

Legislative Council—No 137A

As reported with amendments, report adopted, Standing Orders suspended and passed remaining stages, 30 November 2005

South Australia

Statutes Amendment (Criminal Procedure) Bill 2005

A BILL FOR

An Act to amend the *Criminal Law Consolidation Act 1935*; the *Criminal Law (Forensic Procedures) Act 1998*; the *Director of Public Prosecutions Act 1991*; the *Magistrates Court Act 1991*; and the *Summary Procedure Act 1921*.

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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 (Criminal Procedure) Act 2005*.

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 *Criminal Law Consolidation Act 1935*

5 4—Insertion of sections 285BA, 285BB and 285BC

After section 285B insert:

285BA—Power to serve notice to admit facts

- 10 (1) A court before which a defendant is to be tried on information may, on application by the Director of Public Prosecutions, authorise the Director of Public Prosecutions to serve on the defence a notice to admit specified facts.
- (2) The court may, in granting such an authorisation, fix a time within which the notice is to be complied with.
- 15 (3) The notice must contain a warning, in the prescribed form, to the effect that, if the defendant is convicted, the court is required to take an unreasonable failure to make an admission in response to the notice into account in fixing sentence.
- (4) This section does not abrogate the privilege against self-incrimination and a refusal to make an admission on the ground that
20 the admission would tend to incriminate the defendant of an offence is not to be made the subject of comment to a jury.
- (5) An order under this section may only be made at a directions hearing at which the defendant is represented by a legal practitioner unless the court is satisfied that—
25 (a) the defendant has voluntarily chosen to be unrepresented; or
(b) the defendant is unrepresented for reasons attributable to the defendant's own fault.
- (6) If a defendant unreasonably fails to make an admission in response
30 to a notice under this section, and the defendant is convicted, the court should take the failure into account in fixing sentence.
- (7) Without limiting subsection (6), a defendant unreasonably fails to make an admission if the defendant—
35 (a) claims privilege against self-incrimination as a reason for not making the admission; and
(b) thus puts the prosecution to proof of facts that are not seriously contested at the trial.

285BB—Power to require notice of intention to adduce certain kinds of evidence

- 5 (1) A court before which a defendant is to be tried on information may, on application by the prosecutor, require the defence to give the Director of Public Prosecutions written notice of an intention to introduce evidence of any of the following kinds:
- 10 (a) evidence tending to establish that the defendant was mentally incompetent to commit the alleged offence or is mentally unfit to stand trial;
- (b) evidence tending to establish that the defendant acted for a defensive purpose;
- (c) evidence of provocation;
- (d) evidence of automatism;
- 15 (e) evidence tending to establish that the circumstances of the alleged offence occurred by accident;
- (f) evidence of necessity or duress;
- (g) evidence tending to establish a claim of right;
- (h) evidence of intoxication.
- 20 (2) Before making an order under this section, the court must satisfy itself that—
- (a) the prosecution has provided the defence with an outline of the prosecution case, so far as it has been developed on the basis of material currently available to the prosecution; and
- 25 (b) the prosecution has no existing, but unfulfilled, obligations of disclosure to the defence.
- (3) Non-compliance with a requirement under subsection (1) does not render evidence inadmissible but the prosecutor or the judge (or both) may comment on the non-compliance to the jury.
- 30 (4) A court before which a defendant is to be tried on information may require the defence to notify the Director of Public Prosecutions in writing whether it consents to dispensing with the calling of prosecution witnesses proposed to be called to establish the admissibility of specified intended evidence of any of the following kinds:
- 35 (a) documentary, audio, visual, or audiovisual evidence of surveillance or interview;
- (b) other documentary, audio, visual or audiovisual evidence;
- (c) exhibits.
- 40 (5) If the defence fails to comply with a notice under subsection (4), the defendant's consent to the tender of the relevant evidence for purposes specified in the notice will be conclusively presumed.

285BC—Expert evidence

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- (1) If a defendant is to be tried or sentenced for an indictable offence, and expert evidence is to be introduced for the defence, written notice of intention to introduce the evidence must be given to the Director of Public Prosecutions—
- (a) in the case of trial, on or before the date of the first directions hearing, and, in the case of sentence, at least 28 days before the date appointed for submissions on sentence; or
- 10 (b) if the evidence does not become available to the defence until later—as soon as practicable after it becomes available to the defence.
- (2) The notice—
- (a) must set out the name and qualifications of the expert; and
- 15 (b) must describe the general nature of the evidence and what it tends to establish.
- (3) The court may, on application by a defendant, exempt the defendant from the obligation imposed by this section.
- (4) If the defence proposes to introduce expert psychiatric evidence or other expert medical evidence relevant to the defendant's mental state or medical condition at the time of an alleged offence, the court may, on application by the prosecutor, require the defendant to submit, at the prosecutor's expense, to an examination by an independent expert approved by the court.
- 20
- (5) If a defendant fails to comply with a requirement of or under this section—
- (a) the evidence will not be admitted without the court's permission (but the court cannot allow the admission of evidence if the defendant fails to submit to an examination by an independent expert under subsection (4)); and
- 30 (b) in the case of a trial by jury—the prosecutor or the judge (or both) may comment on the defendant's non-compliance to the jury.
- (6) If the Director of Public Prosecutions receives notice under this section of an intention to introduce expert evidence less than 28 days before the day appointed for the commencement of the trial or submissions on sentence, the court may, on application by the prosecutor, adjourn the case to allow the prosecution a reasonable opportunity to obtain expert advice on the proposed evidence and, if a jury has been empanelled and the adjournment would, in the court's opinion, adversely affect the course of the trial, the court may discharge the jury and order that the trial be re-commenced.
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- (7) The court should grant an application for an adjournment under subsection (6) unless there are good reasons to the contrary.

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- (8) If it appears to the judge, from evidence or submissions before the court, that a legal practitioner has advised the defendant not to comply, or has expressly agreed to the defendant's non-compliance, with a requirement of this section, the judge may report the matter to the appropriate professional disciplinary authority.
- (9) Before the judge makes a report under subsection (8), the judge will invite the legal practitioner to make submissions to the court showing why the matter should not be reported.

5—Substitution of section 288A

10 Section 288A—delete the section and substitute:

288A—Defence to be invited to outline issues in dispute at conclusion of opening address for the prosecution

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- (1) On the trial of an offence on information, the judge is to invite the defendant, at the conclusion of the prosecutor's opening address, to address the court to outline the issues in contention between the prosecution and the defence.
- (2) The defendant may then address the court accordingly or decline the invitation.
- 20 (3) If the trial is before a jury, the invitation to exercise a right under this section must be made in the absence of the jury and a defendant's failure to exercise a right that he or she has been invited to exercise under this section is not to be made the subject of comment by the judge or the prosecutor to the jury.

288AB—Right to call or give evidence

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- (1) A person charged with an offence may, at the conclusion of the evidence for the prosecution, give or call evidence in his or her defence.
- (2) If evidence is to be given for the defence, the defendant may, before giving or calling the evidence, address the court outlining the case for the defence.
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- (3) If there are 2 or more defendants, an address on behalf of any of those defendants must be given before evidence is given by or on behalf of that defendant and, if the court so directs, before evidence is given by or on behalf of any of the defendants.
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- (4) A defendant may exercise a right to address the court under this section even though he or she has already addressed the court to outline issues in contention between the prosecution and the defence.

Part 3—Amendment of *Criminal Law (Forensic Procedures) Act 1998*

6—Amendment of section 3—Interpretation

Section 3(1)—before the definition of *assimilation order* insert:

5 *alcohol or drug testing procedure* means a forensic procedure to determine the presence or concentration of alcohol or a drug in a person's blood or other biological material;

7—Substitution of section 5

Section 5—delete the section and substitute:

5—Application of this Act to alcohol or drug testing procedures

- 10 (1) An alcohol or drug testing procedure may be carried out either under this Act or under some other law authorising the procedure.
- (2) If an alcohol or drug testing procedure is carried out under the *Road Traffic Act 1961* or some other law, this Act does not apply to it.

5A—Body searches

15 A search of the person is not to be regarded as a forensic procedure.

8—Repeal of heading to Part 2 Division 1

Heading to Part 2 Division 1—delete the heading

9—Substitution of section 6

20 Section 6—delete the section and substitute:

6—Part to apply to all forensic procedures other than alcohol or drug testing procedures conducted under other laws

This Part—

- 25 (a) applies to forensic procedures under this Act (including alcohol or drug testing procedures); and
- (b) extends to forensic procedures (except alcohol or drug testing procedures) under other laws.

10—Repeal of heading to Part 2 Division 3

Heading to Part 2 Division 3—delete the heading

Part 4—Amendment of *Director of Public Prosecutions Act 1991*

11—Insertion of section 10A

After section 10 insert:

10A—Disclosure of information to Director

- 5 (1) A police officer in charge of the investigation of an indictable offence (the *chief investigator*) has a duty to disclose to the Director all documentary material collected or created in the course of the investigation that might reasonably be expected to assist the case for the prosecution or the case for the defence.
- 10 (2) The chief investigator must, when so required by the Director, provide the Director with—
- 15 (a) a list, certified by the chief investigator, of all documentary material so far collected or created in the course of the investigation that might reasonably be expected to assist the case for the prosecution or the case for the defence; and
- (b) copies of documentary material referred to in the list.
- (3) The duty of disclosure under subsection (1)—
- 20 (a) extends to material that would be exempt from production in court because it is protected by privilege or for any other reason; and
- (b) continues until the termination date.
- (4) The chief investigator must ensure that all material disclosed, or liable to disclosure, under subsection (1), is retained until the termination date.
- 25 (5) The chief investigator must, at the request of the Director, provide the Director with copies of specified documentary material collected or created in the course of the investigation that is not liable to disclosure under subsection (1).
- (6) Copies of documentary material to be provided under this section may be provided in electronic form.
- 30 (6a) A police officer must not, without good and sufficient cause, fail to carry out a duty under this section promptly and diligently.
- (6b) The police officer in charge of the investigation of an indictable offence will, for the purposes of this section, be the police officer appointed by the Commissioner for that purpose.
- 35 (7) In this section—
- termination date* means the date when—
- 40 (a) the Director decides that the person suspected of having committed the alleged offence not be prosecuted for the offence; or

- (b) the prosecution is terminated; or
- (c) the accused person is convicted or acquitted, and all rights of appeal have expired or been exhausted.

Part 5—Amendment of *Magistrates Court Act 1991*

12—Amendment of section 42—Appeals

Section 42(1a)—delete subsection (1a) and substitute:

- (1a) An appeal does not, however, lie against an interlocutory judgment unless—
 - (a) the judgment stays the proceedings; or
 - (b) the judgment destroys or substantially weakens the basis of the prosecution case and, if correct, is likely to lead to abandonment of the prosecution; or
 - (c) the Court or the appellate court is satisfied that there are special reasons why it would be in the interests of the administration of justice to have the appeal determined before commencement or completion of the trial and grants its permission for an appeal.

Part 6—Amendment of *Summary Procedure Act 1921*

13—Amendment of section 104—Preliminary examination of charges of indictable offences

(1) Section 104(1)(a)(iv)—delete subparagraph (iv) and substitute:

- (iv) all other material relevant to the charge (whether relevant to the case for the prosecution or the case for the defence) that is available to the prosecution except material exempt from production because of privilege or for some other reason; and

(3) Section 104(2)—delete "above" and substitute:

in subsection (1)(a)(i)

(4) Section 104—after subsection (6) insert:

- (7) Documentary material that is to be given to the defendant or a legal practitioner representing the defendant may be given by transmitting the material, in electronic form, to an internet address provided for the purpose by the intended recipient.

14—Amendment of section 107—Evaluation of evidence at preliminary examination

Section 107(5)—delete subsection (5) and substitute:

- (5) Where the Court commits a defendant for trial, the Court must—
 - (a) provide the defendant with a written statement in the prescribed form—

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- (i) setting out the more important statutory obligations of the defendant to be fulfilled in anticipation of trial; and
 - (ii) explaining that non-compliance with those obligations may have serious consequences; and
- (b) give the defendant such further explanations of the trial procedure and the defendant's obligations in regard to the trial as the Court considers appropriate.
- 10 (6) If, in any legal proceedings, the question arises whether a defendant has been provided with the statement and explanations required by subsection (5), it will be presumed, in the absence of proof to the contrary, that the defendant has been provided with the statement and explanations.