

South Australia

Criminal Law Consolidation (Rape and Sexual Offences) Amendment Bill 2007

A BILL FOR

An Act to amend the *Criminal Law Consolidation Act 1935*; and to make a related amendment to the *Child Sex Offenders Registration Act 2006*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2007*.

5 2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

10 Part 2—Amendment of *Criminal Law Consolidation Act 1935*

4—Amendment of section 5—Interpretation

- (1) Section 5(1), definition of *sexual intercourse*, (a)—delete paragraph (a) and substitute:

- 15 (a) sexual penetration of a person by any part of the body of another person or by any object; or

(2) Section 5(1)—after the definition of *sexual intercourse* insert:

sexual penetration of a person means penetration of—

- (a) the anus; or
- (b) the vagina or labia majora (or a surgically constructed or enhanced vagina or labia majora);

5—Substitution of section 48

Section 48—delete the section and substitute:

47—Consent to sexual activity

(1) In this section—

sexual activity includes sexual intercourse.

(2) For the purposes of this Division, a person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity.

(3) Without derogating from subsection (2), a person is taken not to freely and voluntarily agree to sexual activity if—

(a) the person agrees because of—

- (i) the application of force, an express or implied threat of the application of force or a fear of the application of force to the person or to some other person; or
- (ii) an express or implied threat to degrade, humiliate, disgrace or harass the person or some other person; or

(b) the person is unlawfully detained at the time of the activity; or

(c) the activity occurs while the person is asleep or unconscious; or

(d) the activity occurs while the person is intoxicated (whether by alcohol or any other substance or combination of substances) to the point of being incapable of freely and voluntarily agreeing to the activity; or

(e) the activity occurs while the person is affected by a physical, mental or intellectual condition or impairment such that the person is incapable of freely and voluntarily agreeing; or

(f) the person is unable to understand the nature of the activity; or

(g) the person is mistaken about the nature of the activity.

Example—

If the person agrees to the activity under the mistaken belief that the activity is necessary for the purpose of medical diagnosis, investigation or treatment, or for the purpose of hygiene, the person is taken not to freely and voluntarily agree to the sexual activity.

48—Rape

(1) A person who has sexual intercourse with another person without the consent of that other person—

- (a) knowing that the other person does not consent to the sexual intercourse; or
- (b) being recklessly indifferent as to whether that other person consents to the sexual intercourse; or
- (c) having failed to take reasonable steps, in the circumstances, to ascertain whether the other person consents to the sexual intercourse,

is guilty of an offence of rape.

Maximum penalty: Imprisonment for life.

(2) For the purposes of this section, a person who has sexual intercourse with another person without the consent of that other person is ***recklessly indifferent*** as to whether that other person consents to the sexual intercourse if he or she—

- (a) realises the possibility that the other person might not be consenting; or
- (b) does not give any thought as to whether or not the other person is consenting,

but proceeds to have sexual intercourse with the other person regardless.

6—Amendment of section 73—Proof of certain matters

Section 73(5)—delete subsection (5)

7—Substitution of section 74

Section 74—delete the section and substitute:

74—Persistent sexual exploitation of a child

(1) For the purposes of this section, a person engages in ***persistent sexual exploitation*** of a child if—

- (a) the person engages in more than 1 unlawful sexual act with the child; and
- (b) the unlawful sexual acts do not all take place within a period of 24 hours.

- (2) An adult who engages in persistent sexual exploitation of a child under the prescribed age is guilty of an offence.

Maximum penalty: Imprisonment for life.

- (3) For an adult to be convicted of an offence against this section, the trier of fact must be satisfied beyond reasonable doubt that the evidence establishes that persistent sexual exploitation of the child involving unlawful sexual acts existed.

- (4) However, in relation to the unlawful sexual acts involved in the alleged persistent sexual exploitation—

- (a) the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence; and
- (b) the trier of fact is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence; and
- (c) in the case of a trial by jury, all the members of the jury are not required to be satisfied about the same unlawful sexual acts.

- (5) If the child was at least 16 years of age when the offence was alleged to have been committed, it is a defence to prove that the defendant believed on reasonable grounds the child was at least the prescribed age.

- (6) An adult may be charged in 1 information with—

- (a) an offence of persistent sexual exploitation of a child; and
- (b) 1 or more other offences of a sexual nature alleged to have been committed by the adult in relation to the child in the course of the persistent sexual exploitation of the child (the *other offence or offences*).

- (7) The adult charged in 1 information as mentioned in subsection (6) may be convicted of and punished for any or all of the offences charged.

- (8) However, if the adult is—

- (a) charged in 1 information as mentioned in subsection (6); and
- (b) sentenced to imprisonment for the offence against this section and for the other offence or offences,

the court imposing imprisonment may not order that the sentence for the offence against this section be served cumulatively with the sentence or sentences for the other offence or offences.

- (9) In this section—

offence of a sexual nature means an offence against section 48, 49, 56, 58, 63B, 68 or 72, or an attempt to commit, or an assault with intent to commit, any of those offences;

prescribed age, in relation to a child, means—

- (a) in the case of an adult who is the guardian, schoolmaster, schoolmistress or teacher of the child—18 years;
- (b) in any other case—17 years;

unlawful sexual act means an act that constitutes, or would constitute (if it were sufficiently particularised), an offence of a sexual nature.

8—Amendment of section 76—Corroborative evidence in certain cases

Section 76—delete "64,"

9—Amendment of section 278—Joinder of charges

(1) Section 278—after subsection (2) insert:

(2a) Despite subsection (2) and any rule of law to the contrary, if, in accordance with this Act, 2 or more counts charging sexual offences involving different alleged victims are joined in the same information, the following provisions apply:

- (a) subject to paragraph (b), those counts are to be tried together;
- (b) the judge may order a separate trial of a count relating to a particular alleged victim if evidence relating to that count is not admissible in relation to any other count relating to a different alleged victim;
- (c) in determining admissibility in accordance with paragraph (b), evidence relating to the count may be admissible in relation to another count concerning a different alleged victim if it has a relevance other than mere propensity;
- (d) in determining whether or not to exclude evidence relating to a count on the grounds that its probative value is outweighed by its prejudicial effect, the judge is not to have regard to—
 - (i) whether or not there is a reasonable explanation in relation to the evidence consistent with the innocence of the defendant; or
 - (ii) whether or not the evidence may be the result of collusion or concoction.

(2) Section 278—after subsection (3) insert:

(4) In this section—

sexual offence means an offence against section 48, 49, 56, 58, 63B, 68, 72 or 74 or an attempt to commit, or an assault with intent to commit, any of those offences.

Schedule 1—Related amendment to *Child Sex Offenders Registration Act 2006*

1—Amendment of Schedule 1—Class 1 and 2 offences

Schedule 1, clause 2(j)—delete paragraph (j) and substitute:

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- (j) an offence of persistent sexual abuse of a child (see section 74 of the *Criminal Law Consolidation Act 1935*, as in force before the commencement of the *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2007*) other than an offence that occurred in prescribed circumstances;
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- (ja) an offence against section 74 of the *Criminal Law Consolidation Act 1935* (persistent sexual exploitation of a child) other than an offence that occurred in prescribed circumstances;