

South Australia

Statutes Amendment (Domestic Violence) Bill 2018

A BILL FOR

An Act to amend the *Criminal Law Consolidation Act 1935*, the *Evidence Act 1929* and the *Intervention Orders (Prevention of Abuse) Act 2009*.

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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 (Domestic Violence) Act 2018*.

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 5AA—Aggravated offences**

Section 5AA(1)(g)—delete paragraph (g) and substitute:

10 (g) the offender committed the offence knowing that the victim of the offence was a person with whom the offender was, or was formerly, in a relationship (within the meaning of section 8(8) of the *Intervention Orders (Prevention of Abuse) Act 2009*);

5—Insertion of Part 3 Division 7AA

15 After section 20 insert:

Division 7AA—Choking etc in a domestic setting**20A—Choking, suffocation or strangulation in a domestic setting**

20 (1) A person who is in a relationship with another person and chokes, suffocates or strangles that other person, without that other person's consent, is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

(2) An assault is not an element of an offence against this section.

(3) However conduct that is justified or excused by law cannot amount to an offence against this section.

25 (4) Two people will be taken to be *in a relationship* for the purposes of this section if—

- (a) they are married to each other; or
- (b) they are domestic partners; or
- (c) they are in some other form of intimate personal relationship in which their lives are interrelated and the actions of 1 affects the other; or
- (d) 1 is the child, stepchild or grandchild, or is under the guardianship, of the other (regardless of age); or
- (e) 1 is a child, stepchild or grandchild, or is under the guardianship, of a person who is or was formerly in a relationship with the other under paragraph (a), (b) or (c) (regardless of age); or

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- (f) 1 is a child and the other is a person who acts in *loco parentis* in relation to the child; or
- (g) 1 is a child who normally or regularly resides or stays with the other; or
- (h) they are brothers or sisters or brother and sister; or
- (i) they are otherwise related to each other by or through blood, marriage, a domestic partnership or adoption; or
- (j) they are related according to Aboriginal or Torres Strait Islander kinship rules or are both members of some other culturally recognised family group; or

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- (k) 1 is the carer (within the meaning of the *Carers Recognition Act 2005*) of the other.

Part 3—Amendment of *Evidence Act 1929*

6—Insertion of section 13BB

15 After section 13BA insert:

13BB—Admissibility of recorded evidence in domestic violence proceedings

- (1) This section applies in addition to section 13BA and any other law allowing evidence to be admitted in the form of an audio record or audio visual record.
- (2) In proceedings for a domestic violence offence—
 - (a) the evidence of a complainant may be admitted in the form of a prescribed recording if—
 - (i) the court is satisfied as to the complainant's capacity to give sworn or unsworn evidence at the time the recording was made; and
 - (ii) the court is satisfied that the defendant has been given a reasonable opportunity to listen to or view the recording; and
 - (iii) during the course of the trial, the complainant is available, if required, for further examination, cross-examination or re-examination; or
 - (b) the court may admit in evidence an audio record, or audio visual record, made by a police officer of a representation made by a complainant when the complainant was questioned by a police officer in connection with the investigation of the commission of a domestic violence offence if satisfied that the interests of justice require the admission of the evidence.

(3) The court's discretion to exclude evidence is not affected by this section and the court may—

- (a) rule as inadmissible the whole or any part of the recording; or
- (b) before admitting the recording, order that it be edited so as to exclude evidence that is inadmissible for any reason.

(4) Despite subsection (2)(a)(iii) but subject to subsections (5) and (6), the complainant cannot be further examined, cross-examined or re-examined on the evidence admitted in the trial without the permission of the court which may only be given, on application by a party to the proceedings if—

- (a) the court is satisfied that a party to the proceedings has, since the making of the recording, become aware of a matter of which the party could not reasonably have been aware at the time the recording was made; or
- (b) the complainant gives evidence in the trial apart from or in addition to evidence admitted under this section in the form of a prescribed recording and the court is satisfied that it is in the interests of justice that the complainant be further examined, cross-examined or re-examined; or
- (c) the court is satisfied that it is otherwise in the interests of justice to permit the complainant to be further examined, cross-examined or re-examined.

(5) The prosecution may, with the permission of the court and in accordance with any directions of the court, question the complainant about—

- (a) evidence given by the complainant that is unfavourable to the prosecution case; or
- (b) a matter of which the complainant may reasonably be supposed to have knowledge and about which it appears to the court the complainant is not, in examination-in-chief, making a genuine attempt to give evidence; or
- (c) whether the complainant has, at any time, made a prior inconsistent statement,

(and, for the avoidance of doubt, the requirements of subsection (4)(a), (b) and (c) do not apply to the giving of permission under this subsection).

(6) Questioning under subsection (5) must be conducted as if it were (and is, for the purposes of this Act other than provisions relating to re-examination, taken to be) cross-examination.

(7) Subsections (5) and (6) apply in addition to section 27.

(8) If a court admits evidence in the form of an audio record, or audio visual record under this section, the judge must—

- explain to the jury that the law allows the court to admit evidence in this form; and
- warn the jury—
 - not to draw from the admission of evidence in that form any inference adverse to the defendant; and
 - not to allow the admission of evidence in that form to influence the weight to be given to the evidence.

(9) Without limiting section 73, the regulations may—

- prescribe additional requirements in relation to recordings under this section; and
- require that additional material be provided to the court with a recording in certain circumstances (such as a transcript or translation); and
- prescribe requirements in relation to access to, or service of, recordings and other material; and
- prescribe requirements in relation to custody of recordings; and
- impose restrictions on copying or distribution of recordings.

(10) In this section—

complainant, in proceedings for a domestic violence offence, means the person against whom the domestic violence offence is alleged to have been committed, but does not include a person who—

- is under 16 years of age; or
- is cognitively impaired;

domestic violence offence means any offence involving domestic abuse (within the meaning of the *Intervention Orders (Prevention of Abuse) Act 2009*);

informed consent means consent given in accordance with requirements prescribed by the regulations;

prescribed recording means an audio record, or audio visual record, made by a police officer of a representation made by a complainant when the complainant was questioned by a police officer in connection with the investigation of the commission of a domestic violence offence where—

- the questioning occurred as soon as practicable after the commission of the offence; and
- the recording was made with the informed consent of the complainant; and

5 (c) the recording contains the following statements by the complainant:

- (i) a statement as to the complainant's age;
- (ii) a statement as to the truth of the representation;
- (iii) any other matter required by the regulations or by rules of court.

7—Amendment of section 73—Regulations

Section 73—after its present contents (now to be designated as subsection (1)) insert:

10 (2) Without limiting the generality of subsection (1), the regulations may—

- (a) prescribe forms for the purposes of this Act; and
- (b) prescribe, or provide for the calculation of, costs, fees or charges for the purposes of this Act; and
- (c) exempt any person or class of persons from the obligation to pay any costs, fees or charges so prescribed; and
- (d) prescribe penalties, not exceeding \$5 000, for breach of, or non-compliance with, a regulation.

15 (3) The regulations may—

- (a) be of general or limited application; and
- (b) make different provision according to the persons, things or circumstances to which they are expressed to apply; and
- (c) provide that a specified provision of this Act does not apply, or applies with prescribed variations, to any person, circumstance or situation (or person, circumstance or situation of a prescribed class) specified by the regulations, subject to any condition to which the regulations are expressed to be subject; and
- (d) provide that any matter or thing is to be determined, dispensed with, regulated or prohibited according to the discretion of the Minister or another person.

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Part 4—Amendment of *Intervention Orders (Prevention of Abuse) Act 2009*

8—Amendment of section 8—Meaning of abuse—domestic and non-domestic

Section 8(4)—after paragraph (o) insert:

35 (oa) forcing the person to marry another person;

(ob) preventing the person from entering the person's place of residence;

(oc) taking an invasive image (within the meaning of Part 5A of the *Summary Offences Act 1953*) of the person and threatening to distribute the image without the person's consent;

9—Amendment of section 21—Preliminary hearing and issue of interim intervention order

Section 21(4a)—delete subsection (4a)

10—Insertion of sections 28A and 28B

5 After section 28 insert:

28A—Rules of evidence not to apply

In proceedings under this Part—

- (a) the Court is not bound by the rules of evidence but may inform itself as it thinks fit; and
- (b) the Court must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.

28B—Use of evidence in concurrent or related domestic violence proceedings

- (1) This section applies if an application for an order under this Part is made concurrently with proceedings for a domestic violence offence or arises from the circumstances of the alleged domestic violence offence.
- (2) If, in accordance with section 13BB of the *Evidence Act 1929*, evidence is given wholly or partly in the form of an audio record or an audio visual record in the proceedings for the domestic violence offence, that evidence may also be given in that form in the proceedings under this Part.
- (3) Any such evidence is to be given in accordance with any regulations made for the purposes of this section.
- (4) Without limiting section 42, the regulations may—
 - (a) prescribe additional requirements in relation to recordings under this section; and
 - (b) require that additional material be provided to the court with a recording in certain circumstances (such as a transcript or translation); and
 - (c) prescribe requirements in relation to access to, or service of, recordings and other material; and
 - (d) prescribe requirements in relation to custody of recordings; and
 - (e) impose restrictions on copying or distribution of recordings.
- (5) In this section—
domestic violence offence has the same meaning as in section 13BB of the *Evidence Act 1929*.

11—Amendment of section 31—Contravention of intervention order

(1) Section 31(2), penalty provision—delete the penalty provision and substitute:
Maximum penalty: \$10 000 or imprisonment for 2 years.

(2) Section 31(2a)—delete subsection (2a) and substitute:
5 (2a) Despite any other provision of this section, if a person contravenes a term of an intervention order and either—
(a) the act or omission alleged to constitute the contravention involved physical violence or a threat of physical violence; or
10 (b) the contravention constitutes a third or subsequent offence against this section,

the person is guilty of an offence against this subsection.

Maximum penalty: \$20 000 or imprisonment for 4 years.

15 (2b) In determining whether an offence is a third or subsequent offence for the purposes of subsection (2a) any previous offence against this section (whether committed before or after the commencement of this subsection) of which the defendant has been found guilty or that the defendant has expiated will be taken into account, but only if the previous offence was committed or alleged to have been committed within the period of 5 years immediately preceding the date on which the offence under consideration was allegedly committed.

12—Amendment of section 42—Regulations

Section 42—after its present contents (now to be designated as subsection (1)) insert:

25 (2) Without limiting the generality of subsection (1), the regulations may—
(a) prescribe forms for the purposes of this Act; and
(b) prescribe, or provide for the calculation of, costs, fees or charges for the purposes of this Act; and
(c) exempt any person or class of persons from the obligation to pay any costs, fees or charges so prescribed; and
30 (d) prescribe penalties, not exceeding \$5 000, for breach of, or non-compliance with, a regulation.

(3) The regulations may—
(a) be of general or limited application; and
35 (b) make different provision according to the persons, things or circumstances to which they are expressed to apply; and

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- (c) provide that a specified provision of this Act does not apply, or applies with prescribed variations, to any person, circumstance or situation (or person, circumstance or situation of a prescribed class) specified by the regulations, subject to any condition to which the regulations are expressed to be subject; and
- (d) provide that any matter or thing is to be determined, dispensed with, regulated or prohibited according to the discretion of the Minister or another person.