

Legislative Council—No 70

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South Australia

Statutes Amendment (Domestic Violence) Bill 2018

A BILL FOR

An Act to amend the *Bail Act 1985*, the *Criminal Law Consolidation Act 1935*, the *Evidence Act 1929* and the *Intervention Orders (Prevention of Abuse) Act 2009*.

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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 (Domestic Violence) Act 2018*.

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.

Part 2—Amendment of *Bail Act 1985*

4—Amendment of section 10A—Presumption against bail in certain cases

Section 10A(2), definition of *prescribed applicant*, (d)—delete paragraph (d) and substitute:

- 5 (d) an applicant taken into custody in relation to an offence against any of the following provisions of the *Criminal Law Consolidation Act 1935*:
- (i) section 20A;
 - (ii) section 85B;
 - 10 (iii) section 172;
 - (iv) section 248;
 - (v) section 250; or

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

5—Amendment of section 5AA—Aggravated offences

- 15 (1) Section 5AA(1)(g)—delete paragraph (g) and substitute:
- (g) the offender committed the offence knowing that the victim of the offence was a person with whom the offender was, or was formerly, in a relationship;
- (2) Section 5AA—after subsection (4) insert:
- 20 (4a) Two people will be taken to be *in a relationship* for the purposes of subsection (1)(g) if—
- (a) they are married to each other; or
 - (b) they are domestic partners; or
 - (c) they are in some other form of intimate personal relationship in which their lives are interrelated and the actions of 1 affects the other; or
 - (d) 1 is the child, stepchild or grandchild, or is under the guardianship, of the other (regardless of age); or
 - (e) 1 is a child, stepchild or grandchild, or is under the guardianship, of a person who is or was formerly in a relationship with the other under paragraph (a), (b) or (c) (regardless of age); or
 - 30 (f) 1 is a child and the other is a person who acts in *loco parentis* in relation to the child; or
 - (g) 1 is a child who normally or regularly resides or stays with the other; or
 - 35 (h) they are brothers or sisters or brother and sister; or

- (i) they are otherwise related to each other by or through blood, marriage, a domestic partnership or adoption; or
- (j) they are related according to Aboriginal or Torres Strait Islander kinship rules or are both members of some other culturally recognised family group; or
- (k) 1 is the carer (within the meaning of the *Carers Recognition Act 2005*) of the other.

6—Insertion of Part 3 Division 7AA

After section 20 insert:

Division 7AA—Choking etc in a domestic setting

20A—Choking, suffocation or strangulation in a domestic setting

- (1) A person who is, or has been, in a relationship with another person and chokes, suffocates or strangles that other person, without that other person's consent, is guilty of an offence.
Maximum penalty: Imprisonment for 7 years.
- (2) However conduct that is justified or excused by law cannot amount to an offence against this section.
- (3) Two people will be taken to be *in a relationship* for the purposes of this section if—
 - (a) they are married to each other; or
 - (b) they are domestic partners; or
 - (c) they are in some other form of intimate personal relationship in which their lives are interrelated and the actions of 1 affects the other; or
 - (d) 1 is the child, stepchild or grandchild, or is under the guardianship, of the other (regardless of age); or
 - (e) 1 is a child, stepchild or grandchild, or is under the guardianship, of a person who is or was formerly in a relationship with the other under paragraph (a), (b) or (c) (regardless of age); or
 - (f) 1 is a child and the other is a person who acts in *loco parentis* in relation to the child; or
 - (g) 1 is a child who normally or regularly resides or stays with the other; or
 - (h) they are brothers or sisters or brother and sister; or
 - (i) they are otherwise related to each other by or through blood, marriage, a domestic partnership or adoption; or

- (j) they are related according to Aboriginal or Torres Strait Islander kinship rules or are both members of some other culturally recognised family group; or
- (k) 1 is the carer (within the meaning of the *Carers Recognition Act 2005*) of the other.

(4) If —

- (a) a jury is not satisfied beyond reasonable doubt that a charge of an offence against this section has been established; but
- (b) the Judge has instructed the jury that it is open to the jury on the evidence to find the defendant guilty of an offence of assault; and
- (c) the jury is satisfied beyond reasonable doubt that the offence of assault has been established,

the jury may return a verdict that the defendant is not guilty of the offence charged but is guilty of assault.

Part 4—Amendment of *Evidence Act 1929*

7—Insertion of section 13BB

After section 13BA insert:

13BB—Admissibility of recorded evidence in domestic violence proceedings

- (1) This section applies in addition to section 13BA and any other law allowing evidence to be admitted in the form of a recording.
- (2) In proceedings for a domestic violence offence, the evidence of a complainant may be admitted in the form of a recording made by a police officer—
 - (a) if—
 - (i) the evidence is in the form of a prescribed recording; and
 - (ii) the court is satisfied as to the complainant's capacity to give sworn or unsworn evidence at the time the recording was made; and
 - (iii) the court is satisfied that the defendant has been given a reasonable opportunity to listen to or view the recording; and
 - (iv) during the course of the trial, the complainant is available, if required, for further examination, cross-examination or re-examination; or
 - (b) if the court is satisfied that the interests of justice require the admission of the evidence (whether or not any of the requirements specified in paragraph (a) are satisfied).

- (3) The court's discretion to exclude evidence is not affected by this section and the court may—
- (a) rule as inadmissible the whole or any part of the recording; or
 - (b) before admitting the recording, order that it be edited so as to exclude evidence that is inadmissible for any reason.
- (4) Despite subsection (2)(a)(iv) but subject to subsections (5) and (6), the complainant cannot be further examined, cross-examined or re-examined on the evidence admitted in the trial without the permission of the court which may only be given, on application by a party to the proceedings, if—
- (a) the court is satisfied that a party to the proceedings has, since the making of the recording, become aware of a matter of which the party could not reasonably have been aware at the time the recording was made; or
 - (b) the complainant gives evidence in the trial apart from, or in addition to, evidence admitted under this section in the form of a recording and the court is satisfied that it is in the interests of justice that the complainant be further examined, cross-examined or re-examined; or
 - (c) the court is satisfied that it is otherwise in the interests of justice to permit the complainant to be further examined, cross-examined or re-examined.
- (5) The prosecution may, with the permission of the court and in accordance with any directions of the court, question the complainant about—
- (a) evidence given by the complainant that is unfavourable to the prosecution case; or
 - (b) a matter of which the complainant may reasonably be supposed to have knowledge and about which it appears to the court the complainant is not, in examination-in-chief, making a genuine attempt to give evidence; or
 - (c) whether the complainant has, at any time, made a prior inconsistent statement,
- (and, for the avoidance of doubt, the requirements of subsection (4)(a), (b) and (c) do not apply to the giving of permission under this subsection).
- (6) Questioning under subsection (5) must be conducted as if it were (and is, for the purposes of this Act other than provisions relating to re-examination, taken to be) cross-examination.
- (7) Subsections (5) and (6) apply in addition to section 27.

- (8) If a court admits evidence in the form of a recording under this section, the judge must—
- (a) explain to the jury that the law allows the court to admit evidence in this form; and
 - (b) warn the jury—
 - (i) not to draw from the admission of evidence in that form any inference adverse to the defendant; and
 - (ii) not to allow the admission of evidence in that form to influence the weight to be given to the evidence.

- (9) Without limiting section 73, the regulations may—
- (a) prescribe additional requirements in relation to recordings under this section; and
 - (b) require that additional material be provided to the court with a recording in certain circumstances (such as a transcript or translation); and
 - (c) prescribe requirements in relation to access to, or service of, recordings and other material; and
 - (d) prescribe requirements in relation to custody of recordings; and
 - (e) impose restrictions on copying or distribution of recordings.

- (10) In this section—

complainant, in proceedings for a domestic violence offence, means the person against whom the domestic violence offence is alleged to have been committed, but does not include a person who—

- (a) is under 16 years of age; or
- (b) is cognitively impaired;

domestic violence offence means any offence involving domestic abuse (within the meaning of the *Intervention Orders (Prevention of Abuse) Act 2009*);

informed consent means consent given in accordance with requirements prescribed by the regulations;

prescribed recording means a recording made by a police officer of a representation made by a complainant when the complainant was questioned by a police officer in connection with the investigation of the commission of a domestic violence offence where—

- (a) the questioning occurred as soon as practicable after the commission of the offence; and
- (b) the recording was made with the informed consent of the complainant; and
- (c) the recording contains the following statements by the complainant:

- (i) a statement as to the complainant's age;
- (ii) a statement as to the truth of the representation;
- (iii) any other matter required by the regulations or by rules of court;

5 *recording* means an audio record or an audio visual record.

8—Amendment of section 73—Regulations

Section 73—after its present contents (now to be designated as subsection (1)) insert:

- (2) Without limiting the generality of subsection (1), the regulations may—
 - 10 (a) prescribe forms for the purposes of this Act; and
 - (b) prescribe, or provide for the calculation of, costs, fees or charges for the purposes of this Act; and
 - (c) exempt any person or class of persons from the obligation to pay any costs, fees or charges so prescribed; and
 - 15 (d) prescribe penalties, not exceeding \$5 000, for breach of, or non-compliance with, a regulation.
- (3) The regulations may—
 - 20 (a) be of general or limited application; and
 - (b) make different provision according to the persons, things or circumstances to which they are expressed to apply; and
 - (c) provide that a specified provision of this Act does not apply, or applies with prescribed variations, to any person, circumstance or situation (or person, circumstance or situation of a prescribed class) specified by the regulations, subject to any condition to which the regulations are expressed to be subject; and
 - 25 (d) provide that any matter or thing is to be determined, dispensed with, regulated or prohibited according to the discretion of the Minister or another person.

30 Part 5—Amendment of *Intervention Orders (Prevention of Abuse) Act 2009*

9—Amendment of section 8—Meaning of abuse—domestic and non-domestic

Section 8(4)—after paragraph (o) insert:

- (oa) forcing the person to marry another person;
- 35 (ob) preventing the person from entering the person's place of residence;
- (oc) taking an invasive image (within the meaning of Part 5A of the *Summary Offences Act 1953*) of the person and threatening to distribute the image without the person's consent;

10—Amendment of section 21—Preliminary hearing and issue of interim intervention order

Section 21(9)—delete "hearing and determining an" and substitute:

proceedings to determine the

5 **11—Insertion of section 26A**

After section 26 insert:

26A—Interim variation where application made by police

(1) If—

- 10 (a) an application for variation of a final intervention order is made by a police officer under section 26; and
- (b) the applicant requests that the Court make an interim variation of the intervention order, pending final determination of the application,

15 the Court must hold a preliminary hearing as soon as practicable and without summoning the defendant to appear.

(2) If the application is made by telephone or other electronic means in accordance with rules of Court—

- 20 (a) the preliminary hearing may occur by oral questioning of the applicant and any other available witness or by other means contemplated by the rules; and
- (b) if the Court is not satisfied that it is an appropriate case for completing the preliminary hearing without requiring the personal attendance of the applicant, the Court may adjourn the hearing to a time and place fixed by the Court and inform the applicant of the time and place so fixed.

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(3) At the preliminary hearing, the Court may—

- 30 (a) issue an interim variation of the intervention order if it appears to the Court that there are grounds for issuing the variation; or
- (b) determine that the application should be dealt with under section 26 without the issuing of any interim variation order; or
- (c) dismiss the application (on any ground considered sufficient by the Court).

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- (4) The Court may issue an interim variation of the intervention order on the basis of evidence received in the form of an affidavit but, in that case—
- (a) the deponent must, if the defendant so requires, appear personally to give oral evidence of the matters referred to in the affidavit at any hearing held for the purpose of finally determining the application for variation of the intervention order; and
- 10 (b) if the deponent does not appear personally to give evidence as so required—the Court may not rely on the evidence contained in the affidavit for the purpose of finally determining the application.
- 15 (5) An interim variation of an intervention order issued by the Court must require the defendant to appear before the Court at a specified time and place (within 8 days after the date of the order or, if the Court will not be sitting at the place within that period, within 2 days after the Court next commences sitting at the place).
- 20 (6) An interim variation of an intervention order issued by the Court comes into force against the defendant when served on the defendant in accordance with this section.
- (7) For the purposes of subsection (6), an interim variation of an intervention order is served on the defendant if—
- (a) the order is served on the defendant personally; or
- 25 (b) the order is served on the defendant in some other manner authorised by the Court; or
- (c) the defendant is present in the Court when the order is made.
- 30 (8) On an interim variation of an intervention order issued by the Court being served on the defendant, the defendant will be taken to have been issued a summons to appear before the Court as specified in the order for the purposes of proceedings to finally determine the application for variation of the final intervention order under section 26.
- (9) The Principal Registrar must—
- 35 (a) give a copy of an interim variation of an intervention order issued by the Court to each person protected by the order; and
- (b) either—
- (i) notify the Commissioner of Police in writing of the prescribed details of the order; or
- 40 (ii) give a copy of the order to the Commissioner of Police.
- (10) The Principal Registrar must notify the relevant public sector agencies in writing of the prescribed details of an interim variation of an intervention order issued by the Court.

- (11) If a hearing is adjourned under this section, the Court need not be constituted at the adjourned hearing of the same judicial officer as ordered the adjournment.

12—Insertion of section 28A

5 After section 28 insert:

28A—Use of recorded evidence where application made by police

- 10 (1) This section applies in addition to, and does not derogate from, any other power of the Court to receive evidence or to determine the form in which evidence may be received (including evidence in the form of a recording).
- 15 (2) In any proceedings in which a police officer has applied for the making, or variation, of an intervention order—
- (a) the evidence of a relevant person may be admitted in the form of a recording made by a police officer if the Court is satisfied that the interests of justice require the admission of the evidence; and
- 20 (b) if evidence of a relevant person is admitted in the form of a recording pursuant to this section, the relevant person cannot be further examined, cross-examined or re-examined on the evidence so admitted without the permission of the Court.
- (3) Without limiting section 42, the regulations may—
- (a) prescribe additional requirements in relation to recordings under this section; and
- 25 (b) require that additional material be provided to the Court with a recording in certain circumstances (such as a transcript or translation); and
- (c) prescribe requirements in relation to access to, or service of, recordings and other material; and
- 30 (d) prescribe requirements in relation to custody of recordings; and
- (e) impose restrictions on copying or distribution of recordings.

- (4) In this section—

recording means an audio record or an audio visual record;

35 **relevant person**—a person is a relevant person in proceedings on an application for the making, or variation, of an intervention order if the intervention order is to be, or has been, issued for the protection of the person.

13—Insertion of section 29ZCA

Before section 29ZD insert:

29ZCA—Interpretation

In this Subdivision—

Court means—

- (a) the Magistrates Court of South Australia; or
- (b) the Youth Court of South Australia.

14—Amendment of section 31—Contravention of intervention order

(1) Section 31(2), penalty provision—delete the penalty provision and substitute:

Maximum penalty: \$10 000 or imprisonment for 2 years.

(2) Section 31—after subsection (2) insert:

(2aa) Despite any other provision of this section, if a person contravenes a term of an intervention order (other than a term of an intervention order imposed under section 13) and either—

- (a) the contravention constitutes a second or subsequent such contravention; or
- (b) the act or omission alleged to constitute the contravention involved physical violence or a threat of physical violence,

the person is guilty of an offence against this subsection.

Maximum penalty: \$20 000 or imprisonment for 4 years.

(2ab) In determining whether a contravention of an intervention order is a second or subsequent such contravention for the purposes of subsection (2aa), any previous offence against subsection (2) or (2aa) (whether committed before or after the commencement of this subsection) of which the defendant has been found guilty will be taken into account, but only if the previous offence was committed or alleged to have been committed within the period of 5 years immediately preceding the date on which the offence under consideration was allegedly committed.

(3) Section 31(2a)—delete "or (2)" and substitute:

, (2) or (2aa)

15—Amendment of section 42—Regulations

Section 42—after its present contents (now to be designated as subsection (1)) insert:

(2) Without limiting the generality of subsection (1), the regulations may—

- (a) prescribe forms for the purposes of this Act; and
- (b) prescribe, or provide for the calculation of, costs, fees or charges for the purposes of this Act; and

- (c) exempt any person or class of persons from the obligation to pay any costs, fees or charges so prescribed; and
 - (d) prescribe penalties, not exceeding \$5 000, for breach of, or non-compliance with, a regulation.
- 5 (3) The regulations may—
- (a) be of general or limited application; and
 - (b) make different provision according to the persons, things or circumstances to which they are expressed to apply; and
 - 10 (c) provide that a specified provision of this Act does not apply, or applies with prescribed variations, to any person, circumstance or situation (or person, circumstance or situation of a prescribed class) specified by the regulations, subject to any condition to which the regulations are expressed to be subject; and
 - 15 (d) provide that any matter or thing is to be determined, dispensed with, regulated or prohibited according to the discretion of the Court or the Minister or another person.