

**Legislative Council—No 117**

As received from the House of Assembly and read a first time, 26 July 2011

South Australia

**Evidence (Discreditable Conduct) Amendment  
Bill 2011**

A BILL FOR

An Act to amend the *Evidence Act 1929* and to make a related amendment to the *Criminal Law Consolidation Act 1935*.

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## Contents

### Part 1—Preliminary

- 1 Short title
- 2 Commencement
- 3 Amendment provisions

### Part 2—Amendment of *Evidence Act 1929*

- 4 Insertion of Part 3 Division 3
  - Division 3—Admissibility of evidence showing discreditable conduct or disposition
    - 34O Application of Division
    - 34P Evidence of discreditable conduct
    - 34Q Use of evidence for other purposes
    - 34R Trial directions
    - 34S Certain matters excluded from consideration of admissibility
    - 34T Severance

### Part 3—Amendment of *Criminal Law Consolidation Act 1935*

- 5 Amendment of section 278—Joinder of charges

### Schedule 1—Transitional provision

- 1 Transitional provision
- 

## The Parliament of South Australia enacts as follows:

### Part 1—Preliminary

#### 1—Short title

This Act may be cited as the *Evidence (Discreditable Conduct) Amendment Act 2011*.

#### 2—Commencement

- 5 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.

## Part 2—Amendment of *Evidence Act 1929*

### 4—Insertion of Part 3 Division 3

After section 34N insert:

#### Division 3—Admissibility of evidence showing discreditable conduct or disposition

##### 34O—Application of Division

- (1) This Division applies to the trial of a charge of an offence and prevails over any relevant common law rule of admissibility of evidence to the extent of any inconsistency.
- (2) This Division does not apply to—
  - (a) evidence adduced pursuant to section 18; or
  - (b) evidence of the character, reputation, conduct or disposition of a person as a fact in issue.

##### 34P—Evidence of discreditable conduct

- (1) In the trial of a charge of an offence, evidence tending to suggest that a defendant has engaged in discreditable conduct, whether or not constituting an offence, other than conduct constituting the offence (*discreditable conduct evidence*)—
  - (a) cannot be used to suggest that the defendant is more likely to have committed the offence because he or she has engaged in discreditable conduct; and
  - (b) is inadmissible for that purpose (*impermissible use*); and
  - (c) subject to subsection (2), is inadmissible for any other purpose.
- (2) Discreditable conduct evidence may be admitted for a use (the *permissible use*) other than the impermissible use if, and only if—
  - (a) the judge is satisfied that the probative value of the evidence admitted for a permissible use substantially outweighs any prejudicial effect it may have on the defendant; and
  - (b) in the case of evidence admitted for a permissible use that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue—the evidence has strong probative value having regard to the particular issue or issues arising at trial.
- (3) In the determination of the question in subsection (2)(a), the judge must have regard to whether the permissible use is, and can be kept, sufficiently separate and distinct from the impermissible use so as to remove any appreciable risk of the evidence being used for that purpose.

(4) Subject to subsection (5), a party seeking to adduce evidence under this section must give reasonable notice in writing to each other party in the proceedings in accordance with the rules of court.

(5) The court may, if it thinks fit, dispense with the requirement in subsection (4).

### 34Q—Use of evidence for other purposes

Evidence that under this Division is not admissible for 1 use must not be used in that way even if it is relevant and admissible for another use.

### 34R—Trial directions

(1) If evidence is admitted under section 34P, the judge must (whether or not sitting with a jury) identify and explain the purpose for which the evidence may, and may not, be used.

(2) If evidence is admitted under section 34P and that evidence is essential to the process of reasoning leading to a finding of guilt, the evidence cannot be used unless on the whole of the evidence, the facts in proof of which the evidence was admitted are established beyond reasonable doubt, and the judge must (whether or not sitting with a jury) give a direction accordingly.

### 34S—Certain matters excluded from consideration of admissibility

Evidence may not be excluded under this Division if the only grounds for excluding the evidence would be either (or both) of the following:

(a) there is a reasonable explanation in relation to the evidence consistent with the innocence of the defendant;

(b) the evidence may be the result of collusion or concoction.

### 34T—Severance

Where—

(a) 2 or more defendants are charged in the same information; and

(b) a party proposes to adduce discreditable conduct evidence; and

(c) a defendant (the *applicant*) applies prior to or during a trial for a separate trial or for a charge to be severed from the information,

the court, when considering the application, must give strong weight to a real possibility that the applicant may be prejudiced by—

(d) evidence proposed to be adduced by the prosecutor against another defendant which is not admissible against the applicant; or

- (e) evidence proposed to be adduced by another defendant which is not admissible against the applicant; or
- (f) the applicant's inability to adduce with respect to another defendant relevant evidence that would be admissible but for the operation of section 34P.

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### **Part 3—Amendment of *Criminal Law Consolidation Act 1935***

#### **5—Amendment of section 278—Joinder of charges**

- (1) Section 278(2a)(c)—delete paragraph (c)
- (2) Section 278(3)—delete subsection (3) and substitute:
  - (3) This section does not affect any other provision of this Act or any other Act permitting more than 1 charge to be joined in the same information.
- (3) Section 278(4), definition of *sexual offence*, (c)—before "previous enactment" insert:  
corresponding
- (4) Section 278(4), definition of *sexual offence*—after paragraph (c) insert:  
or
  - (d) an offence against the law of the Commonwealth, another State or a Territory corresponding to an offence referred to in a preceding paragraph.

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### **Schedule 1—Transitional provision**

#### **1—Transitional provision**

- (1) The amendments made by Part 2 of this Act to the *Evidence Act 1929* are intended to apply in respect of—
  - (a) proceedings for an offence commenced but not determined before the commencement of this clause; and
  - (b) proceedings for an offence commenced after the commencement of this clause.
- (2) An order made by a court under the *Evidence Act 1929* as in force immediately before the commencement of this clause will remain in force according to its terms.

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