

South Australia

Summary Offences (Filming Offences) Amendment Act 2013

An Act to amend the *Summary Offences Act 1953*.

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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 *Summary Offences (Filming Offences) Amendment Act 2013*.

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 *Summary Offences Act 1953*

4—Repeal of section 23AA

Section 23AA—delete the section

5—Insertion of Part 5A

After Part 5 insert:

Part 5A—Filming offences

26A—Interpretation

In this Part—

carriage service provider has the same meaning as in section 87 of the *Telecommunications Act 1997* of the Commonwealth;

distribute includes—

- (a) communicate, exhibit, send, supply, upload or transmit; and
- (b) make available for access by another,

but does not include distribution by a person solely in the person's capacity as an internet service provider, internet content host or a carriage service provider;

film means take moving or still images by any means;

humiliating or degrading act, in relation to a person, means—

- (a) an assault or other act of violence against the person; or
- (b) an act that reasonable adult members of the community would consider to be humiliating or degrading to such a person (but does not include an act that reasonable adult members of the community would consider to cause only minor or moderate embarrassment);

humiliating or degrading filming means filming images of another person while the other person is being subjected to, or compelled to engage in, a humiliating or degrading act, but does not include filming images of a person who consents to being subjected to, or engaging in, a humiliating or degrading act and consents to the filming of the act;

indecent filming means filming of—

- (a) another person in a state of undress in circumstances in which a reasonable person would expect to be afforded privacy; or
- (b) another person engaged in a private act in circumstances in which a reasonable person would expect to be afforded privacy; or

- (c) another person's private region in circumstances in which a reasonable person would not expect that the person's private region might be filmed;

internet content host has the same meaning as in Schedule 5 of the *Broadcasting Services Act 1992* of the Commonwealth;

internet service provider has the same meaning as in Schedule 5 of the *Broadcasting Services Act 1992* of the Commonwealth;

invasive image means a moving or still image of a person—

- (a) engaged in a private act; or
(b) in a state of undress such that the person's bare genital or anal region is visible,

but does not include an image of a person under, or apparently under, the age of 16 years or an image of a person who is in a public place;

law enforcement personnel means police officers or officers of a law enforcement agency;

private act means—

- (a) a sexual act of a kind not ordinarily done in public; or
(b) using a toilet;

private region of a person means the person's genital or anal region when covered by underwear or bare.

26B—Humiliating or degrading filming

- (1) A person who engages in humiliating or degrading filming is guilty of an offence.

Maximum penalty: Imprisonment for 1 year.

- (2) A person who distributes a moving or still image obtained by humiliating or degrading filming knowing or having reason to believe that the victim—

- (a) does not consent to that particular distribution of the image; or
(b) does not consent to that particular distribution of the image and does not consent to distribution of the image generally,

is guilty of an offence.

Maximum penalty: Imprisonment for 1 year.

- (3) A person who—

- (a) takes part in a humiliating or degrading act; and
(b) in relation to that humiliating or degrading act, engages in conduct constituting an offence against subsection (1) or subsection (2),

is guilty of an offence.

Maximum penalty: Imprisonment for 2 years.

- (4) It is a defence to—
- (a) a charge of an offence against subsection (1); or
 - (b) a charge of an offence against subsection (3) where the defendant is alleged to have engaged in conduct constituting an offence against subsection (1),

to prove 1 or more of the following:

- (c) the defendant did not knowingly film the images the subject of the offence;

Example—

The filming took place accidentally or the filming took place in circumstances where the defendant did not know what images were being filmed

- (d) the defendant reasonably believed that the victim consented to the filming the subject of the offence;
- (e) the conduct constituting the offence was for a legitimate public purpose.

- (5) It is a defence to—

- (a) a charge of an offence against subsection (2); or
- (b) a charge of an offence against subsection (3) where the defendant is alleged to have engaged in conduct constituting an offence against subsection (2),

to prove 1 or more of the following:

- (c) the defendant's distribution of the image was neither intentional nor reckless;
- (d) the conduct constituting the offence was for a legitimate public purpose.

- (6) For the purposes of this section, conduct will only be taken to be for a ***legitimate public purpose*** if the conduct was in the public interest having regard to the following:

- (a) whether the conduct was for the purpose of educating or informing the public;
- (b) whether the conduct was for a purpose connected to law enforcement or public safety;
- (c) whether the conduct was for a medical, legal or scientific purpose;
- (d) any other factor the court determining the charge considers relevant.

- (7) If, in any proceedings for an offence against this section, the defendant establishes that the conduct allegedly constituting the offence was engaged in by or on behalf of a media organisation, the conduct will, for the purposes of this section, be taken to have been engaged in for a legitimate public purpose unless the court determining the charge finds that, having regard to the matters set out in subsection (6), the conduct was not for a legitimate public purpose.
- (8) For the purposes of this section, a person *takes part* in a humiliating or degrading act if he or she—
- (a) subjects a victim to, or compels a victim to engage in, a humiliating or degrading act (where the victim does not consent to being subjected to, or engaging in, the act); or
 - (b) encourages, supports or assists another person to engage in conduct of a kind referred to in paragraph (a) in relation to a victim.

- (9) In this section—

broadcasting includes datacasting;

media organisation means—

- (a) an organisation that engages in broadcasting pursuant to a licence under the *Broadcasting Services Act 1992* of the Commonwealth or that is otherwise authorised under a law of the Commonwealth to engage in broadcasting; or
- (b) an organisation that is a constituent body of the Australian Press Council or is authorised under a law of the Commonwealth to engage in publishing;

publish means publish by newspaper, radio or television, or on the internet, or by other similar means of communication to the public;

victim means a person subjected to, or compelled to engage in, a humiliating or degrading act (where the person does not consent to being subjected to, or engaging in, the act).

26C—Distribution of invasive image

- (1) A person who distributes an invasive image of another person, knowing or having reason to believe that the other person—
- (a) does not consent to that particular distribution of the image; or
 - (b) does not consent to that particular distribution of the image and does not consent to distribution of the image generally,
- is guilty of an offence.

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

- (2) It is a defence to a charge of an offence against this section to prove—
- (a) that the conduct constituting the offence—
 - (i) was for a purpose connected to law enforcement; or
 - (ii) was for a medical, legal or scientific purpose; or
 - (b) that the image was filmed by a licensed investigation agent within the meaning of the *Security and Investigation Agents Act 1995* and occurred in the course of obtaining evidence in connection with a claim for compensation, damages, a payment under a contract or some other benefit and the distribution of the image was for a purpose connected with that claim.

26D—Indecent filming

- (1) A person must not engage in indecent filming.
Maximum penalty:
- (a) if the person filmed was a minor—\$20 000 or imprisonment for 4 years;
 - (b) in any other case—\$10 000 or imprisonment for 2 years.
- (2) It is a defence to a charge of an offence against subsection (1) to prove—
- (a) that the indecent filming occurred with the consent of the person filmed; or
 - (b) that the indecent filming was undertaken by a licensed investigation agent within the meaning of the *Security and Investigation Agents Act 1995* and occurred in the course of obtaining evidence in connection with a claim for compensation, damages, a payment under a contract or some other benefit.
- (3) A person must not distribute a moving or still image obtained by indecent filming.
Maximum penalty:
- (a) if the person filmed was a minor—\$20 000 or imprisonment for 4 years;
 - (b) in any other case—\$10 000 or imprisonment for 2 years.
- (4) It is a defence to a charge of an offence against subsection (3) to prove 1 or more of the following:
- (a) that the person filmed—
 - (i) consented to that particular distribution of the image the subject of the offence; or
 - (ii) consented to distribution of the image the subject of the offence generally; or

- (b) that the defendant did not know, and could not reasonably be expected to have known, that the indecent filming was without the person's consent; or
- (c) that the indecent filming was undertaken by a licensed investigation agent within the meaning of the *Security and Investigation Agents Act 1995* and occurred in the course of obtaining evidence in connection with a claim for compensation, damages, a payment under a contract or some other benefit and the distribution of the moving or still image was for a purpose connected with that claim.

26E—General provisions

- (1) An apparent consent will not be an effective consent for the purposes of this Part if—
 - (a) given by a person who is under 16 years of age or mentally incapacitated; or
 - (b) obtained from a person by duress or deception.
- (2) The following persons do not commit an offence against this Part:
 - (a) law enforcement personnel and legal practitioners, or their agents, acting in the course of law enforcement or legal proceedings;
 - (b) medical practitioners, or their agents, acting in the course of medical practice or for genuine educational or research purposes.
- (3) If a court finds a person guilty of an offence against this Part, the court may order the forfeiture of anything that has been seized and consists of, or contains a record of, moving or still images taken in the course of the commission of the offence, or consists of equipment used for the commission of the offence.
- (4) A court making an order for forfeiture of any equipment or item under subsection (3) may, if it thinks fit, allow the offender or any other person an opportunity to retrieve (in accordance with any directions of the court) specified records, or other material, not involved in the commission of the offence from the equipment or item before it is so forfeited.