

Legislative Council—No 75

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South Australia

Statutes Amendment (Child Exploitation and Encrypted Material) Bill 2018

A BILL FOR

An Act to amend the *Child Sex Offenders Registration Act 2006*, the *Criminal Law Consolidation Act 1935*, the *Evidence Act 1929* and the *Summary Offences Act 1953*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

- 5 This Act may be cited as the *Statutes Amendment (Child Exploitation and Encrypted Material) Act 2018*.

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.

Part 2—Amendment of *Child Sex Offenders Registration Act 2006*

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

Schedule 1, Part 3, clause 3—after paragraph (g) insert:

- (ga) an offence against section 63AB(1), (5) or (7) of the *Criminal Law Consolidation Act 1935* (Offences relating to websites);

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

5—Amendment of section 62—Interpretation

- (1) Section 62—before the definition of *child exploitation material* insert:

administering a website includes—

- (a) building, developing or maintaining the website; and
- (b) moderating contributions to, or content on, the website; and
- (c) managing or regulating membership of, or access to, the website; and
- (d) monitoring traffic through the website; and
- (e) an activity or function of a prescribed kind,

but does not include an activity or function of a kind excluded by the regulations from the ambit of this definition;

- (2) Section 62—after the definition of *child exploitation material* insert:

deal with child exploitation material includes—

- (a) view, upload, download or stream child exploitation material; and
- (b) make child exploitation material available for viewing, uploading, downloading or streaming; and
- (c) facilitate the viewing, uploading, downloading or streaming of child exploitation material;

- (3) Section 62—after the definition of *disseminate* insert:

encourage includes suggest, request, urge, induce and demand;

hosting a website means—

- (a) providing storage space or other resources on a server for the website; or
- (b) an activity or function of a prescribed kind,

but does not include an activity or function of a kind excluded by the regulations from the ambit of this definition;

(4) Section 62—after the definition of *prurient purpose* insert:

relevant industry regulatory authority means a person or body prescribed as a relevant industry regulatory authority for the purposes of section 63AB(3)(d);

5 *website* includes an online forum, group or social media platform.

6—Insertion of section 63AB

After section 63A insert:

63AB—Offences relating to websites

(1) A person commits an offence if—

- 10 (a) the person hosts or administers, or assists in the hosting or administration of, a website; and
- (b) the website is used by another person to deal with child exploitation material; and
- 15 (c) the person—
- (i) intends that the website be used by another person to deal with child exploitation material; or
- (ii) is aware that the website is being used by another person to deal with child exploitation material.

Maximum penalty: Imprisonment for 10 years.

20 (2) It is a defence to a charge of an offence against subsection (1) to prove that the person, on becoming aware that the website was being used, or had been used, by another person to deal with child exploitation material, took all reasonable steps, in the circumstances, to prevent any person from being able to use the website to deal with

25 child exploitation material.

(3) In determining whether a person has taken all reasonable steps, in the circumstances, for the purposes of subsection (2), regard must be had as to whether the person, as soon as it was reasonably practicable, did any of the following:

- 30 (a) shut the website down;
- (b) modified the operation of the website so that it could not be used to deal with child exploitation material;
- 35 (c) notified a police officer that the website was being, or had been, used to deal with child exploitation material, and complied with any reasonable directions given by a police officer as to action to be taken by the person in relation to that use of the website;
- 40 (d) notified a relevant industry regulatory authority that the website was being, or had been, used to deal with child exploitation material, and complied with any reasonable directions given by the authority as to action to be taken by the person in relation to that use of the website.

(4) In proceedings for an offence against subsection (1), it is not necessary to prove the identity of the person that was using the website to deal with child exploitation material.

(5) A person commits an offence if—

- (a) the person encourages another person to use a website; and
- (b) the person intends that the other person use the website to deal with child exploitation material.

Maximum penalty: Imprisonment for 10 years.

(6) In proceedings for an offence against subsection (5), it is not necessary to prove—

- (a) the identity of the person encouraged to use the website to deal with child exploitation material; or
- (b) that another person in fact used the website to deal with child exploitation material; or
- (c) if another person did in fact use the website, that it was the person's encouragement that caused the other person to do so.

(7) A person commits an offence if—

- (a) the person provides information to another person; and
- (b) the person intends the other person to use the information for the purpose of avoiding or reducing the likelihood of apprehension for an offence committed by that other person against this Division.

Maximum penalty: Imprisonment for 10 years.

(8) In proceedings for an offence against subsection (7), it is not necessary to prove—

- (a) the identity of the person to whom the information was provided; or
- (b) that the information was actually used by the other person.

7—Amendment of section 63C—Material to which Division relates

(1) Section 63C(2)—after "this Division" insert:

(other than an offence against section 63AB(7))

(2) Section 63C(2)—after "possession of" insert:

, or dealing with,

(3) Section 63C(2a)—after "this Division" insert:

(other than an offence against section 63AB(7))

(4) Section 63C(2a)—after "possession of" insert:

, or dealing with,

(5) Section 63C(2b)—after "this Division" insert:
(other than an offence against section 63AB(7))

(6) Section 63C(2b)—after "possession of" insert:
, or dealing with,

5 (7) Section 63C(3)—after "this Division" insert:
(other than an offence against section 63AB(7))

(8) Section 63C(3)—after "possession of" insert:
, or dealing with,

10 (9) Section 63C(4)—after "this Division" insert:
(other than an offence against section 63AB(7))

(10) Section 63C(4)(a)—after "dissemination of" insert:
, or dealing with,

8—Insertion of section 63D

After section 63C insert:

15 **63D—Forfeiture**

(1) If a court finds a person guilty of an offence against this Division, the court may order forfeiture of any material, equipment, device or other item that was used for, or in connection with, the commission of the offence.

20 (2) A court making an order for forfeiture of any equipment, device or other item under subsection (1) may, if it thinks fit, allow the offender or any other person an opportunity to retrieve (in accordance with any directions of the court) specified records, or other material not involved in the commission of the offence from
25 the equipment, device or item before it is so forfeited.

Part 4—Amendment of *Evidence Act 1929*

9—Amendment of section 67H—Meaning of sensitive material

Section 67H(1)—after paragraph (a) insert:

30 (ab) child exploitation material (within the meaning of section 62 of the *Criminal Law Consolidation Act 1935*); and

10—Amendment of section 69—Order for clearing court

Section 69—after subsection (1a) insert:

- 5 (1b) Where child exploitation material (within the meaning of section 62 of the *Criminal Law Consolidation Act 1935*) is adduced, or is to be adduced, as evidence in proceedings before the court, an order must be made under subsection (1) requiring all persons except—
- (a) those whose presence is required for the purposes of the proceedings; and
- 10 (b) any other person who, in the opinion of the court, should be allowed to be present,
- to absent themselves from the place in which the court is being held while the evidence is adduced.

Part 5—Amendment of *Summary Offences Act 1953*

11—Insertion of Part 16A

15 After section 74BM insert:

Part 16A—Access to data held electronically

74BN—Interpretation

- (1) In this Part—

20 *computer* includes a tablet, mobile phone and any other electronic device that is capable of connecting to the internet;

25 *criminal intelligence* means information relating to actual or suspected criminal activity (whether in this State or elsewhere) the disclosure of which could reasonably be expected to prejudice criminal investigations, to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement or to endanger a person's life or physical safety;

data includes—

- (a) information in any form; and
- (b) any program or part of a program;

30 *data storage device* means any article, material or thing (for example, a disk or file server) from which information is capable of being reproduced, with or without the aid of any other article or device;

35 *investigator* means an investigator under the *Independent Commissioner Against Corruption Act 2012*;

serious offence means—

- (a) an indictable offence; or
- (b) an offence with a maximum penalty of 2 years imprisonment or more.

- (2) For the purposes of this Part, ***data held on*** a computer or data storage device, includes data held on a remote computer or remote data storage device (for example, a cloud storage system) that is accessible from the computer or data storage device.
- 5 (3) Without limiting the type of information or assistance that may be required to be provided for the purposes of an order under this Part, information or assistance may include the provision of fingerprints and retinal or facial scans.

74BO—Interaction with other Acts or laws

10 The provisions of this Part are in addition to, and do not limit or derogate from, this or any other Act or law.

74BP—Extraterritorial operation

15 It is the intention of the Parliament that this Part apply within the State and outside the State to the full extent of the extraterritorial legislative capacity of the Parliament.

74BQ—Order not required if information or assistance provided voluntarily

20 An order is not required under this Part if information or assistance of a kind referred to in section 74BR(1) is, at the request of a police officer or an investigator, or otherwise, provided by a person voluntarily, and any evidence or information obtained by such voluntary provision of information or assistance is to be treated as if it were obtained by the lawful exercise of powers pursuant to an order under this Part.

74BR—Order to provide information or assistance to access data held on computer etc

- 25 (1) A magistrate may, on application by a police officer or an investigator, make an order requiring a person (the ***specified person***) to provide any information or assistance that is reasonable or necessary to allow a police officer or an investigator to do 1 or more of the following:
- 30 (a) access, examine, or perform any function in relation to, any data held on any computer or data storage device;
- 35 (b) copy data held on any computer or data storage device to another computer or data storage device;
- (c) reproduce or convert data held on any computer or data storage device into documentary form or another form that enables it to be understood by the police officer or investigator.
- 40 (2) The specified person is not a party to proceedings under this section.

- (3) The magistrate may make the order if satisfied that—
- (a) there are reasonable grounds to suspect that data held on a computer or data storage device may afford evidence of a serious offence; and
 - 5 (b) the specified person is—
 - (i) reasonably suspected of having committed a serious offence in relation to which the order is sought; or
 - (ii) the owner or lessee of the computer or data storage device; or
 - 10 (iii) an employee of the owner or lessee of the computer or data storage device; or
 - (iv) a person engaged under a contract for services by the owner or lessee of the computer or data storage device; or
 - 15 (v) a person who uses or has used the computer or data storage device; or
 - (vi) a person who is, or was, a system administrator for the system including the computer or data storage device; and
 - 20 (c) the specified person has relevant knowledge of—
 - (i) the computer, data storage device or a computer network of which the computer or device forms or formed a part; or
 - 25 (ii) measures applied to protect data held on the computer or data storage device.
- (4) The order—
- (a) need not identify any particular computer or data storage device in respect of which it applies; and
 - 30 (b) need not specify the particular information or assistance to be provided; and
 - (c) may specify the period within which the specified person must provide the information or assistance; and
 - (d) may provide that the specified person provide information or assistance at a place at which a computer or data storage device has been, or is to be, lawfully removed; and
 - 35 (e) may specify any conditions to which the requirement to provide information or assistance is subject.
- (5) A statement of the grounds on which an order has been made must not contain information, the disclosure of which would be
- 40 inconsistent with a decision of a magistrate under section 74BU.

- (6) An order may be made in respect of a serious offence suspected of having been committed, or alleged to have been committed, before or after the commencement of this Part.

74BS—Application for order

- 5 (1) An application for an order must—
- (a) state the applicant's full name and official details; and
 - (b) state the name of the person to whom the order will apply; and
 - 10 (c) state the nature of the serious offence that is suspected to have been committed, and in relation to which the order is required; and
 - (d) state the grounds on which the applicant suspects that the offence has been committed; and
 - 15 (e) state the grounds on which the applicant suspects that any data held on a computer or data storage device is or may be relevant to the offence; and
 - (f) state the grounds on which the applicant suspects that the specified person has knowledge relevant to gaining access to any data held on a computer or data storage device; and
 - 20 (g) include any other prescribed information.
- (2) Subject to section 74BT, an application for an order must be accompanied by an affidavit made by the applicant, verifying the grounds of the application.

74BT—Order required in urgent circumstances

- 25 (1) If a police officer or an investigator considers that an order under section 74BR is required urgently, either because of serious or urgent circumstances, or to prevent concealment, alteration, loss or
- 30 destruction of data held on a computer or data storage device that may afford evidence of a serious offence, the police officer or investigator may make an application in accordance with subsection (3) and may—
- 35 (a) require a person who is reasonably suspected of having committed that offence to remain at a particular place, or accompany the officer or investigator to the nearest police station, for—
 - 40 (i) so long as may be necessary for an application for an order to be made to, and considered by, a magistrate in accordance with subsection (3), and if the order is made, for the order to be served on the person; or
 - (ii) 4 hours,
- whichever is the lesser; and

- 5
- (b) require that the person, for the period referred to in paragraph (a), not use or access a computer, data storage device, telephone or other means of electronic communication, other than to contact a legal practitioner for the purpose of obtaining legal advice, or in accordance with any directions of a police officer or an investigator; and
- 10
- (c) if the person refuses or fails to comply with either or both such requirements, or the police officer or investigator forms a reasonable suspicion that either or both such requirements will not be complied with, arrest and, subject to subsection (2), detain the person in custody (without warrant) for the period referred to in paragraph (a).
- 15
- (2) On arresting a person under subsection (1)(c), an investigator must immediately deliver the person, or cause the person to be delivered, into the custody of a police officer (and the person will, for the purposes of any other law, then be taken to have been apprehended by the police officer without warrant).
- 20
- (3) The following provisions apply to an order under this Part that is required in urgent circumstances:
- (a) application may be made to a magistrate by telephone and must include—
- 25
- (i) the information required under section 74BS(1); and
- (ii) details of the circumstances giving rise to the urgency of the application; and
- 30
- (iii) any other information required by the magistrate to determine the application;
- (b) the magistrate is entitled to assume the accuracy of the information as to the applicant's identity and official details supplied by the applicant without further inquiry;
- 35
- (c) if the magistrate is satisfied as to the grounds for making the order, the magistrate must inform the applicant of the facts that justify, in the magistrate's opinion, the making of the order, and must not proceed to make the order unless the applicant undertakes to make an affidavit verifying those facts;
- 40
- (d) if the applicant gives such an undertaking, the magistrate may proceed to make the order and, subject to subsection (4), note on the order, the facts that justify, in the opinion of the magistrate, the making of the order and informing the applicant of the terms of the order;
- (e) the order is to be taken to have been made, and comes into force, when signed by the magistrate;

(f) the applicant must, as soon as reasonably practicable after the making of the order, forward to the magistrate an affidavit verifying the facts referred to in paragraph (c);

(g) the magistrate must, as soon as reasonably practicable after the making of the order, forward a copy of the order to the applicant.

(4) A statement of the grounds on which an order has been made must not contain information, the disclosure of which would be inconsistent with a decision of a magistrate under section 74BU.

74BU—Criminal Intelligence

(1) In any proceedings under this Part the magistrate determining the proceedings—

(a) must, on the application of the Commissioner of Police, take steps to maintain the confidentiality of information classified by the Commissioner as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives; and

(b) may take evidence consisting of, or relating to, information that is so classified by the Commissioner by way of affidavit of a police officer of or above the rank of superintendent.

(2) The duties imposed on a magistrate by subsection (1) in relation to proceedings under this Part apply to any court dealing with information properly classified under this Part as criminal intelligence or with the question of whether information has been properly classified under this Part by the Commissioner of Police as criminal intelligence.

(3) The Commissioner of Police may not delegate the function of classifying information as criminal intelligence for the purposes of this Part except to a Deputy Commissioner or Assistant Commissioner of Police.

74BV—Service of order

A copy of an order under this Part must be served personally on the person to whom it applies as soon as reasonably practicable after it is made, and in any event, before the period specified (if any) in the order within which the assistance or information is to be provided.

74BW—Effect and operation of order

(1) A person who is served with an order under this Part commits an offence if the person, without reasonable excuse, contravenes or fails to comply with the order.

Maximum penalty: Imprisonment for 5 years.

- 5
- (2) A person is not excused from complying with an order on the ground that to do so may result in information being provided that might incriminate the person.
- (3) Despite any other Act or law, evidence or information obtained by the lawful exercise of powers pursuant to an order under this Part, and evidence or information obtained incidentally to such an exercise of powers—
- 10
- (a) may be used by law enforcement and prosecution authorities for the purposes of investigating and prosecuting any serious offence; and
- (b) is not inadmissible in proceedings before a court in relation to a serious offence merely because the order under this Part was obtained in relation to a different serious offence.
- 15
- (4) A police officer or an investigator may be assisted by such other persons in the exercise of powers pursuant to an order under this Part as the officer or investigator considers necessary in the circumstances.

74BX—Impeding investigation by interfering with data

- 20
- (1) A person commits an offence if the person, without lawful authority or reasonable excuse, alters, conceals or destroys data—
- (a) held on a computer or data storage device in respect of which an order has been, or is to be, made under this Part; and
- 25
- (b) that may be, or could reasonably be expected to be, evidence of an offence,
- and in so doing, the person intends that, or is recklessly indifferent as to whether—
- (c) the investigation of the commission of an offence by another person is impeded or prejudiced; or
- 30
- (d) another person is assisted to avoid apprehension or prosecution for an offence; or
- (e) the likelihood that another person is apprehended or prosecuted for an offence is reduced.

Maximum penalty: Imprisonment for 5 years.

- 35
- (2) A person who is served with an order under this Part commits an offence if the person, without lawful authority or reasonable excuse—
- (a) alters, conceals or destroys data; or
- (b) causes another person to alter, conceal or destroy data,

held on a computer or data storage device in respect of which the order was made and in so doing, or in causing the other person to so do, the person intends that, or is recklessly indifferent as to whether, the investigation of the commission of an offence is impeded or prejudiced.

Maximum penalty: Imprisonment for 10 years.

- (3) A person who voluntarily provides, or purports to provide, information or assistance of a kind referred to in section 74BR(1) commits an offence if the information or assistance causes data held on a computer or data storage device to be, without lawful authority or reasonable excuse, altered, concealed or destroyed, and in so doing the person intends that, or is recklessly indifferent as to whether, the investigation of the commission of an offence is impeded or prejudiced.

Maximum penalty: Imprisonment for 10 years.

74BY—Reporting

- (1) The Commissioner of Police must, on or before 30 September in each year (other than the calendar year in which this section comes into operation), provide a report to the Minister specifying the following information in relation to the financial year ending on the preceding 30 June:

- (a) how many applications were made by police officers under section 74BR, and of those applications, how many were granted, withdrawn or refused;
- (b) how many applications were made by police officers by telephone under section 74BT, and of those applications, how many were granted, withdrawn or refused;
- (c) in relation to orders made during that year following application by police officers—
 - (i) a general description of the serious offences in relation to which the orders were made; and
 - (ii) a general description of the types of computers and data storage devices, and the number of such computers and devices, in relation to which information or assistance was provided under each order; and
 - (iii) the number of orders (if any) not complied with;
- (d) whether any persons were charged with a serious offence during that year on the basis (or partly on the basis) of information or evidence obtained as a result of information or assistance provided under an order;
- (e) any other information prescribed by regulation or specified by the Minister.

- 5 (2) The Independent Commissioner Against Corruption must, on or before 30 September in each year (other than the calendar year in which this section comes into operation), provide a report to the Minister specifying the following information in relation to the financial year ending on the preceding 30 June:
- 10 (a) how many applications were made by investigators under section 74BR, and of those applications, how many were granted, withdrawn or refused;
- 15 (b) how many applications were made by investigators by telephone under section 74BT, and of those applications, how many were granted, withdrawn or refused;
- 20 (c) in relation to orders made during that year following application by investigators—
- (i) a general description of the serious offences in relation to which the orders were made; and
- (ii) a general description of the types of computers and data storage devices, and the number of such computers and devices, in relation to which information or assistance was provided under each order; and
- (iii) the number of orders (if any) not complied with;
- 25 (d) the number of matters referred under the *Independent Commissioner Against Corruption Act 2012* during that year to relevant law enforcement agencies for further investigation and potential prosecution in which information or evidence obtained as a result of information or assistance provided under an order, formed part of the basis of the referral;
- 30 (e) any other information prescribed by regulation or specified by the Minister.
- (3) The Commissioner of Police and the Independent Commissioner Against Corruption must keep such records as are necessary to enable compliance with this section.
- 35 (4) The Minister must, within 12 sitting days after receipt of a report under this section, cause a copy of the report to be laid before both Houses of Parliament.

74BZ—Review of Part

- 40 (1) The Minister must, as soon as is practicable after the third anniversary of the commencement of this Part, appoint a retired judicial officer to conduct a review of the operation and effectiveness of this Part since its commencement.

(2) The Minister, the Commissioner of Police and the Independent Commissioner Against Corruption must ensure that the person appointed to conduct the review is provided with such information as the person may require for the purposes of conducting the review.

5 (3) The person conducting the review must maintain the confidentiality of information provided to the person that is classified by the Commissioner of Police as criminal intelligence under this or any other Act.

10 (4) A report on the review must be submitted to the Minister within 4 months of the commencement of the review.

(5) The Minister must, within 12 sitting days after receiving the report, cause a copy of the report to be laid before both Houses of Parliament.

15 (6) In this section—

judicial officer means a person appointed as a judge of the Supreme Court or the District Court or a person appointed as a judge of another State or Territory or of the Commonwealth.