See:  
Act No.  
6231.  
Reprint No. 18  
as at  
1 July 2005  
and  
amending  
Act Nos  
16/2004,  
18/2005,  
56/2005 and  
66/2005.  
LawToday:  
www.dms.  
dpc.vic.  
gov.au

**5. New sections 37A and 37B inserted**

After section 37 of the **Crimes Act 1958** insert—

**"37A. Objectives of Subdivisions 8A to 8G**

The objectives of Subdivisions (8A) to (8G) are—

- (a) to uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity;
- (b) to protect children and persons with a cognitive impairment from sexual exploitation.

**37B. Guiding principles**

It is the intention of Parliament that in interpreting and applying Subdivisions (8A) to (8G), courts are to have regard to the fact that—

- (a) there is a high incidence of sexual violence within society; and
- (b) sexual offences are significantly under-reported; and
- (c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment; and
- (d) sexual offenders are commonly known to their victims; and
- (e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred."

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## 6. Rape

- (1) For section 38(3) of the **Crimes Act 1958** **substitute**—

"(3) A person (the offender) also commits rape if he or she compels a person—

- (a) to sexually penetrate the offender or another person, irrespective of whether the person being sexually penetrated consents to the act; or
  - (b) who has sexually penetrated the offender or another person, not to cease sexually penetrating the offender or that other person, irrespective of whether the person who has been sexually penetrated consents to the act."
- (2) In section 38(4) of the **Crimes Act 1958**, for "a male" **substitute** "another".

## 7. New section 38A inserted

After section 38 of the **Crimes Act 1958** insert—

### **"38A. Compelling sexual penetration**

- (1) A person must not compel another person to take part in an act of sexual penetration.

Penalty: Level 2 imprisonment (25 years maximum).

- (2) A person (the offender) compels another person (the victim) to take part in an act of sexual penetration if—
- (a) the offender compels the victim to introduce (to any extent) an object or a part of his or her body into his or her own anus or, in the case of a female victim, her own vagina, other than in the course of a procedure carried out in



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good faith for medical or hygienic purposes; or

- (b) the offender compels the victim to take part in an act of bestiality within the meaning of section 59.
- (3) For the purposes of sub-section (2), a person compels another person (the victim) to take part in an act of sexual penetration if the person compels the victim (by force or otherwise) to engage in that act—
  - (a) without the victim's consent; and
  - (b) while being aware that the victim is not consenting or might not be consenting."

**8. Incest**

For section 44(6) of the **Crimes Act 1958** substitute—

- "(6) A person who is compelled by another person to take part in an act of sexual penetration in any of the circumstances referred to in sub-section (1), (2), (3) or (4) is not guilty of an offence against this section.
- (6A) For the purposes of this section, a person compels another person (the victim) to take part in an act of sexual penetration if the person compels the victim (by force or otherwise) to engage in that act—
- (a) without the victim's consent; and
  - (b) while being aware that the victim is not consenting or might not be consenting."

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**9. Sexual penetration of child under the age of 16**

- (1) In section 45(4)(a) and (c) of the **Crimes Act 1958**, after "accused" **insert** "satisfies the court on the balance of probabilities that he or she".
- (2) After section 45(4) of the **Crimes Act 1958** **insert**—
  - "(4A) If consent is relevant to a charge under subsection (1), the prosecution bears the burden of proving lack of consent."

**10. Indecent act with child under the age of 16**

- (1) In section 47(2)(a) and (c) of the **Crimes Act 1958**, after "accused" **insert** "satisfies the court on the balance of probabilities that he or she".
- (2) After section 47(2) of the **Crimes Act 1958** **insert**—
  - "(3) If consent is relevant to a charge under subsection (1), the prosecution bears the burden of proving lack of consent."

**11. Sexual relationship with child under the age of 16**

- (1) **Insert** the following heading to section 47A of the **Crimes Act 1958**—

**"Persistent sexual abuse of child under the age of 16"**.
- (2) In section 47A(1) of the **Crimes Act 1958**, for "maintains a sexual relationship with" **substitute** "persistently sexually abuses".

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**12. Sexual penetration of 16 or 17 year old child**

- (1) **Insert** the following heading to section 48 of the **Crimes Act 1958**—

**"Sexual penetration of 16 or 17 year old child".**

- (2) In section 48(2) of the **Crimes Act 1958**, after "unless" **insert** "the accused satisfies the court on the balance of probabilities that".

- (3) After section 48(2) of the **Crimes Act 1958** **insert**—

"(3) If consent is relevant to a charge under sub-section (1), the prosecution bears the burden of proving lack of consent.

- (4) For the purposes of sub-section (1), and without limiting that sub-section, a child is under the care, supervision or authority of a person if the person is—

- (a) the child's teacher;
  - (b) the child's foster parent;
  - (c) the child's legal guardian;
  - (d) a minister of religion with pastoral responsibility for the child;
  - (e) the child's employer;
  - (f) the child's youth worker;
  - (g) the child's sports coach;
  - (h) the child's counsellor;
  - (i) the child's health professional;
  - (j) a member of the police force acting in the course of his or her duty in respect of the child;
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- (k) employed in, or providing services in, a remand centre, youth residential centre, youth training centre or prison and is acting in the course of his or her duty in respect of the child."

**13. New section 49 substituted**

For section 49 of the **Crimes Act 1958** substitute—

**"49. Indecent act with 16 or 17 year old child**

- (1) A person must not wilfully commit, or wilfully be in any way a party to the commission of, an indecent act with or in the presence of a 16 or 17 year old child to whom he or she is not married and who is under his or her care, supervision or authority.

Penalty: Level 6 imprisonment (5 years maximum).

- (2) Consent is not a defence to a charge under sub-section (1) unless the accused satisfies the court on the balance of probabilities that at the time of the alleged offence the accused believed on reasonable grounds—
- (a) that the child was aged 18 or older; or
  - (b) that he or she was married to the child.
- (3) If consent is relevant to a charge under sub-section (1), the prosecution bears the burden of proving lack of consent.

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- (4) For the purposes of sub-section (1), and without limiting that sub-section, a child is under the care, supervision or authority of a person if the person is—
- (a) the child's teacher;
  - (b) the child's parent, adoptive parent, foster parent or step parent;
  - (c) the child's legal guardian;
  - (d) a minister of religion with pastoral responsibility for the child;
  - (e) the child's employer;
  - (f) the child's youth worker;
  - (g) the child's sports coach;
  - (h) the child's counsellor;
  - (i) the child's health professional;
  - (j) a member of the police force acting in the course of his or her duty in respect of the child;
  - (k) employed in, or providing services in, a remand centre, youth residential centre, youth training centre or prison and is acting in the course of his or her duty in respect of the child."

**14. Subdivision heading substituted**

For the heading to Subdivision (8D) of Division 1 of Part I of the **Crimes Act 1958** substitute—

**"(8D) Sexual Offences against Persons with a Cognitive Impairment"**.

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**15. Definitions**

In section 50(1) of the **Crimes Act 1958**—

(a) **insert** the following definitions—

' **"cognitive impairment"** includes impairment because of mental illness, intellectual disability, dementia or brain injury;

**"facility"** means a service operated by any person or body (government or non-government) that provides programs specially designed to meet the developmental or educational needs of persons with a cognitive impairment and includes a residential facility;'

(b) the definitions of "impaired" and "resident" are **repealed**;

(c) for the definition of "worker" **substitute**—

' **"worker"** means a person who delivers, or assists in delivering, at a facility (whether as an employee or as a volunteer or in any other capacity) a program specially designed to meet the developmental or educational needs of persons with a cognitive impairment residing at the facility or attending the facility to take part in the program but does not include a person with a cognitive impairment who also resides at the facility or attends the facility to take part in the program.'

**16. New section 51 substituted**

For section 51 of the **Crimes Act 1958**  
**substitute—**

**"51. Sexual offences against persons with a cognitive impairment by providers of medical or therapeutic services**

- (1) A person who provides medical or therapeutic services to a person with a cognitive impairment who is not his or her spouse or domestic partner must not take part in an act of sexual penetration with that person.

Penalty: Level 5 imprisonment (10 years maximum).

- (2) A person who provides medical or therapeutic services to a person with a cognitive impairment who is not his or her spouse or domestic partner must not commit, or be in any way a party to the commission of, an indecent act with that person.

Penalty: Level 6 imprisonment (5 years maximum).

- (3) In a proceeding for an offence against subsection (1) or (2) in circumstances in which the services provided by the accused were related to the cognitive impairment of the other person, it is a defence to the charge for the accused to prove on the balance of probabilities that at the time at which the offence is alleged to have been committed, the accused believed on reasonable grounds that the other person did not have a cognitive impairment.

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- (4) In a proceeding for an offence against sub-section (1) or (2) in circumstances in which the services provided by the accused were not related to the cognitive impairment of the other person, it is a defence to the charge for the accused to prove on the balance of probabilities that at the time at which the offence is alleged to have been committed, the accused was not aware that the other person had a cognitive impairment.
- (5) Consent is not a defence to a charge against sub-section (1) or (2) unless the accused satisfies the court on the balance of probabilities that at the time at which the offence is alleged to have been committed, the accused believed on reasonable grounds that he or she was the spouse or domestic partner of the other person.
- (6) If consent is relevant to a charge against sub-section (1) or (2), the prosecution bears the burden of proving lack of consent."

**17. Sexual offences against residents of residential facilities**

- (1) **Insert** the following heading to section 52 of the **Crimes Act 1958**—

**"Sexual offences against persons with a cognitive impairment by providers of special programs"**.

- (2) For section 52(1) of the **Crimes Act 1958** **substitute**—

"(1) A worker at a facility must not take part in an act of sexual penetration with a person with a cognitive impairment who—

- (a) is residing at the facility or attending the facility to take part in a program specially designed to meet the



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developmental or educational needs of persons with a cognitive impairment; and

- (b) is not his or her spouse or domestic partner.

Penalty: Level 5 imprisonment (10 years maximum)."

(3) For section 52(2) of the **Crimes Act 1958** **substitute**—

"(2) A worker at a facility must not commit, or be in any way a party to the commission of, an indecent act with a person with a cognitive impairment who—

- (a) is residing at the facility or attending the facility to take part in a program specially designed to meet the developmental or educational needs of persons with a cognitive impairment; and  
(b) is not his or her spouse or domestic partner.

Penalty: Level 6 imprisonment (5 years maximum)."

(4) In section 52(3) of the **Crimes Act 1958**—

- (a) after "unless" **insert** "the accused satisfies the court on the balance of probabilities that";  
(b) for "de facto spouse of the resident" **substitute** "domestic partner of the person residing at or attending the facility".

- (5) After section 52(3) of the **Crimes Act 1958**  
**insert—**

"(4) If consent is relevant to a charge under this section, the prosecution bears the burden of proving lack of consent."

**18. New section 58 substituted**

For section 58 of the **Crimes Act 1958**  
**substitute—**

**"58. Procuring sexual penetration of a child**

- (1) A person aged 18 years or more must not solicit or procure a child under the age of 16 years to take part in an act of sexual penetration, or an indecent act (within the meaning of Subdivision (8D)), outside marriage with him or her or another person.

Penalty: Level 5 imprisonment (10 years maximum).

- (2) A person aged 18 years or more must not solicit or procure another person to take part in an act of sexual penetration, or an indecent act (within the meaning of Subdivision (8D)), outside marriage with a child under the age of 16 years.

Penalty: Level 5 imprisonment (10 years maximum).

- (3) A person aged 18 years or more must not solicit or procure a 16 or 17 year old child to whom he or she is not married and who is under his or her care, supervision or authority to take part in an act of sexual penetration, or an indecent act (within the meaning of Subdivision (8D)), with him or her or another person.

Penalty: Level 5 imprisonment (10 years maximum).

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- (4) If—
- (a) a person does an act or thing referred to in sub-section (1), (2) or (3) outside, or partly outside, Victoria; and
  - (b) there is a real and substantial link within the meaning of sub-section (5) between the doing of the act or thing and Victoria—
- those sub-sections apply to the act or thing as if it had been done wholly within Victoria.
- (5) For the purposes of sub-section (4), there is a real and substantial link with Victoria—
- (a) if a significant part of the conduct relating to, or constituting the doing of, the act or thing occurred in Victoria; or
  - (b) where the act or thing was done wholly outside Victoria, if the act or thing was done with the intention that the act of sexual penetration or the indecent act occur in Victoria.
- (6) For the purposes of sub-section (3), and without limiting that sub-section, a child is under the care, supervision or authority of a person if the person is—
- (a) the child's teacher;
  - (b) the child's foster parent;
  - (c) the child's legal guardian;
  - (d) a minister of religion with pastoral responsibility for the child;
  - (e) the child's employer;
  - (f) the child's youth worker;
  - (g) the child's sports coach;
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- (h) the child's counsellor;
  - (i) the child's health professional;
  - (j) a member of the police force acting in the course of his or her duty in respect of the child;
  - (k) employed in, or providing services in, a remand centre, youth residential centre, youth training centre or prison and is acting in the course of his or her duty in respect of the child."

**19. Repeal of section 60**

Section 60 of the **Crimes Act 1958** is **repealed**.

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Part 3—Amendment of Crimes (Criminal Trials) Act 1999

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See:  
Act No.  
35/1999 and  
amending  
Act Nos  
53/2000 and  
18/2005.  
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**PART 3—AMENDMENT OF CRIMES (CRIMINAL TRIALS)  
ACT 1999**

**20. Definition**

In section 3 of the **Crimes (Criminal Trials) Act 1999** insert the following definition—

' "**cognitive impairment**" includes impairment because of mental illness, intellectual disability, dementia or brain injury;'

**21. Presentment to be filed**

(1) In section 4(2) of the **Crimes (Criminal Trials) Act 1999**, before paragraph (a) insert—

"(aa) in the case of a trial for a sexual offence in which the complainant is a child or a person with a cognitive impairment, not more than 7 days after the day on which the defendant is committed for trial; or"

(2) In section 4(2)(a) of the **Crimes (Criminal Trials) Act 1999**, for "a" (where first appearing) substitute "any other".

(3) After section 4(5) of the **Crimes (Criminal Trials) Act 1999** insert—

"(6) If a recording referred to in section 41G of the **Evidence Act 1958** is admitted in evidence in a trial under section 41H of that Act, then despite anything to the contrary in the **Crimes Act 1958** or in any other Act, the presentment can only be amended in accordance with an order made by the court under section 372 of the **Crimes Act 1958**."

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Part 3—Amendment of Crimes (Criminal Trials) Act 1999

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**22. Directions hearing**

After section 5(4)(b) of the **Crimes (Criminal Trials) Act 1999** insert—

"(ba) in the case of a trial for a sexual offence in which the complainant is a child or a person with a cognitive impairment, require the prosecutor to advise as to the availability of the complainant, and the accused to advise as to his or her own availability, for the special hearing to be held under section 41G of the **Evidence Act 1958**;"

**23. Manner of giving evidence**

In section 20(3) of the **Crimes (Criminal Trials) Act 1999**, after "sections" insert "41G,".

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See:  
Act No.  
6246.  
Reprint No. 14  
as at 6 June  
2002 and  
amending  
Act Nos  
20/2004,  
60/2004,  
72/2004,  
108/2004,  
15/2005 and  
18/2005.  
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dpc.vic.  
gov.au

**PART 4—AMENDMENT OF EVIDENCE ACT 1958**

**24. Definitions**

In section 3(1) of the **Evidence Act 1958**—

(a) **insert** the following definitions—

' **"child"** means a person who is under the age of 18 years;

**"cognitive impairment"** includes impairment because of mental illness, intellectual disability, dementia or brain injury;'

(b) the definition of "impaired" is **repealed**.

**25. Evidence of children and persons with a cognitive impairment**

(1) **Insert** the following heading to section 23 of the **Evidence Act 1958**—

**"Evidence of children and persons with a cognitive impairment"**.

(2) For section 23(1) of the **Evidence Act 1958** **substitute**—

"(1) Subject to this section, a child or a person with a cognitive impairment is competent and compellable to give evidence.

(1A) A child or a person with a cognitive impairment is competent to give sworn evidence only if he or she is capable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence.

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- (1B) Subject to sub-section (1C), a child or a person with a cognitive impairment who is not competent to give sworn evidence is competent to give unsworn evidence only if he or she is capable of understanding, and of giving an answer that can be understood to, a question that is put to him or her.
- (1C) If a child or a person with a cognitive impairment is not capable of understanding, and of giving an answer that can be understood to, a question that is put to him or her, that child or person is not competent to give evidence about the fact to which that question relates, but may be competent to give evidence about another fact that relates to a question which the child or person is capable of understanding and of giving to it an answer that can be understood.
- (1D) If a child or a person with a cognitive impairment is competent to give evidence, the court must, before the evidence is given, explain to the child or person in the absence of the jury (if any)—
- (a) the importance of telling the truth and of not telling lies; and
  - (b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should let the court know if this occurs; and
  - (c) that he or she may be asked questions that make suggestions that are true or untrue and that he or she should agree with the statements that are true and should not feel pressured to agree with statements that he or she believes are untrue."
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- (3) In section 23(2) of the **Evidence Act 1958**, for "person with impaired mental functioning or under the age of 14" **substitute** "child or a person with a cognitive impairment".
- (4) In section 23(2A) of the **Evidence Act 1958**, for "people with impaired mental functioning or children" **substitute** "children or persons with a cognitive impairment".

**26. Repeal of section 23A**

Section 23A of the **Evidence Act 1958** is **repealed**.

**27. New section 32AB inserted**

Before section 32B of the **Evidence Act 1958** **insert—**

**"32AB. Guiding principles**

It is the intention of Parliament that in interpreting and applying Divisions 3 and 3AA and this Division in any legal proceeding that relates (wholly or partly) to a charge for a sexual offence, courts are to have regard to the fact that—

- (a) there is a high incidence of sexual violence within society; and
- (b) sexual offences are significantly under-reported; and
- (c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment; and
- (d) offenders are commonly known to their victims; and

- (e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred."

**28. Definition**

In section 32B(1) of the **Evidence Act 1958**, in the definition of "protected evidence", for "adduced" **substitute** "produced or adduced".

**29. Exclusion of evidence of confidential communications**

- (1) For section 32C(1) of the **Evidence Act 1958** **substitute**—

"(1) In a legal proceeding—

- (a) a party cannot seek to compel another party to produce a document containing a confidential communication;
- (b) a document is not to be produced if it would disclose a confidential communication;
- (c) evidence is not to be adduced if it would disclose—
  - (i) a confidential communication; or
  - (ii) the contents of a document recording a confidential communication—

unless the court grants leave to compel the production of the document or to produce it or to adduce the evidence, and the party seeking to have the document produced or to produce it or to adduce the evidence has given notice of their intention in accordance with sub-section (2)."

- (2) In section 32C(2) of the **Evidence Act 1958**—
  - (a) for "adduce" **substitute** "compel the production of, or to produce or adduce,";
  - (b) after "before the evidence is proposed to be" **insert** "compelled to be produced, produced or".
- (3) In section 32C(7) of the **Evidence Act 1958**, after "is not to be" **insert** "compelled to be produced, produced or".

### **30. Restriction on granting leave**

- (1) In section 32D(1) of the **Evidence Act 1958**—
    - (a) After "A court must not grant leave" **insert** "to compel the production of, to produce or"; and
    - (b) for paragraph (a) **substitute**—
      - "(a) the evidence will, either by itself or having regard to other evidence produced or adduced or to be produced or adduced by the party seeking leave, have substantial probative value to a fact in issue; and".
  - (2) For section 32D(2) of the **Evidence Act 1958** **substitute**—
    - "(2) Without limiting the matters that the court may take into account for the purposes of sub-section (1)(c), the court must take into account—
      - (a) the likelihood, and the nature or extent, of harm that would be caused to the protected confider if the protected evidence is produced or adduced;
      - (b) the extent to which the protected evidence is necessary to allow the accused to make a full defence;
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- (c) the need to encourage victims of sexual offences to seek counselling and the extent to which victims may be discouraged to do so, or the extent to which the effectiveness of counselling may be diminished, if the protected evidence were produced or adduced;
  - (d) whether the party seeking to compel the production of or to produce or adduce the protected evidence is doing so on the basis of a discriminatory belief or bias;
  - (e) whether the protected confider objects to the disclosure of the protected evidence;
  - (f) the nature and extent of the reasonable expectation of confidentiality and the potential prejudice to the privacy of any person."
- (3) In section 32D(3) of the **Evidence Act 1958**—
- (a) for "Leave may be granted to adduce evidence of" **substitute** "A court may grant leave to compel the production of, or to produce or adduce,";
  - (b) after "seeking to" **insert** "compel its production or to produce or".

**31. Limitations on privilege**

- (1) In section 32E(1) of the **Evidence Act 1958** after "prevent the" **insert** "production or".
- (2) In section 32E(3) of the **Evidence Act 1958** after "consent to the" **insert** "production or".

**32. Insertion of Note**

At the foot of the heading to Division 3 of Part II of the **Evidence Act 1958 insert—**

"Note: Section 32AB sets out guiding principles for interpreting and applying this Division."

**33. Special rules of evidence in relation to certain offences which relate to rape**

- (1) In section 37A(1) of the **Evidence Act 1958**, in Rule (2)(a) and (b), after "activities" **insert** "(whether consensual or non-consensual)".
- (2) In section 37A(1) of the **Evidence Act 1958**, for Rule (3)(a) **substitute—**

"(a) it is satisfied that the evidence has substantial relevance to a fact in issue and that it is in the interests of justice to allow the cross-examination or to admit the evidence, having regard to—

- (i) whether the probative value of the evidence outweighs the distress, humiliation and embarrassment that the complainant may experience as a result of the cross-examination or the admission of the evidence, in view of his or her age and the number and nature of the questions that he or she is likely to be asked; and
- (ii) the risk that the evidence may arouse discriminatory belief or bias, prejudice, sympathy or hostility in the jury; and
- (iii) the need to respect the complainant's personal dignity and privacy; and
- (iv) the right of the accused person to fully answer and defend the charge; or".

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- (3) In section 37A(1) of the **Evidence Act 1958**, in Rule (4) after "sexual activities" **insert** ", or had freely agreed to engage in sexual activity with the accused person or another person other than the sexual activity to which the charge relates,".
- (4) In section 37A(1) of the **Evidence Act 1958**, after Rule (4) **insert**—
  - "(4A) Without limiting Rule (4), evidence of a kind referred to in that Rule is not admissible to support an inference that the complainant is the type of person who is more likely to have consented to the sexual activity to which the charge relates."
- (5) In section 37A(1) of the **Evidence Act 1958**, in Rule (5)(c), for "(3) and (4)" **substitute** "(3), (4) and (4A)".
- (6) In section 37B(2) of the **Evidence Act 1958**, for "impaired mental functioning" **substitute** "a cognitive impairment".

**34. Alternative arrangements for giving evidence in certain proceedings**

- (1) Before section 37C(2) of the **Evidence Act 1958** **insert**—
  - "(1) This section does not apply to a witness who is a complainant in relation to a charge for a sexual offence and who is a child or a person with a cognitive impairment.  
  
Note: Section 41E provides for alternative arrangements for the giving of evidence by a complainant who is a child or a person with a cognitive impairment in legal proceedings that relate to a charge for a sexual offence."
- (2) In section 37C(2)(a)(iii) of the **Evidence Act 1958**, for "**1958**; or" **substitute** "**1958**".

- (3) Section 37C(2)(b) of the **Evidence Act 1958** is **repealed**.

**35. New section 37CA inserted**

After section 37C of the **Evidence Act 1958**  
**insert—**

**'37CA. Special rules for cross-examination of protected witnesses**

- (1) This section applies to a legal proceeding that relates (wholly or partly) to a charge for a sexual offence.
- (2) In this section—
- "family member"**, in relation to the complainant or accused person, includes—
- (a) a person who is or has been married to the complainant or accused person; and
  - (b) a person who has or has had an intimate personal relationship with the complainant or accused person; and
  - (c) a person who is or has been the father, mother, step-father or step-mother of the complainant or accused person; and
  - (d) a child who normally or regularly resides with the complainant or accused person; and
  - (e) a guardian of the complainant or accused person; and
  - (f) another person who is or has been ordinarily a member of the household of the complainant or accused person;
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**"protected witness"** means—

- (a) the complainant; or
  - (b) a family member of the complainant; or
  - (c) a family member of the accused person; or
  - (d) any other witness whom the court declares under sub-section (3) to be a protected witness.
- (3) The court may at any time declare a witness to be a protected witness.
- (4) A protected witness must not be personally cross-examined by the accused person.
- (5) If the accused person is not legally represented, the court must—
- (a) inform the accused person and the jury that the accused person is not permitted personally to cross-examine a protected witness; and
  - (b) ask the accused person whether he or she has sought to obtain legal representation for the cross-examination of a protected witness; and
  - (c) if satisfied that the accused person has not had a reasonable opportunity to obtain legal representation, grant an adjournment if so requested by the accused person.
- (6) If the accused person does not obtain legal representation for the cross-examination of a protected witness (after being given a reasonable opportunity to do so), the court must order Victoria Legal Aid to provide
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- legal representation for the accused person for that purpose.
- (7) Despite anything in the **Legal Aid Act 1978**, Victoria Legal Aid must provide legal representation in accordance with an order under sub-section (6).
- (8) A legal practitioner provided by Victoria Legal Aid must act in the best interests of the accused person if the accused person does not give any instructions to that legal practitioner.
- (9) If the accused person refuses the legal representation provided to him or her in accordance with sub-section (7), or otherwise refuses to co-operate, the court must warn the accused person that he or she will not be permitted to adduce evidence from a witness in relation to a fact in issue with the intention of contradicting the evidence of a protected witness in relation to that fact, if the fact upon which he or she intends to rely to contradict the evidence of the protected witness has not been put to that protected witness during cross-examination.
- (10) If the accused person is only legally represented for the cross-examination of a protected witness the court must warn the jury—
- (a) that it is routine practice for an unrepresented accused person to obtain or be provided with legal representation for the cross-examination of a protected witness; and
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- (b) that no adverse inference may be drawn against the accused person as a result of the cross-examination not being conducted by the accused personally; and
- (c) that the evidence given under cross-examination is not to be given any greater or lesser weight as a result of the cross-examination not being conducted by the accused personally.!

**36. Video link evidence from overseas in certain proceedings**

In section 37D(8) of the **Evidence Act 1958**, for "37B or 37C" substitute "37B, 37C or 41E".

**37. New section 37E inserted**

After section 37D of the **Evidence Act 1958** insert—

**"37E. Evidence of specialised knowledge in certain cases**

Despite any rule of law to the contrary, in any legal proceeding that relates (wholly or partly) to a charge for a sexual offence, the court may receive evidence of a person's opinion that is based on that person's specialised knowledge (acquired through training, study or experience) of—

- (a) the nature of sexual offences; and
- (b) the social, psychological and cultural factors that may affect the behaviour of a person who has been the victim, or who alleges that he or she has been the victim, of a sexual offence, including the reasons that may contribute to a delay on the part of the victim to report the offence."

**38. New Division 3AA inserted**

After section 41 of the **Evidence Act 1958**  
**insert—**

**'Division 3AA—Examination and Cross-  
Examination of Certain Witnesses**

**41A. Definition**

In this Division—

**"child complainant"** means a complainant,  
in relation to a charge for a sexual  
offence, who is a child.

**41B. Application of Division**

If a provision of this Division is inconsistent  
with a provision of Division 3, the provision  
of this Division prevails to the extent of the  
inconsistency.

Note: Section 32AB sets out guiding principles for  
interpreting and applying this Division.

**41C. Evidence of specialised knowledge to  
determine competency**

If, in a legal proceeding that relates (wholly  
or partly) to a charge for a sexual offence, a  
child or a person with a cognitive  
impairment is called as a witness, the court  
may receive evidence of a person's opinion  
that is based on that person's specialised  
knowledge (acquired through training, study  
or experience) for the purpose of  
determining whether or not the child or  
person is competent to give sworn or  
unsworn evidence.

Note: Section 23 provides for the giving of evidence  
by children and persons with a cognitive  
impairment.

**41D. Evidence of previous representations  
made by child complainants**

(1) If, in a legal proceeding that relates (wholly or partly) to a charge for a sexual offence, a child complainant who is under 17 years of age and who has made a previous representation is available to give evidence—

- (a) about the existence of a fact of which he or she had personal knowledge and that he or she intended to assert by the representation; or
- (b) if the child complainant's credibility is relevant, to support his or her credibility—

the hearsay rule, subject to sub-section (2), does not apply to evidence of the representation that is given by—

- (c) the child complainant; or
  - (d) a person who saw, heard or otherwise perceived the representation being made.
- (2) Sub-section (1) does not apply unless the court is satisfied that the evidence is relevant to a fact in issue and is sufficiently probative, having regard to the nature and content of the representation and the circumstances in which it was made.
- (3) A witness has personal knowledge of the asserted fact if his or her knowledge of that fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.

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- (4) Evidence of the kind referred to in sub-section (1) is admissible for either or both of the following purposes—
  - (a) to prove the truth of the fact contained in the representation; or
  - (b) to support the credibility of the child complainant as a witness.
- (5) If the court receives evidence of the kind referred to in sub-section (1), the court must warn the jury that evidence of that kind may not be as reliable as original evidence.
- (6) Nothing in this section takes away from, or limits, any discretion a court has to exclude evidence.

**41E. Alternative arrangements for giving of evidence in certain proceedings**

- (1) Subject to sub-section (2), in a legal proceeding that relates (wholly or partly) to a charge for a sexual offence, the court must direct that any of the following alternative arrangements be made for the giving of evidence by a child complainant or a complainant with a cognitive impairment—
  - (a) permitting the evidence to be given from a place other than the courtroom by means of closed-circuit television or other facilities that enable communication between that place and the courtroom;
  - (b) using screens to remove the defendant from the witness' direct line of vision;

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- (c) permitting a person chosen by the witness and approved by the court for this purpose, to be beside the witness while he or she is giving evidence for the purpose of providing emotional support to him or her.
- (2) The court must direct that the alternative arrangement referred to in sub-section (1)(a) be made unless—
- (a) the court is satisfied that the complainant—
- (i) is aware of his or her right to give evidence in accordance with the arrangement referred to in sub-section (1)(a); and
- (ii) is able and wishes to give evidence in the courtroom; and
- (b) the court, on the application of the prosecution, determines not to direct that the arrangement referred to in sub-section (1)(a) be made.
- (3) The court must direct that any evidence given by a complainant in accordance with the arrangement referred to in sub-section (1)(a) is recorded.
- (4) If a court directs that alternative arrangements be made for the giving of evidence by a witness, the judge must warn the jury not to draw any inference adverse to the defendant or give the evidence any greater or lesser weight because of the making of those arrangements.
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- (5) Any place outside the courtroom where a witness is permitted to give evidence under this section is to be taken to be part of the courtroom while the witness is there for the purpose of giving evidence.
- (6) The court may at any time in the course of the proceeding vary or revoke a direction made under this section either of its own motion or on the application of a party to the proceeding.

**41F. Improper questions**

- (1) If, during cross-examination, a witness who is under the age of 18 years or who has a cognitive impairment is asked a question that, in the opinion of the court, is—
  - (a) confusing or misleading; or
  - (b) phrased in inappropriate language; or
  - (c) annoying, harassing, intimidating, offensive, oppressive or unduly repetitive—

whether because of its content, or the manner in which it is structured or sequenced or the tone in which it is put, having regard to the matters set out in sub-section (2), the court must disallow the question or warn the witness that he or she is not obliged to answer the question.

- (2) Without limiting the matters that the court may have regard to for the purposes of sub-section (1), the court must consider—
    - (a) any relevant condition or characteristic of the witness, including his or her age, cultural background, personality, education and level of understanding; and
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- (b) any cognitive impairment that the witness is, or appears to be, subject to.
  - (3) Nothing in this section takes away from, or limits, section 39 or 40.

**41G. Pre-recording evidence at special hearing**

- (1) This section applies to a legal proceeding, other than a committal proceeding, that relates (wholly or partly) to a charge for a sexual offence.
- (2) Subject to sub-section (3), the whole of the evidence of a child complainant or of a complainant with a cognitive impairment (including cross-examination and re-examination) must be—
  - (a) taken at a special hearing under this section and video recorded; and
  - (b) presented to the court in the form of that recording.
- (3) The court may, on the application of the prosecution, direct that sub-section (2) is not to apply and that the complainant is to give direct testimony in the proceeding if the court is satisfied that the complainant—
  - (a) is aware of his or her right to have his or her evidence taken at a special hearing under this section and video recorded; and
  - (b) is able and wishes to give direct testimony in the proceeding.



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- (4) If a special hearing is to be held, it must be held—
- (a) within 21 days after the day on which the defendant is committed for trial; and
  - (b) before the court at which presentment is made.
- (5) The court may fix a longer time for the holding of a special hearing if the court is satisfied that it is in the interests of justice to do so because of the existence of exceptional circumstances.
- (6) At a special hearing—
- (a) the defendant and his or her legal practitioner are to be present in the courtroom;
  - (b) the defendant—
    - (i) is not to be in the same room as the complainant when the complainant's evidence is being taken; but
    - (ii) is entitled to see and hear the complainant while the complainant is giving evidence and to have at all times the means of communicating with his or her legal practitioner;
  - (c) no person, other than a person authorised by the court, is to be present in the same room as the complainant when the complainant's evidence is being taken;
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- (d) the evidence of the complainant is to be given by means of closed-circuit television that enables communication between the room in which the complainant is present and the courtroom;
  - (e) except as provided by this section, the usual rules of evidence apply.
- (7) The room in which the complainant's evidence is taken is to be taken to be part of the courtroom while the complainant is there for the purpose of giving evidence.

**41H. Use of pre-recorded evidence**

- (1) Subject to sub-section (2), a recording referred to in section 41G is admissible in evidence as if its contents were the direct testimony of the witness—
- (a) in the proceeding; and
  - (b) unless the relevant court otherwise orders, in—
    - (i) any rehearing or re-trial of, or appeal from, the proceeding; or
    - (ii) another proceeding in the same court for the relevant charge or for another charge arising out of the same, or the same set of, circumstances; or
    - (iii) a civil proceeding arising from the same facts as those on which the charge for the relevant offence is founded.
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- (2) The court may rule as inadmissible the whole or any part of the contents of a recording and, if so, the court may direct that the recording be edited or altered to delete any part of it that is inadmissible.
  - (3) Subject to sub-section (2), the whole of a recording referred to in section 41G must be heard by the court and the jury.
  - (4) The admissibility of the recording of the evidence of a child is not affected only because the child attains the age of 18 years before the evidence is presented in a proceeding.
  - (5) The judge must warn the jury not to draw any inference adverse to the defendant or give the evidence of the witness any greater or lesser weight because it is recorded.
  - (6) Subject to sub-section (9), if under this section the recorded evidence of a witness is admitted into evidence in a proceeding, the witness is not required to attend the proceeding unless required to do so for cross-examination or re-examination.
  - (7) A witness whose evidence is recorded under section 41G cannot be cross-examined or re-examined without leave.
  - (8) A court must not grant leave to cross-examine a witness referred to in sub-section (7) unless satisfied that—
    - (a) the defendant is seeking leave because of becoming aware of a matter of which he or she could not reasonably have been aware at the time of the recording; or
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- (b) if the witness were giving direct testimony in the proceeding, he or she could, in the interests of justice, be recalled to give further evidence; or
  - (c) it is otherwise in the interests of justice to permit the witness to be cross-examined or re-examined.
- (9) If leave is granted under sub-section (8), the witness must attend the proceeding to be cross-examined or re-examined.'
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See:  
Act No.  
51/1989.  
Reprint No. 11  
as at 1 July  
2005  
and  
amending  
Act Nos  
77/2004,  
2/2005,  
16/2005,  
18/2005,  
19/2005,  
45/2005,  
62/2005 and  
69/2005.  
LawToday:  
www.dms.  
dpc.vic.  
gov.au

**PART 5—AMENDMENT OF MAGISTRATES' COURT ACT  
1989**

**39. Definitions**

In clause 1(1) of Schedule 5 to the **Magistrates' Court Act 1989** insert the following definition—

' "cognitive impairment" includes impairment because of mental illness, intellectual disability, dementia or brain injury;'

**40. New Part 3A of Schedule 5 inserted**

After Part 3 of Schedule 5 to the **Magistrates' Court Act 1989** insert—

**"PART 3A—TIME LIMIT APPLICABLE TO  
CERTAIN COMMITTAL PROCEEDINGS**

**10A. Time limit applicable to certain committal proceedings**

- (1) This clause applies to a committal proceeding for a sexual offence if—
  - (a) the complainant is a child or a person with a cognitive impairment; and
  - (b) a witness, other than the complainant, is to be cross-examined in the proceeding.
- (2) The Court must determine a committal proceeding within the period of 60 days after the committal mention date or the final committal mention date if more than one committal mention hearing is held.
- (3) The Court may fix a longer or shorter period for the determination of a committal proceeding but cannot do so unless the Court is satisfied that, having regard to all the circumstances of the case including the seriousness of the offence and the overall interests of justice, another period should be fixed because of the existence of exceptional circumstances or another good and sufficient reason.

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- (4) Sub-clause (2) does not apply—
- (a) if the defendant has failed to appear in accordance with the conditions of his or her bail; or
  - (b) if a warrant to arrest the defendant has been issued and at the end of the relevant period referred to in clause 4(2) from the commencement of the proceeding for the offence the defendant has not been arrested; or
  - (c) if the defendant requests that the committal proceeding be determined after the period referred to in sub-clause (2) and the Court is satisfied that in the interests of justice the request should be granted.
- (5) If a committal proceeding has not been determined before the expiry of the period referred to in sub-clause (2), or any other period fixed under sub-clause (3), the Court may, on the application of the defendant, order the defendant to be discharged."

**41. Procedure where hand-up brief served**

In Part 5 of Schedule 5 to the **Magistrates' Court Act 1989**, before clause 12 **insert—**

**"11A. No cross-examination of certain witnesses**

Despite anything to the contrary in this Part, the Court must not grant leave to cross-examine a witness who—

- (a) is a complainant in a legal proceeding that relates (wholly or partly) to a charge for a sexual offence; and
  - (b) is a child or a person with a cognitive impairment; and
  - (c) made a statement a copy of which was served in the hand-up brief or a transcript of a recording of whose evidence-in-chief or examination under section 56A was served in the hand-up brief."
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**PART 6—CONSEQUENTIAL AMENDMENT OF OTHER ACTS**

**42. Consequential amendment of Crimes Act 1958**

In Schedule 8 to the **Crimes Act 1958**—

- (a) in clause 7(h), for "(sexual relationship with" **substitute** "(persistent sexual abuse of";
- (b) in clause 7(j) for "people with impaired mental functioning)" **substitute** "persons with a cognitive impairment)".

**43. Consequential amendment of Sentencing Act 1991**

- (1) In section 3(1) of the **Sentencing Act 1991**, in the definition of "serious offence" in paragraph (c)(viii), for "(sexual relationship with" **substitute** "(persistent sexual abuse of".
  - (2) In Schedule 1 to the **Sentencing Act 1991**—
    - (a) after clause 1(a)(i) **insert**—
      - "(ia) section 38A (compelling sexual penetration) if the person against whom the offence is committed is a child;"
    - (b) in clause 1(a)(viii), for "(sexual relationship with" **substitute** "(persistent sexual abuse of";
    - (c) in clause 1(a)(x), for "people with impaired mental functioning)" **substitute** "persons with a cognitive impairment by providers of medical or therapeutic services)";
    - (d) in clause 1(a)(xi), for "residents of residential facilities" **substitute** "persons with a cognitive impairment by providers of special programs";
    - (e) in clause 1(a)(xvi), for "child under the age of 16" **substitute** "a child".
-

**44. Consequential amendment of Serious Sex Offenders Monitoring Act 2005**

In the Schedule to the **Serious Sex Offenders Monitoring Act 2005**—

- (a) in the Note at the foot of item 1—
  - (i) for "impaired mental functioning" **substitute** "a cognitive impairment by providers of medical or therapeutic services";
  - (ii) for "resident of residential facility" **substitute** "person with a cognitive impairment by providers of special programs";
- (b) after item 1 **insert**—

"1A. An offence against section 38A of the **Crimes Act 1958** (compelling sexual penetration) if the person against whom the offence is committed is a child.";
- (c) in item 2, for "(sexual relationship with" **substitute** "(persistent sexual abuse of";
- (d) in item 9, after "16" **insert** "or 17";
- (e) in item 10, for "impaired mental functioning" **substitute** "a cognitive impairment by providers of medical or therapeutic services";
- (f) in item 11, for "resident of residential facility" **substitute** "person with a cognitive impairment by providers of special programs";
- (g) in item 17, for "child under the age of 16" **substitute** "a child";
- (h) item 19 is **repealed**.



**45. Consequential amendment of Sex Offenders  
Registration Act 2004**

(1) In Schedule 1 to the **Sex Offenders Registration  
Act 2004**—

- (a) in the Note at the foot of item 1—
  - (i) for "impaired mental functioning"  
**substitute** "a cognitive impairment by  
providers of medical or therapeutic  
services";
  - (ii) for "resident of residential facility"  
**substitute** "person with a cognitive  
impairment by providers of special  
programs";
- (b) after item 1 **insert**—

"1A. An offence against section 38A of the **Crimes  
Act 1958** (compelling sexual penetration) if the  
person against whom the offence is committed  
is a child.";
- (c) in item 2, for "(sexual relationship with"  
**substitute** "(persistent sexual abuse of".

(2) In Schedule 2 to the **Sex Offenders Registration  
Act 2004**—

- (a) in item 4, after "16" **insert** "or 17";
  - (b) in item 5, for "impaired mental functioning"  
**substitute** "a cognitive impairment by  
providers of medical or therapeutic  
services";
  - (c) in item 6, for "resident of residential facility"  
**substitute** "person with a cognitive  
impairment by providers of special  
programs";
  - (d) in item 12, for "child under the age of 16"  
**substitute** "a child";
  - (e) item 14 is **repealed**.
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Part 6—Consequential Amendment of Other Acts

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(3) In Schedule 3 to the **Sex Offenders Registration Act 2004**—

(a) in the Note at the foot of item 1—

(i) for "impaired mental functioning"  
**substitute** "a cognitive impairment by providers of medical or therapeutic services";

(ii) for "resident of residential facility"  
**substitute** "person with a cognitive impairment by providers of special programs";

(b) after item 1 **insert**—

"1A. An offence against section 38A of the **Crimes Act 1958** (compelling sexual penetration) if the person against whom the offence is committed is a child."

(4) In Schedule 4 to the **Sex Offenders Registration Act 2004**—

(a) in item 3, for "impaired mental functioning"  
**substitute** "a cognitive impairment by providers of medical or therapeutic services";

(b) in item 4, for "resident of residential facility"  
**substitute** "person with a cognitive impairment by providers of special programs".

**46. Consequential amendment of Victims of Crime Assistance Act 1996**

In section 42(3)(a)(iii) of the **Victims of Crime Assistance Act 1996**, for "impaired mental functioning" **substitute** "a cognitive impairment".

*Crimes (Sexual Offences) Act 2006*  
*Act No. 2/2006*

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Part 6—Consequential Amendment of Other Acts

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**47. Consequential amendment of Working with Children Act 2005**

In section 51(4) of the **Working with Children Act 2005**, for "impaired mental functioning" **substitute** "a cognitive impairment".

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*Crimes (Sexual Offences) Act 2006*  
*Act No. 2/2006*

Endnotes

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**ENDNOTES**

† *Minister's second reading speech—*

*Legislative Assembly: 16 November 2005*

*Legislative Council: 9 February 2006*

The long title for the Bill for this Act was "to amend the **Crimes Act 1958**, the **Crimes (Criminal Trials) Act 1999**, the **Evidence Act 1958** and the **Magistrates' Court Act 1989** in relation to sexual offences and for other purposes."