

House of Assembly

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South Australia

Spent Convictions Bill 2009

A BILL FOR

An Act to limit the effect of a person's conviction for certain offences if the person completes a period of crime-free behaviour; and for other purposes.

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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 *Spent Convictions Act 2009*.

2—Commencement

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

3—Preliminary

- (1) In this Act, unless the contrary intention appears—

adult means a person of or above the age of 18 years;

AUSTRAC means the Australian Transaction Reports and Analysis Centre continued in existence by the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* of the Commonwealth;

child means a person under the age of 18 years;

Commonwealth authority means—

- (a) a Commonwealth Minister; or
- (b) a Commonwealth Department; or
- (c) the Defence Force; or
- (d) a body (whether incorporated or not) established or appointed for a public purpose by or under a Commonwealth law, not being—
 - (i) an incorporated company, society or association; or
 - (ii) an organisation registered, or an association recognised, under the *Fair Work (Registered Organisations) Act 2009* of the Commonwealth, or a branch of such an organisation or association; or
- (e) a body established or appointed by the Governor-General, or by a Commonwealth Minister, otherwise than by or under a Commonwealth law; or

- (f) a person holding or performing the duties of an office established by or under, or an appointment made under, a Commonwealth law other than the office of Secretary of a Commonwealth Department; or
- (g) a person holding or performing the duties of an appointment made by the Governor-General, or by a Commonwealth Minister, otherwise than under a Commonwealth law; or
- (h) a federal court; or
- (i) a tribunal established under a Commonwealth law; or
- (j) the Australian Federal Police;

Commonwealth Department means an Agency within the meaning of the *Public Service Act 1999* of the Commonwealth;

conviction means a conviction, whether summary or on indictment, for an offence and includes a finding which, under subsection (5), is treated as a conviction for the purposes of this Act or a case which falls within the ambit of subsection (6);

corresponding law means a law of another State or of the Commonwealth that is declared by the regulations to be a corresponding law for the purposes of this Act;

designated Commonwealth position means a position in a Commonwealth authority which the head of the authority has determined to be a designated security assessment position whose duties are likely to involve access to national security information classified as secret or top secret;

designated judicial authority means—

- (a) a court or tribunal (including a military tribunal established under a law of the Commonwealth); or
- (b) a judicial or quasi-judicial body brought within the ambit of this definition by the regulations;

eligible adult offence means an offence committed by an adult for which—

- (a) a sentence of imprisonment is not imposed; or
- (b) a sentence of imprisonment is imposed but the sentence is 12 months or less;

eligible juvenile offence means an offence committed while the defendant was a child where, on conviction of the defendant—

- (a) a sentence of imprisonment is not imposed; or
- (b) a sentence of imprisonment is imposed but the sentence is 24 months or less;

intelligence or security agency means—

- (a) the Australian Security Intelligence Organisation; or
- (b) the Australian Secret Intelligence Service; or
- (c) the Office of National Assessments; or
- (d) that part of the Department of Defence known as the Defence Signals Directorate; or
- (e) that part of the Department of Defence known as the Defence Intelligence Organisation; or

- (f) that part of the Department of Defence known as the Defence Imagery and Geospatial Organisation; or
- (g) any other similar agency, office or part of a Commonwealth Department that has a direct involvement in national intelligence or security activities;

justice agency means any of the following:

- (a) the Australian Federal Police;
- (b) the police force or service of a State;
- (c) the Australian Customs and Border Protection Service;
- (d) the Australian Commission for Law Enforcement Integrity, the Australian Crime Commission, or any other similar crime or integrity commission, body, office or agency established under a law of the Commonwealth or a State;
- (e) the CrimTrac Agency (established on 1 July 2000 as an Executive Agency of the Governor-General of the Commonwealth under section 65 of the *Public Service Act 1999* of the Commonwealth);
- (f) AusCheck (established by the Commonwealth on 5 December 2005);
- (g) the Australian Securities and Investments Commission;
- (h) the Attorney-General for the Commonwealth or a State;
- (i) the Director of Public Prosecutions for the Commonwealth or a State, or a person or body performing a similar function under a law of a State;
- (j) staff appointed to assist a person or body referred to in paragraph (i);
- (k) a government department or agency of the Commonwealth or the State which is concerned, as 1 of its principal or primary duties, with the prosecution of offences or assisting with the prosecution of offences;
- (l) the Australian Taxation Office or the Australian Electoral Commission, in connection with any function associated with the prosecution of offences or assisting with the prosecution of offences;
- (m) the Department for Correctional Services or an equivalent entity in another State;
- (n) the Department responsible for a training centre under the *Young Offenders Act 1993* or an equivalent entity in another State;
- (o) the Registrar or administrator of a Commonwealth or State court;
- (p) a person or body brought within the ambit of this definition or a corresponding definition by regulations made under this Act or under a corresponding law for the purposes of a corresponding definition;

minor offence means an offence where, on conviction—

- (a) the defendant is discharged without penalty; or
- (b) the only penalty imposed on the defendant (disregarding any demerit points that may apply) is a fine not exceeding—
 - (i) unless an amount applies under subparagraph (ii)—\$500; or

- (ii) an amount, greater than \$500, prescribed by the regulations for the purposes of this definition;

mutual recognition principle—see subsection (7);

national security information means information affecting the defence, security or international relations of Australia;

official record means a record kept by a court, tribunal, police force or public authority;

overseas jurisdiction means a jurisdiction outside Australia and the external territories;

public authority means—

- (a) a public or local authority constituted by or under an Act of this State, another State or the Commonwealth; or
- (b) a government department of this State, another State or the Commonwealth; or
- (c) a statutory body representing the Crown in right of this State, another State or the Commonwealth,

and includes a person performing a function on behalf of the authority, department or body;

qualification period means the qualification period that applies under section 7;

quashed—a conviction is quashed if—

- (a) the conviction is quashed or set aside; or
- (b) a finding of guilt, or a finding that a charge has been proved, is quashed or set aside;

recognised jurisdiction—if a law of another State or of the Commonwealth has been declared by the regulations to be a corresponding law, then that State or the Commonwealth (as the case requires) is a recognised jurisdiction;

security has the same meaning as in the *Australian Security Intelligence Organisation Act 1979* of the Commonwealth;

sex offence means an offence prescribed as a sex offence for the purposes of this definition;

spent, for a conviction—see section 4;

State includes Territory;

this jurisdiction means South Australia;

tribunal means a tribunal constituted by law;

work includes the following:

- (a) work—
 - (i) under a contract of employment or contract for services; or
 - (ii) in a leadership role in a religious institution or as part of the duties of a religious vocation; or

- (iii) as an officer of a body corporate, member of the committee of management of an unincorporated body or association or member of a partnership; or
 - (iv) as a volunteer, other than unpaid work engaged in for a private or domestic purpose; or
 - (v) as a self-employed person;
 - (b) practical training as part of a course of education or vocational training;
 - (c) acting in a prescribed capacity or engaging in a prescribed activity.
- (2) If—
 - (a) a person is convicted by a court of a number of offences; and
 - (b) the sentencing court imposes 1 penalty for some or all of the offences,the penalty so imposed will be taken to apply in relation to each offence for the purpose of determining whether a particular offence is an eligible adult offence or an eligible juvenile offence under subsection (1).
- (3) In this Act, a reference to a sentence of imprisonment extends to—
 - (a) a period of detention under the *Young Offenders Act 1993*;
 - (b) a sentence of imprisonment or a period of detention that has been suspended (in whole or in part).
- (4) In this Act, a reference to a conviction that is spent includes a reference to the charge to which the spent conviction related and any investigation or legal process associated with the offence or the conviction.
- (5) The following findings are treated as convictions for the purposes of this Act:
 - (a) a formal finding of guilt by a court;
 - (b) a finding by a court that an offence has been proved.
- (6) For the purposes of this Act, if an offence is taken into account for the purposes of sentencing for another offence or offences, it will be taken that there is a conviction for that offence (and that the conviction is capable of being spent).
- (7) The *mutual recognition principle* is as follows:
 - (a) a conviction for an offence against a law of a recognised jurisdiction that is spent under the corresponding law of that jurisdiction will be taken to be spent for the purposes of Part 3 and Part 4; and
 - (b) a conviction for an offence against a law of a recognised jurisdiction that is not spent (or has ceased to be spent) under the corresponding law of that jurisdiction will be taken not to be spent for the purposes of Part 3 and Part 4.

4—Meaning of *spent* conviction

- (1) For the purposes of this Act, the conviction of a person for an offence is *spent* if—
 - (a) the conviction is spent under Part 2; or
 - (b) the conviction is quashed; or
 - (c) the person is granted a pardon for the offence.

- (2) This section applies subject to the operation of section 6.

5—Scope of Act

- (1) The following convictions are capable of becoming spent under this Act:
- (a) a conviction for an eligible adult offence;
 - (b) a conviction for an eligible juvenile offence.
- (2) However, the following convictions cannot become spent under this Act:
- (a) a conviction of a body corporate;
 - (b) a conviction for a sex offence;
 - (c) a conviction of a class prescribed by the regulations.
- (3) A regulation made under subsection (2)(c) does not affect a conviction that has already become spent under this Act.
- (4) Nothing in this Act affects—
- (a) the enforcement of any process or proceedings relating to any fine or other sum imposed with respect to a spent conviction; or
 - (b) any process or proceedings in respect of a breach of a condition or requirement applicable to a sentence imposed in respect of a spent conviction; or
 - (c) the operation of any disqualification, disability or other prohibition imposed in respect of or on account of a spent conviction; or
 - (d) the imposition or accumulation of demerit points; or
 - (e) the exercise of any other enforcement power or the institution or undertaking of any other processes or proceedings by a justice agency.
- (5) Nothing in this Act affects a claim (or any proceedings arising from a claim) for compensation (including statutory compensation) for injury, loss or damage caused by an offence.
- (6) This section applies subject to the operation of section 6.

6—Application of Act

- (1) This Act applies to convictions for offences against the laws of this State and convictions for offences against any other law.
- (2) In the case of convictions for offences against the laws of a recognised jurisdiction, the mutual recognition principle applies.
- (3) In the case of convictions for offences against the laws of any other jurisdiction (including the laws of an overseas jurisdiction), this Act applies with the changes necessary to enable its provisions to apply to those convictions in a way that corresponds as closely as possible to the way in which it applies to convictions for offences against the laws of this jurisdiction.
- (4) However, if an offence against the laws of another jurisdiction (including the laws of an overseas jurisdiction), other than a recognised jurisdiction, has no correspondence to an offence against a law of this jurisdiction, then the conviction of the person for the offence is immediately spent for the purposes of this Act.

- (5) This Act applies to convictions for offences whether such convictions occurred before or after the commencement of this Act.

Part 2—Requirements for a conviction to become spent

7—Determination of qualification period

- (1) Subject to this section, the *qualification period* for the conviction of a person for an offence is—
- (a) in the case of an eligible juvenile offence, other than where the person was dealt with as an adult—5 consecutive years; or
 - (b) in any other case—10 consecutive years,
- from the relevant day for the conviction for the offence.
- (2) If during the qualification period for a conviction (the *first conviction*) the person is convicted of another offence (the *second conviction*), the time that has run as part of the qualification period for the first conviction is cancelled and the relevant day for the second conviction becomes a new relevant day for the first conviction (and a conviction for a third offence within the period that then applies will have a corresponding effect on the first and second convictions, and so on for any subsequent conviction or convictions).
- (3) In addition—
- (a) if at the end of a period that applies under subsection (1) or (2) the person is a registrable offender under the *Child Sex Offenders Registration Act 2006* who is subject to reporting obligations imposed by Part 3 of that Act, the qualification period is extended so as to expire when or if those reporting obligations cease or are suspended under that Part; and
 - (b) if during the period of extension that applies under paragraph (a) the person is convicted of another offence, the conviction has the same effect on any previous conviction that is subject to the period of extension that a second or subsequent conviction has on a previous conviction or convictions under subsection (2).
- (4) For the purposes of subsections (2) and (3)(b), a conviction for a second or subsequent offence will be disregarded if—
- (a) the offence is a minor offence (including in a case where the conviction with respect to the minor offence is constituted by a finding under section 3(5)); or
 - (b) the conviction is quashed; or
 - (c) the convicted person is granted a pardon.
- (5) A period under a preceding subsection may commence before the commencement of this Act and, in such a case, the qualification period will be completed—
- (a) on the commencement of this Act; or
 - (b) on the day on which the qualification period would have been completed if this Act had been in force continuously since the day of the relevant conviction,
- whichever is the later.

- (6) For the purposes of this section—
- (a) the *relevant day* for the conviction for an offence is the day on which the person is convicted; and
 - (b) a reference to a conviction for an offence does not extend to a conviction for an offence against a law of another jurisdiction (including the laws of an overseas jurisdiction), other than a recognised jurisdiction, that has no correspondence to an offence against a law of this jurisdiction.

8—Spent conviction—general provision

A conviction for an offence is spent on completion of the qualification period for the conviction.

9—Subsequent conviction after conviction becomes spent

- (1) A conviction of a person for an offence (the *first offence*) that is spent is not revived by the subsequent conviction of the person for another offence (the *later offence*).
- (2) However, if—
 - (a) the later offence was committed during the qualification period for the first offence; and
 - (b) the later offence is an offence for which a conviction during the qualification period for the first offence would have resulted in the cancellation of the time that had already run as part of the qualification period under section 7(2) or (3)(b),

the first offence will cease to be treated as a spent conviction under this Act while the qualification period for the later offence is running.

Part 3—Effect of a conviction becoming spent

Division 1—General provisions

10—Ability to disregard spent convictions

If a conviction of a person is spent—

- (a) a question about the person's criminal history is taken not to refer to the spent conviction, but to refer only to any of the person's convictions that are not spent; and
- (b) the person is not required to disclose to any other person for any purpose information concerning the spent conviction; and
- (c) in the application to the person of an Act, statutory instrument, agreement or arrangement—
 - (i) a reference to a conviction, however expressed, is taken not to refer to the spent conviction; and
 - (ii) a reference to the person's character or fitness, however expressed, is not to be taken as allowing or requiring account to be taken of the spent conviction; and

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- (d) the spent conviction, or the non-disclosure of the spent conviction, is not a proper ground for—
 - (i) refusing the person any appointment, post, status or privilege; or
 - (ii) revoking any appointment, status or privilege held by the person, or dismissing the person from any post.

11—Unlawful disclosures—public records

- (1) A person is guilty of an offence if—
 - (a) the person has access to records of convictions kept by or on behalf of a public authority; and
 - (b) the person discloses information about a spent conviction that the person has gained on account of that access; and
 - (c) the person knew, or ought reasonably have known, at the time of the disclosure, that the information was about a spent conviction.

Maximum penalty: \$10 000.

- (2) It is a defence to a charge for an offence against subsection (1) to prove—
 - (a) that the disclosure was made with the consent of the person whose conviction is spent; or
 - (b) that—
 - (i) the person who made the disclosure believed in good faith that the disclosure was within the ambit of an exclusion from the operation of this section under Schedule 1; and
 - (ii) the disclosure occurred in circumstances where steps had been taken to avoid any breach of subsection (1) by putting in place any systems or safeguards that might reasonably be expected to be provided.

12—Unlawful disclosures—business activities

- (1) A person is guilty of an offence if—
 - (a) the person, in the course of carrying on a business that includes or involves the provision of information about convictions for offences, discloses information about a spent conviction; and
 - (b) the person knew, or ought reasonably have known, at the time of the disclosure, that the information was about a spent conviction.

Maximum penalty: \$10 000.

- (2) It is a defence to a charge for an offence against subsection (1) to prove—
 - (a) that the disclosure forms part of the ongoing disclosure of the information in materials or in a manner that cannot be reasonably altered to remove information about the spent conviction; and
 - (b) that the disclosure of the information commenced before the conviction became a spent conviction.

Division 2—Exclusions

13—Exclusions

- (1) Schedule 1 sets out exclusions from the operation of Division 1.
- (2) Subject to subsection (3), the exclusions do not apply in relation to an offence if—
 - (a) the conviction has been quashed; or
 - (b) the person has been granted a pardon for the offence.
- (3) Subsection (2) does not apply in relation to the operation of clause 6 of Schedule 1.

Part 4—Miscellaneous

14—Improperly obtaining information about spent convictions

A person must not fraudulently or dishonestly obtain information about a spent conviction from records of convictions kept by or on behalf of a public authority.
Maximum penalty: \$10 000.

15—Prerogative of mercy not affected

This Act does not affect the exercise of the Royal prerogative of mercy.

16—Act does not authorise destruction of records

This Act does not authorise or require the destruction by or on behalf of a public authority of a record relating to a spent conviction, a quashed conviction or a pardon.

17—Regulations

- (1) The Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this Act.
- (2) The regulations may—
 - (a) be of general or limited application;
 - (b) vary according to the persons, times, places or circumstances to which they are expressed to apply.

Schedule 1—Exclusions

1—Justice agencies

- (1) Part 3 Division 1 does not apply to the performance of a function or the exercise of a power by—
 - (a) a justice agency; or
 - (b) a person who is acting as a member, officer, employee, agent or contractor of a justice agency.
- (2) Part 3 Division 1 does not apply if the disclosure is made, or to be made, to or is made by—
 - (a) a justice agency; or

- (b) a person who is acting as a member, officer, employee, agent or contractor of a justice agency.
- (3) Part 3 Division 1 does not apply if a disclosure is made, or to be made, to or is made by a justice agency for the purposes of assessing—
 - (a) prospective employees or prospective members of the agency; or
 - (b) persons proposed to be engaged as consultants to, or to perform services for, the agency or a member of the agency.

2—Commonwealth agencies

Part 3 Division 1 does not apply if a disclosure is made, or to be made, to or is made by—

- (a) an intelligence or security agency, for the purpose of assessing—
 - (i) prospective employees or prospective members of the agency; or
 - (ii) persons proposed to be engaged as consultants to, or to perform services for, the agency or a member of the agency; or
- (b) a Commonwealth authority, for the purpose of assessing appointees or prospective appointees to a designated Commonwealth position; or
- (c) a person who makes a decision under the *Migration Act 1958* of the Commonwealth, the *Australian Citizenship Act 2007* of the Commonwealth or the *Immigration Act 1980* of the Territory of Norfolk Island, for the purpose of making that decision; or
- (d) AUSTRAC, for the purpose of assessing—
 - (i) prospective members of the staff of AUSTRAC; or
 - (ii) persons proposed to be engaged as consultants under subsection 225(1) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* of the Commonwealth; or
 - (iii) persons whose services are proposed to be made available to AUSTRAC under subsection 225(3) of that Act; or
- (e) a person or body, for the purpose of instituting or conducting proceedings for any offence.

3—Designated judicial authorities

- (1) Part 3 Division 1 does not apply in connection with proceedings before, or the making of any decision by, a designated judicial authority (including any proceedings associated with jury selection or service or otherwise with respect to the operation of a jury, a decision concerning sentencing, or a decision concerning the granting of bail).
- (2) However, a designated judicial authority before which evidence of a spent conviction is admitted must take such steps as are, in the opinion of the designated judicial entity, appropriate to avoid or minimise publication of the evidence.

4—Parole Board

Part 3 Division 1 does not apply in connection with proceedings before, or the making of any decision by, the Parole Board.

5—Judicial and associated officers

Part 3 Division 1 does not apply in relation to an assessment of the suitability of a person appointed, or being considered for appointment—

- (a) as a judge, magistrate or justice of the peace; or
- (b) as a member of a court or tribunal prescribed by the regulations for the purposes of this paragraph.

6—Care of children

(1) Part 3 Division 1 does not apply in relation to—

- (a) any administrative, judicial or other inquiry into, or assessment of, the fitness of a person to have the guardianship or custody of a child, or access to a child; or
- (b) any assessment of the fitness of a person undertaking, or seeking to undertake, (including without any fee or reward) work or any other activity that directly involves—
 - (i) the care, control, supervision or instruction of children; or
 - (ii) otherwise working in close proximity with children on a regular basis; or
- (c) any assessment of the fitness of a person undertaking, or seeking to undertake, (including without any fee or reward) work or any other activity that directly involves acting as an advocate for children in legal proceedings; or
- (d) without limiting a preceding paragraph, a disclosure required or permitted by or under another law (including a law of another jurisdiction (including a law of an overseas jurisdiction)) in relation to a person who works, or who is seeking to work, with children; or
- (e) any—
 - (i) disciplinary or fitness inquiry or investigation; or
 - (ii) enforcement action or proceedings (including for the suspension or cancellation of a registration, licence, accreditation or other authorisation or authority),associated with a person within a preceding paragraph.

(2) This clause extends to cases involving circumstances arising outside this jurisdiction.

7—Care of vulnerable people

(1) Part 3 Division 1 does not apply in relation to—

- (a) any administrative, judicial or other inquiry into, or assessment of, the fitness of a person to have the guardianship of an aged person or persons with a disability (including an intellectual disability), illness or impairment; or
- (b) any assessment of the fitness of a person undertaking, or seeking to undertake, (including without any fee or reward) work or any other activity that directly involves—

- (i) the care of aged persons or persons with a disability (including an intellectual disability), illness or impairment in legal proceedings; or
- (ii) otherwise working in close proximity with aged persons or persons with a disability (including an intellectual disability), illness or impairment; or
- (c) any assessment of the fitness of a person undertaking, or seeking to undertake, (including without any fee or reward) work or any other activity that directly involves acting as an advocate for aged persons or persons with a disability (including an intellectual disability), illness or impairment in legal proceedings; or
- (d) any—
 - (i) disciplinary or fitness inquiry or investigation; or
 - (ii) enforcement action or proceedings (including for the suspension or cancellation of a registration, licence, accreditation or other authorisation or authority),

associated with a person within a preceding paragraph.

- (2) This clause extends to cases involving circumstances arising outside this jurisdiction.

8—Activities associated with a character test

- (1) Part 3 Division 1 does not apply in relation to—
 - (a) any assessment of whether a person who, pursuant to statute, has obtained, or is seeking, registration or enrolment, or a licence, accreditation or other authorisation or authority, in or in relation to an occupation, profession, position or activity, is a fit and proper person or a person of good character; or
 - (b) any—
 - (i) disciplinary or fitness inquiry or investigation; or
 - (ii) enforcement action or proceedings (including for the suspension or cancellation of a registration, licence, accreditation or other authorisation or authority),

associated with a person within the preceding paragraph.

- (2) This clause extends to cases involving circumstances arising outside this jurisdiction.

9—Firefighting, police and correctional services

- (1) Part 3 Division 1 does not apply in relation to a disclosure to an authority concerned with the prevention or fighting of fires about a conviction that relates to the setting or lighting of a fire.
- (2) Part 3 Division 1 does not apply in relation to a person employed, or seeking employment, as a police officer.
- (3) Part 3 Division 1 does not apply in relation to a person employed in, or seeking employment in, an office or position involving duties connected with the punishment, probation or paroling of offenders.

10—Official records

Part 3 Division 1 does not apply in relation to a disclosure or a disclosure of information where the disclosure is made, in the course of official duties, by a person who has custody of or access to an official record.

11—Archives and libraries

Part 3 Division 1 does not apply to an archive or library (or a person acting in the performance of a function of an archive or library) in accordance with the normal procedures of the archive or library.

12—Reports and authorised publications

Part 3 Division 1 does not apply in relation to a disclosure—

- (a) made in the ordinary course of the preparation, publication or use of a textbook, report, article or collection of material published for historical, educational, scientific or professional purposes, or in the ordinary course of any lecture, class or discussion given or held for any such purpose; or
- (b) made in connection with the preparation, publication or use of a genuine series of law reports on proceedings in courts or tribunals; or
- (c) made in connection with the preparation, publication or use of the official records of a court or tribunal.

13—Non-identifying information

Part 3 Division 1 does not apply if a disclosure does not contain any information that would tend to identify the convicted person.

14—Prescribed exclusions

The regulations may prescribe other exclusions from the operation of section 10, 11 or 12.