

Legislative Council

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South Australia

Statutes Amendment (Stealthing and Consent) Bill 2022

A BILL FOR

An Act to amend the *Criminal Law Consolidation Act 1935*, the *Criminal Procedure Act 1921* and the *Evidence Act 1929*.

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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 (Stealthing and Consent) Act 2022*.

2—Commencement

This Act comes into operation on a day to be fixed by proclamation.

Part 2—Amendment of *Criminal Law Consolidation Act 1935*

3—Amendment of section 46—Consent to sexual activity

Section 46(3)—after paragraph (g) insert:

- (ga) the person agrees to engage in the activity because of a misrepresentation (whether express or implied) as to the use of a condom during the activity; or

Part 3—Amendment of *Criminal Procedure Act 1921*

4—Amendment of section 124—Expert evidence and evidence of alibi

Section 124(8)—delete subsection (8) and substitute:

- (8) The defendant must provide to the prosecution a copy of any report obtained by the defendant from a person proposed to be called to give expert evidence at the trial if—
 - (a) the expert evidence is of a kind referred to in section 34N(2a) of the *Evidence Act 1929*; or
 - (b) the court has, on application by the prosecution, made an order requiring the defendant to provide a copy of the report to the prosecution.

5—Transitional provision

The amendments made by this Part apply to proceedings relating to an offence that are commenced after the commencement of this Part, regardless of when the offence occurred.

Part 4—Amendment of *Evidence Act 1929*

6—Amendment of section 34N—Directions relating to consent in certain sexual cases

(1) Section 34N(1)—delete subsection (1) and substitute:

- (1) Subject to subsection (2), in a trial of a charge of a sexual offence where a lack of consent of a person in relation to a particular sexual activity is in issue, the judge must direct the jury as to the following matters:
 - (a) that there is no typical or normal response to non-consensual sexual activity and the person is not to be regarded as having consented to the sexual activity the subject of the charge merely because—
 - (i) the person did not say or do anything to indicate that he or she did not freely and voluntarily agree to the sexual activity; or

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- (ii) the person did not protest to or physically resist the sexual activity; or
 - (iii) the person was not physically injured in the course of, or in connection with, the sexual activity; or
 - (iv) 1 or more of the following circumstances apply:
 - (A) the person freely and voluntarily agreed to sexual activity of a different kind with the defendant;
 - (B) the person had freely and voluntarily agreed to sexual activity (whether or not of the same kind) with the defendant on an earlier occasion;
 - (C) the person had, on that or some other occasion, freely and voluntarily agreed to sexual activity (whether or not of the same kind) with another person;
- (b) that non-consensual sexual activity can occur in many different circumstances and is not always perpetrated by a stranger in a public area;
- (c) that non-consensual sexual activity can occur between different kinds of people including—
- (i) people who know one another; or
 - (ii) people who are married to one another; or
 - (iii) people who are in an established relationship with one another,
- and is not less serious just because the people involved have any such relationship;
- (d) that—
- (i) trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence but others may not; and
 - (ii) the presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth about an alleged sexual offence;
- (e) that it should not be assumed that a person consented to sexual activity because the person—
- (i) wore particular clothing or had a particular appearance; or
 - (ii) consumed alcohol or any other drug; or

(iii) was present in a particular location (either generally or at a particular time).

(2) Section 34N—after subsection (2) insert:

(2a) Despite any other provision of this Act, or any other Act or law, a court may, in a trial of a charge of a sexual offence, receive expert evidence about any matter referred to in this section.

7—Transitional provision

The amendments made by this Part apply to proceedings relating to an offence that are commenced after the commencement of this Part, regardless of when the offence occurred.