

# House of Assembly

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South Australia

## Statutes Amendment and Repeal (Aggravated Offences) Bill 2005

A BILL FOR

An Act to amend the *Criminal Law Consolidation Act 1935*, the *Criminal Law (Sentencing) Act 1988*, the *Juries Act 1927*, the *Summary Offences Act 1953* and the *Summary Procedure Act 1921*; and to repeal the *Kidnapping Act 1960*.

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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 and Repeal (Aggravated Offences) Act 2005*.

#### 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 *Criminal Law Consolidation Act 1935*

#### 4—Amendment of section 5—Interpretation

Section 5(1)—delete the definition of *cattle* and substitute:

*aggravated offence*—where a provision differentiates between the penalty for an aggravated offence and the penalty for a basic offence, the reference to an aggravated offence is a reference to the offence in its aggravated form (see section 5AA);

*basic offence*—where a provision differentiates between the penalty for an aggravated offence and the penalty for a basic offence, the reference to a basic offence is a reference to the offence in its non-aggravated form (see section 5AA);

## 5—Insertion of section 5AA

After section 5 insert:

### 5AA—Aggravated offences

- (1) An aggravated offence is an offence committed in the following circumstances:
  - (a) the offender committed the offence in the course of deliberately and systematically inflicting severe pain on the victim;
  - (b) the offender used, or threatened to use, an offensive weapon to commit, or when committing, the offence;
  - (c) the offender committed the offence against a police officer, prison officer or other law enforcement officer—
    - (i) knowing the victim to be acting in the course of his or her official duty; or
    - (ii) in retribution for something the offender knows or believes to have been done by the victim in the course of his or her official duty;
  - (d) the offender committed the offence—
    - (i) intending to prevent or dissuade the victim from taking legal proceedings or from pursuing a particular course in legal proceedings; or
    - (ii) in connection with the victim's conduct or future conduct (as party, witness or in any other capacity) in legal proceedings; or
    - (iii) in retribution against the victim for taking legal proceedings or for the victim's conduct (as party, witness or in any other capacity) in legal proceedings;
  - (e) the offender committed the offence knowing that the victim of the offence was, at the time of the offence, under the age of 12 years;
  - (f) the offender committed the offence knowing that the victim of the offence was, at the time of the offence, over the age of 60 years;
  - (g) the offender committed the offence knowing that the victim of the offence was—
    - (i) a spouse or former spouse of the offender; or

- (ii) a child of whom the offender, or a spouse or former spouse of the offender, is the parent or guardian; or
    - (iii) a child who normally or regularly resides with the offender or a spouse or former spouse of the offender;
  - (h) the offender committed the offence in company with 1 or more other persons;
  - (i) the offender abused a position of authority, or a position of trust, in committing the offence;
  - (j) the offender committed the offence knowing that the victim was, at the time of the offence, in a position of particular vulnerability because of physical or mental disability;
  - (k) in the case of an offence against the person—
    - (i) the victim was, to the knowledge of the offender, in a position of particular vulnerability at the time of the offence because of the nature of his or her occupation or employment; or
    - (ii) the victim was, at the time of the offence, engaged in a prescribed occupation or employment and the offender committed the offence knowing that the victim was then engaged in an occupation or employment and knowing the nature of the occupation or employment;
  - (l) the offender was, at the time of the offence, acting in contravention of an injunction or other order of a court (made in the exercise of either state or federal jurisdiction) and the offence lay within the range of conduct that the injunction or order was designed to prevent.
- (2) A person is taken to know a particular fact if the person, knowing of the possibility that it is true, is reckless as to whether it is true or not.
- (3) If a person is charged with an aggravated offence, the circumstances alleged to aggravate the offence must be stated in the instrument of charge.
- (4) If a jury finds a person guilty of an aggravated offence, and 2 or more aggravating factors are alleged in the instrument of charge, the jury must state which of the aggravating factors it finds to have been established.
- (5) In this section—  
**child** means a person under 18 years of age;  
**spouse** includes a de facto spouse.
- (6) This section does not prevent a court from taking into account, in the usual way, the circumstances of and surrounding the commission of an offence for the purpose of determining sentence.

**Example—**

- 1 A person is charged with a basic offence and the court finds that the offence was committed in circumstances that would have justified a charge of the offence in its aggravated form. In this case, the court may, in sentencing, take into account the circumstances of aggravation for the purpose of determining penalty but must (of course) fix a penalty within the limits appropriate to the basic offence.
- 2 A person is charged with an aggravated offence and the court finds a number (but not all) of the circumstances alleged in the instrument of charge to aggravate the offence have been established. In this case, the court may, in sentencing, take into account the established circumstances of and surrounding the aggravated offence (whether alleged in the instrument of charge or not) but must not (of course) take account of circumstances alleged in the instrument of charge that were not established.

**6—Amendment of section 19—Unlawful threats**

- (1) Section 19(1) and (2)—delete subsections (1) and (2) and substitute:

- (1) A person who—

- (a) threatens, without lawful excuse, to kill or endanger the life of another; and
- (b) intends to arouse a fear that the threat will be, or is likely to be, carried out, or is recklessly indifferent as to whether such a fear is aroused,

is guilty of an offence.

Maximum penalty:

- (a) for a basic offence—imprisonment for 10 years;
- (b) for an aggravated offence—imprisonment for 12 years.

- (2) A person who—

- (a) threatens, without lawful excuse, to cause harm to the person or property of another; and
- (b) intends to arouse a fear that the threat will be, or is likely to be, carried out, or is recklessly indifferent as to whether such a fear is aroused,

is guilty of an offence.

Maximum penalty:

- (a) for a basic offence—imprisonment for 5 years;
- (b) for an aggravated offence—imprisonment for 7 years.

- (2) Section 19—after subsection (3) insert:

- (4) In this section—

***harm***, in relation to a person, has the same meaning as in section 21.

### **7—Amendment of section 19AA—Unlawful stalking**

Section 19AA(2), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) for a basic offence—imprisonment for 3 years;
- (b) for an aggravated offence—imprisonment for 5 years.

### **8—Amendment of section 19A—Death and injury arising from reckless driving etc**

(1) Section 19A(4)(a)—delete "grievous bodily" and substitute:

serious

(2) Section 19A(4)(b)—delete "grievous bodily" and substitute:

serious

(3) Section 19A(4)(b)(i)—delete "4" and substitute:

5

(4) Section 19A(4)(b)(ii)—delete "6" and substitute:

7

(5) Section 19A(4)(c)—delete "2" and substitute:

5

(6) Section 19A(5)—delete "grievous bodily" and substitute:

serious

(7) Section 19A(7)—delete "bodily"

(8) Section 19A(10)—after the definition of *consumption* insert:

*harm* and *serious harm* have the same meanings as in section 21;

### **9—Substitution of heading to Part 3 Division 7**

Heading to Part 3 Division 7—delete the heading and substitute:

#### **Division 7—Assault**

### **10—Substitution of sections 20 to 27**

Sections 20 to 27—delete the sections and substitute:

#### **20—Assault**

- (1) A person commits an assault if the person, without the consent of another person (the *victim*)—
  - (a) intentionally applies force (directly or indirectly) to the victim; or
  - (b) intentionally makes physical contact (directly or indirectly) with the victim, knowing that the victim might reasonably object to the contact in the circumstances (whether or not the victim was at the time aware of the contact); or

- (c) threatens (by words or conduct) to apply force (directly or indirectly) to the victim and there are reasonable grounds for the victim to believe that—
    - (i) the person who makes the threat is in a position to carry out the threat and intends to do so; or
    - (ii) there is a real possibility that the person will carry out the threat; or
  - (d) does an act of which the intended purpose is to apply force (directly or indirectly) to the victim; or
  - (e) accosts or impedes another in a threatening manner.
- (2) However—
- (a) conduct that lies within limits of what would be generally accepted in the community as normal incidents of social interaction or community life cannot amount to an assault; and
  - (b) conduct that is justified or excused by law cannot amount to an assault.
- (3) A person who commits an assault is guilty of an offence.
- Maximum penalty:
- (a) for a basic offence—imprisonment for 2 years;
  - (b) for an aggravated offence (except one to which paragraph (c) applies)—imprisonment for 3 years;
  - (c) for an offence aggravated by the use of, or a threat to use, an offensive weapon—imprisonment for 4 years.
- (4) A person who commits an assault that causes harm to another is guilty of an offence.
- Maximum penalty:
- (a) for a basic offence—imprisonment for 3 years;
  - (b) for an aggravated offence (except one to which paragraph (c) applies)—imprisonment for 4 years;
  - (c) for an offence aggravated by the use of, or a threat to use, an offensive weapon—imprisonment for 5 years.

**Note—**

This offence replaces section 40 (assault occasioning actual bodily harm) as in force prior to the commencement of this subsection and, consequently, see *Coulter v The Queen* (1988) 164 CLR 350.

## Division 7A—Causing physical or mental harm

### 21—Harm

In this Division—

**cause**—a person causes harm if the person's conduct is the sole cause of the harm or substantially contributes to the harm;

If a victim suffers serious harm as a result of multiple acts of harm and those acts occur in the course of the same incident, or together constitute a single course of conduct, a person who commits any of the acts causing harm is taken to cause serious harm even though the harm caused by the act might not, if considered in isolation, amount to serious harm.

**harm** means physical or mental harm (whether temporary or permanent);

**lesser offence**, in relation to an offence against this Division, means—

- (a) in relation to an aggravated offence—the basic offence or some other offence against this Division for which a lesser maximum penalty is prescribed;
- (b) in any other case—some other offence against this Division for which a lesser maximum penalty is prescribed;

**mental harm** means psychological harm and does not include emotional reactions such as distress, grief, fear or anger unless they result in psychological harm;

**physical harm** includes—

- (a) unconsciousness;
- (b) pain;
- (c) disfigurement;
- (d) infection with a disease;

**recklessly**—a person is reckless in causing harm or serious harm to another if the person—

- (a) is aware of a substantial risk that his or her conduct could result in harm or serious harm (as the case requires); and
- (b) engages in the conduct despite the risk and without adequate justification;

**serious harm** means—

- (a) harm that endangers a person's life; or
- (b) harm that consists of, or results in, serious and protracted impairment of a physical or mental function; or
- (c) harm that consists of, or results in, serious disfigurement.



## **22—Conduct falling outside the ambit of this Division**

- (1) This Division does not apply to the conduct of a person who causes harm to another if the victim lawfully consented to the act causing the harm.
- (2) A lawful consent given on behalf of a person who is not of full age and capacity by a parent or guardian will be taken to be the consent of the person for whom the consent was given.
- (3) A person may consent to harm (including serious harm) if the nature of the harm and the purpose for which it is inflicted fall within limits that are generally accepted in the community.

### **Examples—**

- 1 A person may (within the limits referred to above) consent to harm that has a religious purpose (eg male circumcision but not female genital mutilation).
  - 2 A person may (within the limits referred to above) consent to harm that has a genuine therapeutic purpose (eg a person with 2 healthy kidneys may consent to donate 1 for the purpose of transplantation to someone with kidney disease).
  - 3 A person may (within the limits referred to above) consent to harm for the purpose of controlling fertility (eg a vasectomy or tubal ligation).
  - 4 A participant in a sporting or recreational activity may (within the limits referred to above) consent to harm arising from a risk inherent in the nature of the activity (eg a boxer may accept the risk of being knocked unconscious in the course of a boxing match and, hence, consent to that harm if it in fact ensues).
- (4) If a defendant's conduct lies within the limits of what would be generally accepted in the community as normal incidents of social interaction or community life, this Division does not apply to the conduct unless it is established that the defendant intended to cause harm.
  - (5) If the defendant's conduct caused only mental harm, this Division does not apply to the defendant's conduct unless—
    - (a) the defendant's conduct gave rise to a situation in which the victim's life or physical safety was endangered and the mental harm arose out of that situation; or
    - (b) the defendant's primary purpose was to cause such harm.

### **Examples—**

- 1 An examiner fails a student in an examination knowing that the student has been diagnosed with schizophrenia and that failure to pass is likely to precipitate a schizophrenic episode. The student in fact suffers such an episode.

- 2 An employer legally terminates an employee's employment knowing that the employee suffers from a mental illness and that the termination is likely to exacerbate the mental illness. The employee in fact suffers an exacerbation of the mental illness.

In both the above examples, it is not sufficient for the prosecution to prove that the defendant acted intentionally knowing that harm would inevitably, probably or possibly result from his or her act. It would be necessary for the prosecution to establish that the defendant wanted to cause harm and that desire was the sole or a significant motivation for the defendant's conduct.

### **23—Causing serious harm**

- (1) A person who causes serious harm to another, intending to cause serious harm, is guilty of an offence.

Maximum penalty:

- (a) for a basic offence—imprisonment for 20 years;  
(b) for an aggravated offence—imprisonment for 25 years.
- (2) If, however, the victim in a particular case suffers such serious harm that a penalty exceeding the maximum prescribed in subsection (1) is warranted, the court may, on application by the Director of Public Prosecutions, impose a penalty exceeding the prescribed maximum.
- (3) A person who causes serious harm to another, and is reckless in doing so, is guilty of an offence.

Maximum penalty:

- (a) for a basic offence—imprisonment for 15 years;  
(b) for an aggravated offence—imprisonment for 19 years.

### **24—Causing harm**

- (1) A person who causes harm to another, intending to cause harm, is guilty of an offence.

Maximum penalty:

- (a) for a basic offence—imprisonment for 10 years;  
(b) for an aggravated offence—imprisonment for 13 years.
- (2) A person who causes harm to another, and is reckless in doing so, is guilty of an offence.

Maximum penalty:

- (a) for a basic offence—imprisonment for 5 years;  
(b) for an aggravated offence—imprisonment for 7 years.

### **25—Alternative verdicts**

If —

- (a) a jury is not satisfied beyond reasonable doubt that a charge of an offence against this Division 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 a specified lesser offence or any 1 of a number of specified lesser offences; and
- (c) the jury is satisfied beyond reasonable doubt that the specified lesser offence, or a particular 1 of the specified lesser offences, has been established,

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

### **11—Amendment of section 29—Acts endangering life or creating risk of serious harm**

- (1) Section 29(1)—delete "shall be guilty of an indictable offence and liable to be imprisoned for a term not exceeding 15 years." and substitute:
  - is guilty of an offence.
  - Maximum penalty:
    - (a) for a basic offence—imprisonment for 15 years;
    - (b) for an aggravated offence—imprisonment for 18 years.
- (2) Section 29(2)(a)—delete "grievous bodily" and substitute:
  - serious
- (3) Section 29(2)—delete "shall be guilty of an indictable offence and liable to be imprisoned for a term not exceeding 10 years." and substitute:
  - is guilty of an offence.
  - Maximum penalty:
    - (a) for a basic offence—imprisonment for 10 years;
    - (b) for an aggravated offence—imprisonment for 12 years.
- (4) Section 29(3)(a)—delete "the person of"
- (5) Section 29(3)—delete "shall be guilty of an indictable offence and liable to be imprisoned for a term not exceeding 5 years." and substitute:
  - is guilty of an offence.
  - Maximum penalty:
    - (a) for a basic offence—imprisonment for 5 years;
    - (b) for an aggravated offence—imprisonment for 7 years.

### **12—Amendment of section 31—Possession of object with intent to kill or cause serious harm**

- (1) Section 31(1)(b)—delete "grievous bodily" and substitute:
  - serious
- (2) Section 31(2)—delete "the person of"

## 13—Substitution of Part 3 Division 9

Part 3 Division 9—delete Division 9 and substitute:

### Division 9—Kidnapping and unlawful child removal

#### 38—Interpretation

In this Division—

*child* means a person under the age of 18 years;

*detain*—detention is not limited to forcible restraint but extends to any means by which a person gets another to remain in a particular place or with a particular person or persons;

*take*—a person takes another if the person compels, entices or persuades the other to accompany him or her or a third person.

#### 39—Kidnapping

- (1) A person who takes or detains another person, without the other person's consent—
  - (a) with the intention of holding the other person to ransom or as a hostage; or
  - (b) with the intention of committing an indictable offence against the other person or a third person,

is guilty of an offence.

Maximum penalty:

- (a) for a basic offence—imprisonment for 20 years;
  - (b) for an aggravated offence—imprisonment for 25 years.
- (2) A consent to the taking or detention is to be ignored in the following cases:
  - (a) if the person apparently giving the consent is a child or mentally incapable of understanding the significance of the consent;
  - (b) if the consent was obtained by duress or deception.

#### 40—Unlawful removal of child from jurisdiction

- (1) A person who wrongfully takes or sends a child out of the jurisdiction is guilty of an offence.

Maximum penalty:

- (a) for a basic offence—imprisonment for 15 years;
- (b) for an aggravated offence—imprisonment for 19 years.

- (2) For the purposes of subsection (1), a person acts wrongfully if—
- (a) the person acts in the knowledge that a person who has the lawful custody of the child (either alone or jointly with someone else) does not consent to the child being taken or sent out of the jurisdiction; and

**Note—**

As a general rule, the parents of a child have joint custody of the child (see *Guardianship of Infants Act 1940*, section 4).

- (b) there is no judicial or statutory authority for the person's act.

## **14—Repeal of Part 3 Division 10**

Part 3 Division 10—delete Division 10

## **15—Amendment of section 49—Unlawful sexual intercourse**

- (1) Section 49(3)—delete "shall be guilty of an offence and liable to be imprisoned for a term not exceeding seven years." and substitute:

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

- (2) Section 49(5)—delete "shall be guilty of an offence and liable to be imprisoned for a term not exceeding seven years." and substitute:

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

- (3) Section 49(6)—delete "indictable"

- (4) Section 49(6), penalty provision—delete the penalty provision and substitute:

Maximum penalty: Imprisonment for 10 years.

## **16—Substitution of section 56**

Section 56—delete the section and substitute:

### **56—Indecent assault**

- (1) A person who indecently assaults another is guilty of an offence.

Maximum penalty:

- (a) for a basic offence—imprisonment for 8 years;  
(b) for an aggravated offence—imprisonment for 10 years.

- (2) If the victim of the offence was at the time of the offence under the age of 12 years, the offence is an aggravated offence and it is unnecessary for the prosecution to establish that the defendant knew of, or was reckless as to, the aggravating factor.

### **17—Amendment of section 59—Abduction of male or female person**

Section 59—delete "shall be guilty of an offence and liable to be imprisoned for a term not exceeding fourteen years." and substitute:

is guilty of an offence.

Maximum penalty:

- (a) for a basic offence—imprisonment for 14 years;
- (b) for an aggravated offence—imprisonment for 18 years.

### **18—Amendment of section 64—Procuring sexual intercourse**

Section 64—delete "shall be guilty of an offence and liable to be imprisoned for a term not exceeding seven years." and substitute:

is guilty of an offence.

Maximum penalty:

- (a) for a basic offence—imprisonment for 7 years;
- (b) for an aggravated offence—imprisonment for 10 years.

### **19—Amendment of section 137—Robbery**

- (1) Section 137(1), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) for a basic offence—imprisonment for 15 years;
- (b) for an aggravated offence—imprisonment for life.

- (2) Section 137(2)—delete subsection (2)

- (3) Section 137(3), example—delete "expressed in subsection (2)(a)" and substitute "that, where robbery is committed jointly, each participant in the offence is guilty of aggravated robbery"

### **20—Amendment of section 139—Deception**

Section 139, penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) for a basic offence—imprisonment for 10 years;
- (b) for an aggravated offence—imprisonment for 15 years.

### **21—Amendment of section 140—Dishonest dealings with documents**

Section 140(4), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) for a basic offence—imprisonment for 10 years;
- (b) for an aggravated offence—imprisonment for 15 years.

**22—Amendment of section 169—Serious criminal trespass—non-residential buildings**

- (1) Section 169(1), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) for a basic offence—imprisonment for 10 years;
- (b) for an aggravated offence—imprisonment for 20 years.

- (2) Section 169(2)—delete the subsection

**23—Amendment of section 170—Serious criminal trespass—places of residence**

- (1) Section 170(1), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) for a basic offence—imprisonment for 15 years;
- (b) for an aggravated offence—imprisonment for life.

- (2) Section 170(2)—delete subsection (2) and substitute:

- (2) A person who commits a serious criminal trespass in a place of residence is guilty of an aggravated offence if—
  - (a) any of the factors that generally give rise to aggravation of an offence are applicable;<sup>1</sup> or
  - (b) another person is lawfully present in the place of residence when the offence is committed and the offender knows of the other's presence or is reckless about whether anyone is in the place.

**Note—**

- 1 See section 5AA.

**24—Amendment of section 170A—Criminal trespass—places of residence**

Section 170A(1), penalty provision—delete the penalty provision and substitute:

Maximum penalty:

- (a) for a basic offence—imprisonment for 3 years;
- (b) for an aggravated offence—imprisonment for 5 years.

**Part 3—Amendment of *Criminal Law (Sentencing) Act 1988***

**25—Amendment of section 20A—Interpretation**

Section 20A(1), definition of *serious offence*, (b)(ii)—delete "robbery with violence" and substitute:

aggravated robbery

## Part 4—Amendment of *Juries Act 1927*

### 26—Amendment of section 7—Trial without jury

Section 7(4)—delete subsection (4) and substitute:

- (4) If a criminal trial proceeds without a jury under this section, the judge may make any decision that could have been made by a jury and such a decision will, for all purposes, have the same effect as a verdict of a jury.

## Part 5—Repeal of *Kidnapping Act 1960*

### 27—Repeal

The *Kidnapping Act 1960* is repealed.

## Part 6—Amendment of *Summary Offences Act 1953*

### 28—Substitution of section 7A

Section 7A—delete the section and substitute:

#### **7A—Obstructing or disturbing religious services etc**

- (1) A person who intentionally—
  - (a) obstructs or disturbs—
    - (i) a religious service; or
    - (ii) a wedding or funeral (whether secular or religious);or
  - (b) obstructs or disturbs persons proceeding to or from a religious service, wedding or funeral in a way that is calculated to be offensive and is related in some way to their attendance, or intention to attend, the religious service, wedding or funeral,

is guilty of an offence.

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

- (2) In this section—

***religion*** means any philosophy or system of belief that is generally recognised in the Australian community as being of a religious nature;

***religious service*** means a lawful assembly of the adherents of any religion for the purpose of prayer or any other form of religious observance.



## **Part 7—Amendment of *Summary Procedure Act 1921***

### **29—Amendment of section 4—Interpretation**

Section 4(1), definition of *offence of violence*, (b)—delete "injury" wherever occurring and substitute in each case:

harm

### **30—Amendment of section 5—Classification of offences**

Section 5(3)(a)(iii)(B)—delete subparagraph (B) and substitute:

- (B) an offence against section 24(2) of the *Criminal Law Consolidation Act 1935* (recklessly causing harm to another);