

South Australia

Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008

An Act to amend the *Criminal Law Consolidation Act 1935*; and to make related amendments to the *Child Sex Offenders Registration Act 2006*, the *Correctional Services Act 1982*, the *Criminal Law (Sentencing) Act 1988*, the *Evidence Act 1929* 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 *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008*.

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

(1) Section 5(1)—after the definition of *basic offence* insert:

bestiality means sexual activity between a person and an animal;

(2) Section 5(1), definition of *sexual intercourse*, (a)—delete paragraph (a) and substitute:

(a) penetration of a person's vagina, labia majora or anus by any part of the body of another person or by any object;

(3) Section 5(1), definition of *sexual intercourse*—after paragraph (c) insert:

and includes a continuation of such activity;

(4) Section 5—after subsection (2) insert:

- (3) For the purposes of this Act, a reference to a breast, vagina, labia majora, penis or other sexual organ includes a reference to a surgically constructed or altered breast, vagina, labia majora, penis or sexual organ (as the case may be).

5—Substitution of section 48

Section 48—delete the section and substitute:

46—Consent to sexual activity

- (1) In this section—
sexual activity includes sexual intercourse.
- (2) For the purposes of this Division, a person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity.
- (3) Without limiting subsection (2), a person is taken not to freely and voluntarily agree to sexual activity if—
- (a) the person agrees because of—
 - (i) the application of force or an express or implied threat of the application of force or a fear of the application of force to the person or to some other person; or
 - (ii) an express or implied threat to degrade, humiliate, disgrace or harass the person or some other person; or
 - (b) the person is unlawfully detained at the time of the activity; or
 - (c) the activity occurs while the person is asleep or unconscious; or
 - (d) the activity occurs while the person is intoxicated (whether by alcohol or any other substance or combination of substances) to the point of being incapable of freely and voluntarily agreeing to the activity; or
 - (e) the activity occurs while the person is affected by a physical, mental or intellectual condition or impairment such that the person is incapable of freely and voluntarily agreeing; or
 - (f) the person is unable to understand the nature of the activity; or
 - (g) the person agrees to engage in the activity with a person under a mistaken belief as to the identity of that person; or
 - (h) the person is mistaken about the nature of the activity.

Example—

A person is taken not to freely and voluntarily agree to sexual activity if the person agrees to engage in the activity under the mistaken belief that the activity is necessary for the purpose of medical diagnosis, investigation or treatment, or for the purpose of hygiene.

47—Reckless indifference

For the purposes of this Division, a person is *recklessly indifferent* to the fact that another person does not consent to an act, or has withdrawn consent to an act, if he or she—

- (a) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility; or
- (b) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed; or
- (c) does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.

48—Rape

- (1) A person (the *offender*) is guilty of the offence of rape if he or she engages, or continues to engage, in sexual intercourse with another person who—

- (a) does not consent to engaging in the sexual intercourse; or
- (b) has withdrawn consent to the sexual intercourse,

and the offender knows, or is recklessly indifferent to, the fact that the other person does not so consent or has so withdrawn consent (as the case may be).

Maximum penalty: Imprisonment for life.

- (2) A person (the *offender*) is guilty of the offence of rape if he or she compels a person to engage, or to continue to engage, in—

- (a) sexual intercourse with a person other than the offender; or
- (b) an act of sexual self-penetration; or
- (c) an act of bestiality,

when the person so compelled does not consent to engaging in the sexual intercourse or act, or has withdrawn consent to the sexual intercourse or act, and the offender knows, or is recklessly indifferent to, the fact that the person does not so consent or has so withdrawn consent (as the case may be).

Maximum penalty: Imprisonment for life.

(3) In this section—

compels—a person compels another person if he or she controls or influences the other person's conduct by means that effectively prevent the other person from exercising freedom of choice;

sexual self-penetration means the penetration by a person of the person's vagina, labia majora or anus by any part of the body of the person or by any object.

48A—Compelled sexual manipulation

(1) A person (the **offender**) is guilty of an offence if he or she, for a prurient purpose, compels a person to engage, or to continue to engage, in—

- (a) an act of sexual manipulation of the offender; or
- (b) an act of sexual manipulation of a person other than the offender; or
- (c) an act of sexual self-manipulation,

when the person so compelled does not consent to engaging in the act, or has withdrawn consent to the act, and the offender knows, or is recklessly indifferent to, the fact that the person does not so consent or has so withdrawn consent (as the case may be).

Maximum penalty:

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

(2) In this section—

compels—a person compels another person if he or she controls or influences the other person's conduct by means that effectively prevent the other person from exercising freedom of choice;

prurient purpose—a person acts for a prurient purpose if the person acts with the intention of satisfying his or her own desire for sexual arousal or gratification or of providing sexual arousal or gratification for someone else;

sexual manipulation means the manipulation by a person of another person's genitals or anus (whether or not including sexual intercourse);

sexual self-manipulation means the manipulation by a person of his or her genitals or anus (whether or not including sexual self-penetration, within the meaning of section 48).

6—Amendment of section 49—Unlawful sexual intercourse

Section 49—delete subsection (5) and substitute:

- (5) A person who, being in a position of authority in relation to a person under the age of 18 years, has sexual intercourse with that person is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

- (5a) For the purposes of subsection (5), a person is in *a position of authority* in relation to a person under the age of 18 years (the *child*) if the person is—

- (a) a teacher (within the meaning of the *Education Act 1972*) engaged in the education of the child; or
- (b) a foster parent, step-parent or guardian of the child; or
- (c) a religious official or spiritual leader (however described and including lay members and whether paid or unpaid) providing pastoral care or religious instruction to the child; or
- (d) a medical practitioner, psychologist or social worker providing professional services to the child; or
- (e) a person 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 any other person engaged in the administration of those Acts, acting in the course of his or her duties in relation to the child; or
- (f) 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).

7—Insertion of section 50

After section 49 insert:

50—Persistent sexual exploitation of a child

- (1) A adult person who, over a period of not less than 3 days, commits more than 1 act of sexual exploitation of a particular child under the prescribed age is guilty of an offence.

Maximum penalty: Imprisonment for life.

- (2) For the purposes of this section, a person commits an act of sexual exploitation of a child if the person commits an act in relation to the child of a kind that could, if it were able to be properly particularised, be the subject of a charge of a sexual offence.

(3) If—

- (a) at any time when an act of sexual exploitation of a child was allegedly committed the child was at least 16 years of age; and
- (b) the defendant proves that he or she believed on reasonable grounds that the child was of or over the prescribed age at that time,

the act of sexual exploitation is not to be regarded for the purposes of an offence against this section.

(4) Despite any other Act or rule of law, the following provisions apply in relation to the charging of a person on an information for an offence against this section:

- (a) subject to this subsection, the information must allege with sufficient particularity—
 - (i) the period during which the acts of sexual exploitation allegedly occurred; and
 - (ii) the alleged conduct comprising the acts of sexual exploitation;
- (b) the information must allege a course of conduct consisting of acts of sexual exploitation but need not—
 - (i) allege particulars of each act with the degree of particularity that would be required if the act were charged as an offence under a different section of this Act; or
 - (ii) identify particular acts of sexual exploitation or the occasions on which, places at which or order in which acts of sexual exploitation occurred;
- (c) the person may, on the same information, be charged with other offences, provided that any sexual offence allegedly committed by the person—
 - (i) in relation to the child who is allegedly the subject of the offence against this section; and
 - (ii) during the period during which the person is alleged to have committed the offence against this section,must be charged in the alternative.

(5) A person who has been tried and convicted or acquitted on a charge of persistent sexual exploitation of a child may not be convicted of a sexual offence against the same child alleged to have been committed during the period during which the person was alleged to have committed the offence of persistent sexual exploitation of the child.

- (6) This section applies in relation to acts of sexual exploitation of a child whether they were committed before or after the commencement of this section.
- (7) In this section—
- prescribed age***, in relation to a child, means—
- (a) in the case of a person who is in a position of authority in relation to the child—18 years;
 - (b) in any other case—17 years;
- sexual offence*** means—
- (a) an offence against Division 11 (other than sections 59 and 61) or sections 63B, 66, 69 or 72; or
 - (b) an attempt to commit, or assault with intent to commit, any of those offences; or
 - (c) a substantially similar offence against a previous enactment.
- (8) For the purposes of this section, a person is in ***a position of authority*** in relation to a child if the person is—
- (a) a teacher (within the meaning of the *Education Act 1972*) engaged in the education of the child; or
 - (b) a foster parent, step-parent or guardian of the child; or
 - (c) a religious official or spiritual leader (however described and including lay members and whether paid or unpaid) providing pastoral care or religious instruction to the child; or
 - (d) a medical practitioner, psychologist or social worker providing professional services to the child; or
 - (e) a person 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 any other person engaged in the administration of those Acts, acting in the course of his or her duties in relation to the child; or
 - (f) 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 57—Consent no defence in certain cases

- (1) Section 57(1)—delete subsection (1) and substitute:
- (1) A person under the age of 18 years will be taken not to be capable of consenting to an indecent assault committed by a person who is in a position of authority in relation to the person.

(2) Section 57—after subsection (3) insert:

- (4) For the purposes of subsection (1), a person is in *a position of authority* in relation to a person under the age of 18 years (the *child*) if the person is—
- (a) a teacher (within the meaning of the *Education Act 1972*) engaged in the education of the child; or
 - (b) a foster parent, step-parent or guardian of the child; or
 - (c) a religious official or spiritual leader (however described and including lay members and whether paid or unpaid) providing pastoral care or religious instruction to the child; or
 - (d) a medical practitioner, psychologist or social worker providing professional services to the child; or
 - (e) a person 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 any other person engaged in the administration of those Acts, acting in the course of his or her duties in relation to the child; or
 - (f) 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).

9—Substitution of section 69

Section 69—delete the section and substitute:

69—Bestiality

A person who commits bestiality is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

Note—

Bestiality is defined in section 5.

10—Substitution of section 72

Section 72—delete the section and substitute:

72—Incest

- (1) A person who has sexual intercourse with a close family member is guilty of an offence.
Maximum penalty: Imprisonment for 10 years.
- (2) It is a defence to a charge of an offence against this section for the accused to prove that he or she did not know, and could not reasonably have been expected to know, that the person was a close family member.

(3) In this section—

close family member, in relation to a person, means—

- (a) a parent; or
- (b) a child; or
- (c) a sibling (including a half-brother or half-sister); or
- (d) a grandparent; or
- (e) a grandchild,

of the person, but does not include such a family member related to the person by marriage or adoption alone.

11—Amendment of section 73—Proof of certain matters

Section 73(5)—delete subsection (5)

12—Repeal of section 74

Section 74—delete the section

13—Amendment of section 75—Alternative verdict on charge of rape etc

Section 75—after "rape" wherever occurring insert:

, compelled sexual manipulation

14—Amendment of section 76—Corroborative evidence in certain cases

Section 76—delete "64,"

15—Amendment of section 268—Mental element of offence to be presumed in certain cases

Section 268(3)—delete subsection (3) and substitute:

- (3) However, subsection (2) does not extend to—
- (a) a case in which it is necessary to establish that the defendant foresaw the consequences of his or her conduct; or
 - (b) except where the alleged offence is an offence against section 48 (rape)—a case in which it is necessary to establish that the defendant was aware of the circumstances surrounding his or her conduct.

Example—

A, whose consciousness is impaired by self-induced intoxication to the point of criminal irresponsibility at the time of the alleged offence, beats B up and B dies of the injuries. In this case, A could be convicted of manslaughter but not of murder (because A is taken to have intended to do the act that results in death but not the death).

16—Amendment of section 278—Joinder of charges

- (1) Section 278—after subsection (2) insert:
- (2a) Despite subsection (2) and any rule of law to the contrary, if, in accordance with this Act, 2 or more counts charging sexual offences involving different alleged victims are joined in the same information, the following provisions apply:
- (a) subject to paragraph (b), those counts are to be tried together;
 - (b) the judge may order a separate trial of a count relating to a particular alleged victim if (and only if) evidence relating to that count is not admissible in relation to each other count relating to a different alleged victim;
 - (c) in determining admissibility for the purposes of paragraph (b)—
 - (i) evidence relating to the count may be admissible in relation to another count concerning a different alleged victim if it has a relevance other than mere propensity; and
 - (ii) the judge is not to have regard to—
 - (A) whether or not there is a reasonable explanation in relation to the evidence consistent with the innocence of the defendant; or
 - (B) whether or not the evidence may be the result of collusion or concoction.
- (2) Section 278—after subsection (3) insert:
- (4) In this section—
sexual offence means—
- (a) an offence against section 48, 48A, 49, 50, 56, 58, 63B, 68 or 72; or
 - (b) an attempt to commit, or an assault with intent to commit, any of those offences; or
 - (c) a substantially similar offence against a previous enactment.

Schedule 1—Related amendments and transitional provisions

Part 1—Related amendment to *Child Sex Offenders Registration Act 2006*

1—Amendment of Schedule 1—Class 1 and 2 offences

- (1) Schedule 1, clause 1(1), definition of *sexual offence*—after paragraph (a) insert:
 - (ab) an offence against section 48A of the *Criminal Law Consolidation Act 1935* (compelled sexual manipulation); or
- (2) Schedule 1, clause 2—after paragraph (d) insert:
 - (da) an offence against section 48A of the *Criminal Law Consolidation Act 1935* (compelled sexual manipulation) if the victim was a child;
- (3) Schedule 1, clause 2—after paragraph (e) insert:
 - (ea) an offence against section 50 of the *Criminal Law Consolidation Act 1935* (persistent sexual exploitation of a child);
 - (eb) an offence of persistent sexual abuse of a child (see section 74 of the *Criminal Law Consolidation Act 1935*, as in force before the commencement of the *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2007*) other than an offence that occurred in prescribed circumstances;
- (4) Schedule 1, clause 2(j)—delete paragraph (j)

Part 2—Related amendment to *Correctional Services Act 1982*

2—Amendment of section 4—Interpretation

- (1) Section 4(1), definition of *child sexual offence*—delete "any of the following offences" and substitute:

an offence under the *Criminal Law Consolidation Act 1935* of the following kind
- (2) Section 4(1), definition of *child sexual offence*—after paragraph (a) insert:
 - (ab) compelled sexual manipulation;
- (3) Section 4(1), definition of *child sexual offence*—after paragraph (b) insert:
 - (ba) persistent sexual exploitation of a child;
- (4) Section 4(1), definition of *sexual offence*—delete "any of the following offences" and substitute:

an offence under the *Criminal Law Consolidation Act 1935* of the following kind
- (5) Section 4(1), definition of *sexual offence*—after paragraph (a) insert:
 - (ab) compelled sexual manipulation;

- (6) Section 4(1), definition of *sexual offence*—after paragraph (b) insert:
(ba) persistent sexual exploitation of a child;

Part 3—Related amendment to *Criminal Law (Sentencing) Act 1988*

3—Amendment of section 20A—Interpretation

- (1) Section 20A(1), definition of *serious sexual offence*, (a)(i)—delete "49," and substitute:
48A, 49, 50,
- (2) Section 20A(1), definition of *serious sexual offence*, (a)(i)—delete ", 72 or 74" and substitute:
or 72

4—Amendment of section 23—Offenders incapable of controlling, or unwilling to control, sexual instincts

- (1) Section 23(1), definition of *relevant offence*, (a)—delete "49," and substitute:
48A, 49, 50,
- (2) Section 23(1), definition of *relevant offence*, (a)—delete ", 72 or 74" and substitute:
or 72

Part 4—Related amendment to the *Evidence Act 1929*

5—Amendment of section 4—Interpretation

- Section 4, definition of *sexual offence*—after paragraph (a) insert:
(ab) compelled sexual manipulation; or

Part 5—Related amendment to *Summary Procedure Act 1921*

6—Amendment of section 4—Interpretation

- (1) Section 4(1), definition of *sexual offence*—delete "means—" and substitute:
means an offence under the *Criminal Law Consolidation Act 1935* of the following kind:
- (2) Section 4(1), definition of *sexual offence*—after paragraph (a) insert:
(ab) compelled sexual manipulation; or
- (3) Section 4(1), definition of *sexual offence*—after paragraph (b) insert:
(ba) persistent sexual exploitation of a child; or

Part 6—Transitional provision

7—Transitional provision—Persistent sexual abuse of a child

For the avoidance of doubt, the repeal of section 74 of the *Criminal Law Consolidation Act 1935* does not affect any proceedings for an offence against that section commenced prior to the repeal of that section.