

House of Assembly—No 131

As laid on the table and read a first time, 14 September 2011

South Australia

**Evidence (Hearsay Rule Exception) Amendment
Bill 2011**

A BILL FOR

An Act to amend the *Evidence Act 1929*.

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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 *Evidence (Hearsay Rule Exception) Amendment Act 2011*.

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 *Evidence Act 1929*

4—Repeal of section 34CA

Section 34CA—delete the section

5—Insertion of section 34LA

After section 34L insert:

34LA—Admissibility of evidence of out of court statements by certain alleged victims of sexual offences

- 5 (1) Subject to this section, in a trial of a charge of a sexual offence where the alleged victim of the offence is a person to whom this section applies, the judge may, in his or her discretion, admit evidence from a person of what the person heard the alleged victim say (whether to the person or to some other person) out of court (an *out of court statement*) if, after considering the nature of the out of court statement, the circumstances in which it was made and any other relevant factor, the judge is of the opinion that the evidence has sufficient probative value to justify its admission.
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- 15 (2) Subsection (1) does not apply to any statement made by the alleged victim (whether or not in answer to a question) to an investigating or other authority as part of a formal interview process conducted in relation to the alleged offence.
- (3) Evidence of an out of court statement admitted under this section may be used to prove the truth of the facts asserted in the statement.
- 20 (4) If—
- (a) evidence of an out of court statement is admitted under this section; and
- (b) the prosecution calls the alleged victim as a witness and examines him or her on the evidence,
- 25 cross-examination of the alleged victim may not extend to matters other than the nature of the out of court statement and the circumstances in which it was made unless—
- (c) the alleged victim has given evidence about other matters; or
- (d) the judge is of the opinion that, even though the alleged victim has not given evidence about other matters, cross-examination on other matters is necessary to identify which parts of the evidence of the out of court statement are in dispute and why.
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- (5) If—
- 35 (a) evidence of an out of court statement is admitted under this section in a trial where the making of the statement, or the content or context of the statement, is in issue; and
- (b) the alleged victim, under cross-examination—
- 40 (i) wholly or partly fails to recall making the statement or matters relating to the content or context of the statement; or

- (ii) has a recollection that is wholly or partly inconsistent with the evidence admitted under this section or with other evidence relevant to the issue (including evidence of out of court statements admitted under other provisions of this Act),

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the judge must—

- (c) explain to the jury that there may be good reason for the alleged victim's failure to recall or inconsistent recollection; and

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- (d) direct the jury that the failure or inconsistency is not by itself a reason to find that the statement was not made, or that its content or context were different from the evidence admitted.

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- (6) If evidence of an out of court statement is admitted under this section and the alleged victim is not cross-examined on evidence relating to the out of court statement, the judge must—

- (a) warn the jury to treat the evidence that has not been tested by way of cross-examination with particular care; and

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- (b) if of the opinion that, in the circumstances of the case, it is in the interests of justice to do so—direct the jury to take into account that the reason for the evidence not being so tested was because the defendant, for whatever reason, chose not to cross-examine the alleged victim on the evidence.

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- (7) This section applies to an alleged victim of a sexual offence who is—

- (a) a young child; or

- (b) a person who suffers from a mental disability that adversely affects the person's capacity to give a coherent account of the person's experiences or to respond rationally to questions.

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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—

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- (a) proceedings for a sexual offence commenced but not determined before the commencement of this clause; and

- (b) proceedings for a sexual offence commenced after the commencement of this clause.

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- (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.