

Legislative Council—No 242A

As reported with amendments and an amended Title, report adopted, Standing Orders suspended and passed remaining stages, 19 October 2017

South Australia

Statutes Amendment (Attorney-General's Portfolio) (No 2) Bill 2017

A BILL FOR

An Act to amend the *Child Sex Offenders Registration Act 2006*; the *Correctional Services Act 1982*; the *Criminal Law Consolidation Act 1935*; the *Cross-border Justice Act 2009*; the *Justices of the Peace (Miscellaneous) Amendment Act 2016*; the *Real Property Act 1886*; the *Summary Procedure Act 1921*; and the *Surveillance Devices Act 2016*.

Contents

Part 1—Preliminary

- 1 Short title
- 2 Amendment provisions

Part 1A—Amendment of *Child Sex Offenders Registration Act 2006*

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

Part 1B—Amendment of *Correctional Services Act 1982*

- 2B Amendment of section 4—Interpretation

Part 1C—Amendment of *Criminal Law Consolidation Act 1935*

- 2C Amendment of section 49—Unlawful sexual intercourse
- 2D Substitution of section 50
 - 50 Persistent sexual abuse of child
- 2E Amendment of section 57—Consent no defence in certain cases
- 2F Amendment of section 63B—Procuring child to commit indecent act etc
- 2G Sentencing for offences under previous law

Part 2—Amendment of *Cross-border Justice Act 2009*

- 3 Insertion of section 108A
 - 108A Application of *Youth Justice Administration Act 2016*
- 4 Insertion of section 117A
 - 117A Application of *Youth Justice Administration Act 2016*

Part 3—Amendment of *Justices of the Peace (Miscellaneous) Amendment Act 2016*

- 5 Substitution of section 8
 - 8 Amendment of section 11—Disciplinary action, suspension and removal of other justices

Part 4—Amendment of *Real Property Act 1886*

- 6 Substitution of section 6
 - 6 Laws inconsistent not to apply
 - 6A Effect of section 6

Part 5—Amendment of *Summary Procedure Act 1921*

- 7 Amendment of section 4—Interpretation
- 7A Amendment of section 99AAC—Child protection restraining orders

Part 6—Amendment of *Surveillance Devices Act 2016*

- 7B Amendment of section 3—Interpretation
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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 *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017*.

5 2—Amendment provisions

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

Part 1A—Amendment of *Child Sex Offenders Registration Act 2006*

10 2A—Amendment of Schedule 1—Class 1 and 2 offences

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

- (ea) an offence against section 50 of the *Criminal Law Consolidation Act 1935* (persistent sexual abuse of a child);
- (eab) an offence of persistent sexual exploitation of a child (see section 50 of the *Criminal Law Consolidation Act 1935* as in force before the commencement of Part 1C of the *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017*);

Part 1B—Amendment of *Correctional Services Act 1982*

20 2B—Amendment of section 4—Interpretation

- (1) Section 4(1), definition of *child sexual offence*, (ba)—delete paragraph (ba) and substitute:
 - (ba) persistent sexual abuse of a child;
- (2) Section 4(1), definition of *sexual offence*, (ba)—delete paragraph (ba) and substitute:
 - (ba) persistent sexual abuse of a child;

25 Part 1C—Amendment of *Criminal Law Consolidation Act 1935*

2C—Amendment of section 49—Unlawful sexual intercourse

- (1) Section 49(5a)—delete subsection (5a)
- (2) Section 49—after subsection (8) insert:
 - (9) For the purposes of this section, a person is in *a position of authority* in relation to a person under the age of 18 years (the *child*) if—
 - (a) the person is a teacher and the child is a pupil of the teacher or of a school at which the teacher works; or

- 5
- (b) the person is a parent, step-parent, guardian or foster parent of the child or the de facto partner or domestic partner of a parent, step-parent, guardian or foster parent of the child; or
- (c) the person provides religious, sporting, musical or other instruction to the child; or
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- (d) the person is a religious official or spiritual leader (however described and including lay members and whether paid or unpaid) in a religious or spiritual group attended by the child; or
- (e) the person is a health professional or social worker providing professional services to the child; or
- (f) the person is responsible for the care of the child and the child has a cognitive impairment; or
- 15
- (g) the person is employed or providing services in a correctional institution (within the meaning of the *Correctional Services Act 1982*) or a training centre (within the meaning of the *Young Offenders Act 1993*), or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; or
- 20
- (h) the person is an employer of the child or other person who has the authority to determine significant aspects of the child's terms and conditions of employment or to terminate the child's employment (whether the child is being paid in respect of that employment or is working in a voluntary capacity).
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2D—Substitution of section 50

Section 50—delete the section and substitute:

50—Persistent sexual abuse of child

- 30
- (1) An adult who maintains an unlawful sexual relationship with a child is guilty of an offence.
Maximum penalty: Imprisonment for life.
- (2) An *unlawful sexual relationship* is a relationship in which an adult engages in 2 or more unlawful sexual acts with or towards a child over any period.
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- (3) For an adult to be convicted of an unlawful sexual relationship offence, the trier of fact must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship existed.
- (4) However—
- 40
- (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

- 5
- (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, but must be satisfied as to the general nature or character of those acts; and
- (c) if the trier of fact is a jury, the members of the jury are not required to agree on which unlawful sexual acts constitute the unlawful sexual relationship.
- 10
- (5) The prosecution is required to allege the particulars of the period of time over which the unlawful sexual relationship existed.
- (6) This section extends to a relationship that existed wholly or partly before the commencement of this section and to unlawful sexual acts that occurred before the commencement of this section.
- 15
- (7) A person may be charged on a single indictment with, and convicted of and punished for, both—
- (a) an offence of maintaining an unlawful sexual relationship with a child; and
- (b) 1 or more sexual offences committed by the person against the same child during the alleged period of the unlawful sexual relationship.
- 20
- (8) Except as provided by subsection (7)—
- (a) a person who has been convicted or acquitted of an unlawful sexual relationship offence in relation to a child cannot be convicted of a sexual offence in relation to the same child if the occasion on which the sexual offence is alleged to have occurred is during the period over which the person was alleged to have committed the unlawful sexual relationship offence; and
- 25
- (b) a person who has been convicted or acquitted of a sexual offence in relation to a child cannot be convicted of an unlawful sexual relationship offence in relation to the same child if the sexual offence of which the person has been convicted or acquitted is one of the unlawful sexual acts that are alleged to constitute the unlawful sexual relationship.
- 30
- (9) A person who has been convicted or acquitted of a predecessor offence in relation to a child cannot be convicted of an unlawful sexual relationship offence in relation to the same child if the period of the alleged unlawful sexual relationship includes any part of the period during which the person was alleged to have committed the predecessor offence.
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- (10) For the purposes of this section, a person ceases to be regarded as having been convicted for an offence if the conviction is quashed or set aside.

(11) A court sentencing a person for an offence against this section is to sentence the person consistently with the verdict of the trier of fact but having regard to the general nature or character of the unlawful sexual acts determined by the sentencing court to have been proved beyond a reasonable doubt (and, for the avoidance of doubt, the sentencing court need not ask any question of the trier of fact directed to ascertaining the general nature or character of the unlawful sexual acts determined by the trier of fact found to be proved beyond a reasonable doubt).

(12) In this section—

adult means a person of or over the age of 18 years;

child means—

- (a) a person who is under 17 years of age; or
- (b) a person who is under 18 years of age if, during the period of the relationship that is the subject of the alleged unlawful sexual relationship offence, the adult in the relationship is in a position of authority in relation to the person who is under 18 years of age;

predecessor offence means an offence of persistent sexual exploitation of a child, or of persistent sexual abuse of a child, as in force under a previous enactment;

sexual offence means—

- (a) an offence against Division 11 (other than sections 59 and 61) or sections 63B, 66, 69 or 72; or
- (b) an attempt to commit, or assault with intent to commit, any of those offences; or
- (c) a substantially similar offence against a previous enactment;

unlawful sexual act means any act that constitutes, or would constitute (if particulars of the time and place at which the act took place were sufficiently particularised), a sexual offence;

unlawful sexual relationship offence means an offence against subsection (1).

(13) For the purposes of this section, a person is in **a position of authority** in relation to a child if—

- (a) the person is a teacher and the child is a pupil of the teacher or of a school at which the teacher works; or
- (b) the person is a parent, step-parent, guardian or foster parent of the child or the de facto partner or domestic partner of a parent, step-parent, guardian or foster parent of the child; or
- (c) the person provides religious, sporting, musical or other instruction to the child; or

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- (d) the person is a religious official or spiritual leader (however described and including lay members and whether paid or unpaid) in a religious or spiritual group attended by the child; or
- (e) the person is a health professional or social worker providing professional services to the child; or
- (f) the person is responsible for the care of the child and the child has a cognitive impairment; or
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- (g) the person is employed or providing services in a correctional institution (within the meaning of the *Correctional Services Act 1982*) or a training centre (within the meaning of the *Young Offenders Act 1993*), or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; or
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- (h) the person is an employer of the child or other person who has the authority to determine significant aspects of the child's terms and conditions of employment or to terminate the child's employment (whether the child is being paid in respect of that employment or is working in a voluntary capacity).
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2E—Amendment of section 57—Consent no defence in certain cases

Section 57(4)—delete subsection (4) and substitute:

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- (4) For the purposes of subsection (1), a person is in ***a position of authority*** in relation to a person under the age of 18 years (the ***child***) if—
- (a) the person is a teacher and the child is a pupil of the teacher or of a school at which the teacher works; or
- (b) the person is a parent, step-parent, guardian or foster parent of the child or the de facto partner or domestic partner of a parent, step-parent, guardian or foster parent of the child; or
- 30
- (c) the person provides religious, sporting, musical or other instruction to the child; or
- (d) the person is a religious official or spiritual leader (however described and including lay members and whether paid or unpaid) in a religious or spiritual group attended by the child; or
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- (e) the person is a health professional or social worker providing professional services to the child; or
- (f) the person is responsible for the care of the child and the child has a cognitive impairment; or
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- 5
- (g) the person is employed or providing services in a correctional institution (within the meaning of the *Correctional Services Act 1982*) or a training centre (within the meaning of the *Young Offenders Act 1993*), or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; or
- 10
- (h) the person is an employer of the child or other person who has the authority to determine significant aspects of the child's terms and conditions of employment or to terminate the child's employment (whether the child is being paid in respect of that employment or is working in a voluntary capacity).

2F—Amendment of section 63B—Procuring child to commit indecent act etc

Section 63B(6)—delete subsection (6) and substitute:

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- (6) For the purposes of this section, a person is in *a position of authority* in relation to a child if—
- 20
- (a) the person is a teacher and the child is a pupil of the teacher or of a school at which the teacher works; or
- (b) the person is a parent, step-parent, guardian or foster parent of the child or the de facto partner or domestic partner of a parent, step-parent, guardian or foster parent of the child; or
- 25
- (c) the person provides religious, sporting, musical or other instruction to the child; or
- (d) the person is a religious official or spiritual leader (however described and including lay members and whether paid or unpaid) in a religious or spiritual group attended by the child; or
- 30
- (e) the person is a health professional or social worker providing professional services to the child; or
- (f) the person is responsible for the care of the child and the child has a cognitive impairment; or
- 35
- (g) the person is employed or providing services in a correctional institution (within the meaning of the *Correctional Services Act 1982*) or a training centre (within the meaning of the *Young Offenders Act 1993*), or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; or
- 40
- (h) the person is an employer of the child or other person who has the authority to determine significant aspects of the child's terms and conditions of employment or to terminate the child's employment (whether the child is being paid in respect of that employment or is working in a voluntary capacity).

2G—Sentencing for offences under previous law

5 (1) A sentence imposed on a person, before the commencement of this section, in respect of an offence against section 50 of the *Criminal Law Consolidation Act 1935* (as in force before the commencement of section 2D of this Act) is taken to be, and always to have been, not affected by error or otherwise manifestly excessive merely because—

10 (a) the trial judge did not ask any question of the trier of fact directed to ascertaining which acts of sexual exploitation, or which particulars of the offence as alleged, the trier of fact found to have been proved beyond a reasonable doubt and the person was not sentenced on the view of the facts most favourable to the person; and

(b) the sentencing court sentenced the person consistently with the verdict of the trier of fact but having regard to the acts of sexual exploitation determined by the sentencing court to have been proved beyond a reasonable doubt.

15 (2) Where, after the commencement of this section, a person is to be sentenced for an offence against section 50 of the *Criminal Law Consolidation Act 1935* (as in force before the commencement of section 2D of this Act) the following provisions apply:

20 (a) a verdict of guilt handed down by the trier of fact in relation to the offence is taken to be, and always to have been, a finding by the trier of fact that the person is guilty of the acts of sexual exploitation comprising the course of conduct alleged by the information;

25 (b) notwithstanding paragraph (a), in sentencing the person for the offence, the sentencing court may determine which alleged acts of sexual exploitation the sentencing court finds proved beyond a reasonable doubt and may disregard any acts of sexual exploitation that the sentencing court is not satisfied were proved beyond a reasonable doubt;

30 (c) for the avoidance of doubt, the sentencing court need not ask any question of the trier of fact directed to ascertaining which acts of sexual exploitation, or which particulars of the offence as alleged, the trier of fact found to have been proved beyond a reasonable doubt and, unless it has so determined in accordance with paragraph (b), need not sentence the person on the view of the facts most favourable to the person.

(3) This section does not apply in relation to the particular matter that was the subject of the determination in *Chiro v The Queen* [2017] HCA 37 (13 September 2017).

35 **Note—**

Except as provided in subsection (3), this section negates the effect of the determination of the High Court in *Chiro v The Queen* [2017] HCA 37 (13 September 2017).

Part 2—Amendment of *Cross-border Justice Act 2009*

3—Insertion of section 108A

After section 108 insert:

108A—Application of *Youth Justice Administration Act 2016*

5 The *Youth Justice Administration Act 2016* does not apply in relation to a person detained in a detention centre in another participating jurisdiction under this Part.

4—Insertion of section 117A

After section 117 insert:

117A—Application of *Youth Justice Administration Act 2016*

10 The *Youth Justice Administration Act 2016* applies in relation to a person detained in a detention centre in the State under this Division.

Part 3—Amendment of *Justices of the Peace (Miscellaneous) Amendment Act 2016*

5—Substitution of section 8

Section 8—delete the section and substitute:

8—Amendment of section 11—Disciplinary action, suspension and removal of other justices

(1) Section 11(1)—delete subsection (1) and substitute:

20 (1) There is proper cause for taking disciplinary action against a justice if the justice breaches or fails to comply with—

(a) this Act; or

(b) a condition of his or her appointment; or

25 (c) a prescribed provision of a code of conduct.

(2) Section 11(2), (3), (5) and (6)—delete "Governor" wherever occurring and substitute in each case:

Attorney-General

Part 4—Amendment of *Real Property Act 1886*

6—Substitution of section 6

Section 6—delete the section and substitute:

6—Laws inconsistent not to apply

5 No law, so far as inconsistent with this Act, shall apply to land
subject to the provisions of this Act, nor shall any future law, so far
as inconsistent with this Act, so apply unless it shall be expressly
enacted that it shall so apply "notwithstanding the provisions of the
Real Property Act 1886".

6A—Effect of section 6

10 Section 6 has effect as if Schedule 1 Part 4 of the *Aboriginal Lands
Trust Act 2013* had never come into operation.

Part 5—Amendment of *Summary Procedure Act 1921*

7—Amendment of section 4—Interpretation

15 Section 4(1), definition of *sexual offence*, (ba)—after "child" insert:
or persistent sexual abuse of a child

7A—Amendment of section 99AAC—Child protection restraining orders

20 Section 99AAC(8), definition of *child sexual offence*—after paragraph (d) insert:
(daa) an offence of persistent sexual abuse of a child under section 50 of
the *Criminal Law Consolidation Act 1935*;

Part 6—Amendment of *Surveillance Devices Act 2016*

7B—Amendment of section 3—Interpretation

25 Section 3(1), definition of *review agency*, (a)—delete "the Police Ombudsman" and
substitute:
the reviewer under Schedule 4 of the *Independent Commissioner Against
Corruption Act 2012*