

Legislative Council—No 138

As introduced and read a first time, 24 August 2021

South Australia

**Statutes Amendment (Child Sexual Abuse)
Bill 2021**

A BILL FOR

An Act to amend the *Criminal Law Consolidation Act 1935*, the *Criminal Procedure Act 1921*, the *Evidence Act 1929*, the *Sentencing Act 2017*, the *Summary Offences Act 1953* and the *Young Offenders Act 1993*.

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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 (Child Sexual Abuse) Act 2021*.

2—Commencement

5 This Act comes 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 49—Unlawful sexual intercourse

Section 49—after subsection (5) insert:

(5a) It is a defence to a charge under subsection (5) if the accused was a person of a class described in subsection (9)(c) and proves that—

- 15 (a) the person with whom the accused is alleged to have had sexual intercourse was, on the date on which the offence is alleged to have been committed, of or above the age of 17 years; and
- 20 (b) the accused—
- (i) was, on the date on which the offence is alleged to have been committed, under the age of 18 years; or
 - (ii) believed on reasonable grounds that the person with whom the accused is alleged to have had sexual intercourse was of or above the age of 18 years.

5—Amendment of section 57—Consent no defence in certain cases

25 (1) Section 57(1)—delete "A person" and substitute:

Subject to subsection (1a), a person

(2) Section 57—after subsection (1) insert:

30 (1a) Despite subsection (1), the alleged victim's consent will be a defence to a charge of indecent assault if the accused was a person of a class described in subsection (4)(c) in relation to the alleged victim and proves that—

- (a) the alleged victim was, on the day on which the offence is alleged to have occurred, of or above the age of 17 years; and
- 35 (b) the accused—

- (i) was, on that day, under the age of 18 years; or
- (ii) believed on reasonable grounds that the alleged victim was, on that day, of or above the age of 18 years.

5 **6—Amendment of section 63B—Procuring child to commit indecent act etc**

Section 63B—after subsection (4) insert:

(4a) It is a defence to a charge under subsection (1)(a), (1)(b)(i) or (3) if the defendant was a person of a class described in subsection (6)(c) in relation to the child and proves that—

- 10 (a) the child was, on the date on which the offence is alleged to have been committed, of or above the age of 17 years; and
- (b) the defendant—
 - 15 (i) was, on the date on which the offence is alleged to have been committed, under the age of 18 years; or
 - (ii) believed on reasonable grounds that the child was of or above the age of 18 years.

7—Insertion of Part 3 Division 11B

After section 63D insert:

20 **Division 11B—Institutional and out of home care child sexual abuse**

64—Interpretation

In this Division—

adult means a person who is not a child;

child means a person under 18 years of age;

25 **institution** means—

- 30 (a) an entity (whether private or public) that operates facilities or provides services to children who are in the care, or under the supervision or control, of the institution and includes (without limitation) medical and religious institutions and any services or functions provided by persons as part of the duties of a medical practitioner or of a religious or spiritual vocation; or
- (b) an entity of a class prescribed by the regulations;

out of home care means—

- 35 (a) care provided to a child where—
 - (i) the child is under the guardianship or custody of the Chief Executive under the *Children and Young People (Safety) Act 2017*; and

- (ii) the care is provided by a person with whom the child is placed pursuant to section 84 of that Act; and
- (iii) the care is provided on a residential basis in premises other than the child's home; and
- (iv) the provider of the care receives, or may receive, payment, or financial or other assistance, in relation to the care provided; or

- (b) any other care of a kind declared by the regulations to be included in the ambit of this definition;

prescribed person means an adult who—

- (a) is an employee of an institution, including a person who—
 - (i) is a self-employed person who constitutes, or who carries out work for, an institution; or
 - (ii) carries out work for an institution under a contract for services; or
 - (iii) carries out work as a minister of religion or as part of the duties of a religious or spiritual vocation; or
 - (iv) undertakes practical training with an institution as part of an educational or vocational course; or
 - (v) carries out work as a volunteer for an institution; or
 - (vi) is of a class prescribed by the regulations; or
- (b) provides out of home care;

sexual abuse of a child includes any unlawful conduct of a sexual nature committed to, or in relation to, a child.

64A—Failure to report suspected child sexual abuse

- (1) A prescribed person is guilty of an offence if the person knows, suspects or should have suspected that another person (the ***abuser***)—
 - (a) has previously engaged in the sexual abuse of a child while an employee of the institution or, if the prescribed person provides out of home care, while also providing out of home care, and—
 - (i) the child is still under the age of 18 years; or
 - (ii) the abuser is still an employee of the institution or another institution or still provides out of home care; or
 - (iii) the sexual abuse occurred during the preceding 10 year period; or

(b) is an employee of the institution or, if the prescribed person provides out of home care, is providing out of home care, and is engaging, or is likely to engage, in the sexual abuse of a child,

5 and the prescribed person refuses or fails to report that to the police.
Maximum penalty: Imprisonment for 3 years.

10 (2) For the purposes of subsection (1), a defendant should have suspected that another person has engaged, is engaging or is likely to engage in sexual abuse of a child if a reasonable person in the defendant's circumstances would have held the relevant suspicion and the defendant's failure to hold that suspicion, if judged by the standard appropriate to a reasonable person in the defendant's position, amounts to criminal negligence.

15 (3) A prescribed person may be guilty of an offence under this section in respect of any knowledge, suspicion, or circumstances in which they should have held a suspicion, occurring before the commencement of this section, but in such a case the person will not be guilty of the offence unless—

20 (a) the relevant child is still under the age of 18 years and is still in the care, or under the supervision or control, of the institution or is still in out of home care; or

(b) the abuser is still an employee of the institution or another institution or still provides out of home care.

25 (4) It is a defence to a charge of an offence under this section if the defendant had a reasonable excuse for the refusal or failure to report.

30 (5) Without limiting the circumstances in which a person might be found to have had a reasonable excuse for a refusal or failure to report, a person will be taken to have had a reasonable excuse if the person refused or failed to report the matter to the police because the person believed on reasonable grounds that the matter had already been reported to the police or had been reported under Chapter 5 Part 1 of the *Children and Young People (Safety) Act 2017*.

35 (6) If a prescribed person reports a matter to the police, in good faith, believing that the report was required under this section—

(a) no civil or criminal liability lies against the person for making the report; and

40 (b) the person cannot be held to have breached any code of professional etiquette or ethics, or to have departed from any acceptable form of professional conduct, for making the report.

(7) Sections 163 (other than section 163(1)(ab)) and 165 of the *Children and Young People (Safety) Act 2017* apply in relation to a prescribed person who reports a matter to the police under this section as if they had provided the information under Chapter 5 Part 1 of that Act.

65—Failure to protect child from sexual abuse

- (1) A prescribed person is guilty of an offence if—
- (a) the prescribed person knows that there is a substantial risk that another person (the **abuser**) who is also an employee of the institution or, if the prescribed person provides out of home care, who is also a provider of out of home care, will engage in the sexual abuse of a child—
 - (i) who is under 17 years of age; or
 - (ii) in relation to whom the abuser is in a position of authority; and
 - (b) the prescribed person has the power or responsibility to reduce or remove that risk but negligently fails to do so.

Maximum penalty: Imprisonment for 15 years.

- (2) For the avoidance of doubt, it is not necessary for the prosecution to prove that sexual abuse of a child occurred to make out an offence against this section.
- (3) For the purposes of this section, a person is in **a position of authority** in relation to a person under the age of 18 years (the **child**) if—
- (a) the person is a teacher and the child is a pupil of the teacher or of a school at which the teacher works; or
 - (b) the person is a parent, step-parent, guardian or foster parent of the child or the de facto partner or domestic partner of a parent, step-parent, guardian or foster parent of the child; or
 - (c) the person provides religious, sporting, musical or other instruction to the child; or
 - (d) the person is a religious official or spiritual leader (however described and including lay members and whether paid or unpaid) in a religious or spiritual group attended by the child; or
 - (e) the person is a health professional or social worker providing professional services to the child; or
 - (f) the person is responsible for the care of the child and the child has a cognitive impairment; or
 - (g) the person is employed or providing services in a correctional institution (within the meaning of the *Correctional Services Act 1982*) or a training centre (within the meaning of the *Young Offenders Act 1993*), or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; or

(h) the person is employed or providing services in a licensed children's residential facility (within the meaning of the *Children and Young People (Safety) Act 2017*), or a residential care facility or other facility established under section 36 of the *Family and Community Services Act 1972*, or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; or

(i) the person is an employer of the child or other person who has the authority to determine significant aspects of the child's terms and conditions of employment or to terminate the child's employment (whether the child is being paid in respect of that employment or is working in a voluntary capacity).

8—Amendment of section 73—Proof of certain matters

Section 73—after subsection (2) insert:

(2a) Subsection (2) applies to proceedings for an offence regardless of whether the offence was allegedly committed before or after the commencement of that subsection.

Part 3—Amendment of *Criminal Procedure Act 1921*

9—Amendment of section 111—Committal brief etc

Section 111(6)—after paragraph (c) insert:

or

(d) the victim of an alleged sexual offence; or

(e) the victim of an alleged offence involving domestic abuse (within the meaning of the *Intervention Orders (Prevention of Abuse) Act 2009*).

10—Amendment of section 114—Taking evidence at committal proceedings

Section 114(3)—after "victim of an alleged sexual offence," insert:

the victim of an alleged offence involving domestic abuse (within the meaning of the *Intervention Orders (Prevention of Abuse) Act 2009*),

11—Amendment of section 157—Right of appeal in criminal cases

(1) Section 157(1)—after paragraph (d) insert:

(e) subject to subsection (3), the Director of Public Prosecutions may, with the permission of the Full Court, appeal against an interlocutory judgment.

(2) Section 157—after subsection (2) insert:

(3) The Full Court may only grant permission for an appeal under subsection (1)(e) if satisfied that—

- 5
- (a) the interlocutory judgment destroys or substantially weakens the prosecution case in respect of any charge and, if correct, is likely to lead to abandonment of that charge; or
 - (b) it is otherwise in the interests of justice to do so.

Part 4—Amendment of *Evidence Act 1929*

12—Amendment of section 4—Interpretation

10 Section 4(1)—after the definition of *child* insert:

child sexual offence means a sexual offence committed in relation to a child;

13—Amendment of section 12AB—Pre-trial special hearings

(1) Section 12AB—after subsection (11) insert:

15 (11a) If an order has been made for a pre-trial special hearing in relation to a witness in a trial of a charge of a child sexual offence, the court may also (at the time of making that order, at the pre-trial special hearing or at any other time) give 1 or more of the following directions:

- 20
- (a) a direction about the manner of questioning the witness;
 - (b) a direction about the duration of questioning the witness;
 - (c) a direction about the questions that may or may not be put to the witness;
 - (d) if there is more than 1 accused, a direction about the allocation among the accused of the topics about which the witness may be asked;
 - (e) a direction about the use of models, plans, body maps or similar aids to help communicate a question or an answer;
 - (f) a direction that if a party intends to lead evidence that contradicts or challenges the evidence of the witness or that otherwise discredits the witness, the party is not obliged to put that evidence in its entirety to the witness in cross-examination;
 - (g) any other direction the court thinks necessary for the fair and efficient conduct of the proceeding.
- 25
- 30

35 (2) Section 12AB(14), definition of *witness to whom this section applies*—after paragraph (b) insert:

or

- (c) in the case of a trial of a charge of a child sexual offence, any of the following witnesses:

- (i) an alleged victim of the offence (regardless of their age at the time of the trial);
- (ii) a child;
- (iii) a vulnerable witness;
- (iv) any other witness if the court is satisfied that they should be allowed to give evidence in a manner contemplated by this section; or

- (d) in the case of a trial of an offence involving domestic abuse (within the meaning of the *Intervention Orders (Prevention of Abuse) Act 2009*)—an alleged victim of the domestic abuse.

14—Amendment of section 13A—Special arrangements for protecting vulnerable witnesses when giving evidence in criminal proceedings

Section 13A—after subsection (13) insert:

- (14) If an order has been made under this section in relation to a witness in a trial of a charge of a child sexual offence, the court may also (at the time of making that order or at any other time) give 1 or more of the following directions:
 - (a) a direction about the manner of questioning the witness;
 - (b) a direction about the duration of questioning the witness;
 - (c) a direction about the questions that may or may not be put to the witness;
 - (d) if there is more than 1 accused, a direction about the allocation among the accused of the topics about which the witness may be asked;
 - (e) a direction about the use of models, plans, body maps or similar aids to help communicate a question or an answer;
 - (f) a direction that if a party intends to lead evidence that contradicts or challenges the evidence of the witness or that otherwise discredits the witness, the party is not obliged to put that evidence in its entirety to the witness in cross-examination;
 - (g) any other direction the court thinks necessary for the fair and efficient conduct of the proceeding.

15—Amendment of section 13C—Court's power to make audio visual record of evidence of vulnerable witnesses in criminal proceedings

Section 13C(1)(a)—delete "is a child of or under the age of 16 years and who is the alleged victim of a sexual offence" and substitute:

is the alleged victim of a child sexual offence

16—Insertion of sections 29B and 29C

After section 29A insert:

29B—Prohibited direction in relation to doubts regarding truthfulness or reliability of victim's evidence

- 5 (1) In a trial in which more than one offence is charged, the trial judge must not direct the jury that if the jury doubts the truthfulness or reliability of the victim's evidence in relation to a charge, that doubt must be taken into account in assessing the truthfulness or reliability of the victim's evidence generally or in relation to other charges.
- 10 (2) Any rule of common law under which a trial judge is required or permitted to give the jury a direction referred to in subsection (1) is abolished.

29C—Evidence of opinions based on specialised knowledge of child behaviour etc

- 15 (1) Despite any other provision of this Act, or any other Act or law, if a person has specialised knowledge, based on the person's training, study or experience, of child development and child behaviour then evidence of that person's opinion that is wholly or substantially based on that specialised knowledge is admissible in proceedings relating to sexual abuse of a child.
- 20 (2) A reference in subsection (1) to an opinion of a person includes a reference to an opinion relating to—
- (a) the development and behaviour of children generally; or
- (b) the development and behaviour of children who have been
- 25 victims of sexual offences, or offences similar to sexual offences.
- (3) In this section—
- sexual abuse* of a child includes any unlawful conduct of a sexual nature committed to, or in relation to, a child.

30 17—Amendment of section 34P—Evidence of discreditable conduct

Section 34P(2)(a)—delete "substantially"

18—Insertion of Part 7 Division 11

After section 67J insert:

Division 11—Religious confession

35 67K—No confessional privilege in child sexual abuse matters

- (1) The fact that information was gained by a person during, or in connection with, a religious confession does not prevent or otherwise affect the giving of evidence as to, or other disclosure of, the information for the purpose of criminal proceedings for a child sexual offence or civil proceedings for child sexual abuse.
- 40

(2) In this section—

civil proceedings for child sexual abuse means any civil proceedings in which a party is alleging that unlawful conduct of a sexual nature was committed to, or in relation to, a child;

5 *religious confession* means a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the member's church or religious denomination.

Part 5—Amendment of *Sentencing Act 2017*

10 19—Amendment of section 26—Sentencing for multiple offences

Section 26—after subsection (2) insert:

(2a) If any of the offences in respect of which a single sentence is being imposed under this section—

(a) involve different victims; or

15 (b) were committed on different occasions,

the court must indicate the sentence that would have been imposed in respect of each such offence had this provision not been applied.

20—Amendment of heading to Part 3 Division 6

Heading to Part 3 Division 6—delete "paedophilia" and substitute:

20 child sexual abuse

21—Substitution of section 68

Section 68—delete the section and substitute:

68—Sentencing standards for offences involving child sexual abuse

25 (1) A court that is sentencing an offender in relation to a child sexual offence must have regard to the sentencing practices, principles and guidelines applicable when the sentence is imposed rather than when the offence was committed.

30 (2) Nothing in this section requires a court to apply a maximum penalty that is greater than the maximum penalty that was applicable at the time the offence was committed.

(3) In this section—

child sexual offence means a sexual offence committed in relation to a person under the age of 18 years;

35 *sexual offence* has the same meaning as in section 28.

Part 6—Amendment of *Summary Offences Act 1953*

22—Amendment of section 74EA—Application and interpretation

(1) Section 74EA—after subsection (1) insert:

5 (1a) This Division also applies to a person (not being a person described in subsection (1)) who is being interviewed as the victim of an alleged child sexual offence.

(2) Section 74EA(2)—before the definition of *serious offence against the person* insert:

child sexual offence means a sexual offence committed in relation to a person under the age of 18 years;

Part 7—Amendment of *Young Offenders Act 1993*

23—Insertion of section 19A

After section 19 insert:

19A—Proceedings for child sexual offences

15 (1) If committal proceedings take place in the Court for a charge of a child sexual offence—

(a) an audio visual record of the evidence of the alleged victim may be admitted in the proceedings if the recording—

(i) is of evidence given by the alleged victim in earlier criminal proceedings; or

20 (ii) has been made pursuant to Part 17 Division 3 of the *Summary Offences Act 1953* and—

25 (A) the Court is satisfied as to the alleged victim's capacity to give sworn or unsworn evidence at the time the recording was made; and

(B) the Court is satisfied that the defendant has been given a reasonable opportunity to view the recording; and

30 (b) despite any other Act or law, the alleged victim cannot be required to give oral evidence for the purposes of the committal proceedings except evidence in the form of such an audio visual record.

(2) In this section—

35 *child sexual offence* means a sexual offence committed in relation to a person under the age of 18 years;

sexual offence has the same meaning as in the *Evidence Act 1929*;