

South Australia

# Spent Convictions (Miscellaneous) Amendment Act 2013

An Act to amend the *Spent Convictions 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 *Spent Convictions (Miscellaneous) 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 *Spent Convictions Act 2009*

### 4—Amendment of section 3—Preliminary

- (1) Section 3(1)—after the definition of *eligible juvenile offence* insert:

*eligible sex offence* means a sex offence (being either an eligible adult offence or an eligible juvenile offence) for which a sentence of imprisonment is not imposed;

- (2) Section 3(1)—after the definition of *qualification period* insert:

*qualified magistrate*—see section 6A;

- (3) Section 3(3)—after paragraph (b) insert:

- (c) a period of detention under section 23 of the *Criminal Law (Sentencing) Act 1988*.

### 5—Amendment of section 4—Meaning of *spent conviction*

Section 4—after subsection (1) insert:

- (1a) In addition, if—

- (a) a finding is treated as a conviction under section 3(5); but  
(b) no conviction is recorded against the person,

then the finding, as constituting a conviction for the purposes of this Act, will be taken to be immediately spent.

### 6—Amendment of section 5—Scope of Act

- (1) Section 5(1)—after "convictions" insert:

(and no other convictions)

- (2) Section 5(2)(b)—after "sex offence" insert:

unless the offence is an eligible sex offence

### 7—Insertion of section 6A

After section 6 insert:

#### 6A—Qualified magistrates

- (1) For the purposes of this Act, a *qualified magistrate* is a magistrate in relation to whom a consent is in force under subsection (2) and who has been approved by the Chief Magistrate to act as a qualified magistrate in accordance with subsection (3).

- (2) A magistrate may, by instrument in writing, consent to acting as a qualified magistrate under this Act.
- (3) The Chief Magistrate may, by instrument in writing, approve a magistrate in relation to whom a consent is in force under subsection (2) to act as a qualified magistrate under this Act.
- (4) A qualified magistrate has, in relation to the exercise of a function conferred on a qualified magistrate by this Act, the same protection, privileges and immunities as a magistrate has in relation to proceedings in the Magistrates Court of South Australia.
- (5) A magistrate who has given consent under subsection (2) may, by instrument in writing, revoke the consent.
- (6) An approval of a magistrate to act as a qualified magistrate under subsection (3) is revoked if—
  - (a) the qualified magistrate revokes his or her consent in accordance with subsection (5) or ceases to be a magistrate; or
  - (b) the Chief Magistrate determines that the magistrate should not continue to be a qualified magistrate.

#### **8—Amendment of section 7—Determination of qualification period**

Section 7(1)—delete "this section" and substitute:  
this Act

#### **9—Amendment of section 8—Spent conviction—general provision**

- (1) Section 8—after "an offence" insert:  
, other than a sex offence,
- (2) Section 8—after its present contents as amended by this section (now to be designated as subsection (1)) insert:
  - (2) Subsection (1) operates subject to section 4(1a).

#### **10—Insertion of section 8A**

After section 8 insert:

##### **8A—Spent conviction for an eligible sex offence**

- (1) A conviction for an eligible sex offence is spent if, on application by the convicted person in accordance with the regulations, a qualified magistrate makes an order that the conviction is spent.
- (2) An application for an order under this section in respect of a conviction—
  - (a) may not be made until the completion of the qualification period for the conviction; and
  - (b) may not be made if a qualified magistrate has refused to make an order under this section in respect of the same conviction within the proceeding 2 years.

- (3) An application under this section may not be made in respect of a conviction for an offence against the laws of another jurisdiction.
- (4) Schedule 2 applies to an application under this section and to proceedings on an application.
- (5) The making of an order under this section is at the discretion of the qualified magistrate and that discretion will be exercised having regard to—
  - (a) the nature, circumstances and seriousness of the offence; and
  - (b) if a victim impact statement was furnished to the sentencing court in connection with the sentencing of the applicant for the offence (and that statement is available to the qualified magistrate)—anything referred to in that statement; and
  - (c) any penalty imposed, and any other order or requirement made or imposed by a court, in relation to the offence; and
  - (d) the length of time since the conviction; and
  - (e) all the circumstances of the applicant, including the circumstances of the applicant at the time of the commission of the offence and at the time of the application and whether the applicant appears to have rehabilitated and to be of good character; and
  - (f) whether the spending of the conviction and the non-disclosure of the offence to other persons by operation of an order under this section might present a risk to the public (and, if so, the extent of that risk); and
  - (g) whether there is any other public interest served in not making the order; and
  - (h) any other matter considered relevant by the qualified magistrate.

### **11—Amendment of section 13—Exclusions**

- (1) Section 13(2)—delete "Subject to subsection (3), the" and substitute:

The

- (2) Section 13(3)—delete subsection (3) and substitute:
  - (3) The exclusions do not apply in relation to a conviction that is constituted by a finding that is to be treated as a conviction under section 3(5) and that is taken to be spent under section 4(1a).
  - (4) An exclusion under clause 6, 7 or 8 of Schedule 1 does not apply in relation to an offence committed by a particular person if a qualified magistrate has made an order to that effect under section 13A.

## 12—Insertion of section 13A

After section 13 insert:

### **13A—Exclusions may not apply**

- (1) A person in relation to whom a conviction for an offence is spent may apply to a qualified magistrate for an order that 1 or more of clauses 6, 7 and 8 of Schedule 1 do not apply in relation to the offence.
- (2) An application under this section must be made in accordance with the regulations.
- (3) An application for an order under this section in relation to an offence may not be made if a qualified magistrate has refused to make an order under this section in relation to the same offence within the proceeding 2 years.
- (4) An application under this section may not be made in respect of a conviction for an offence against the laws of another jurisdiction.
- (5) Schedule 2 applies to an application under this section and to proceedings on an application.
- (6) The making of an order under this section is at the discretion of the qualified magistrate and that discretion will be exercised having regard to—
  - (a) the nature, circumstances and seriousness of the offence; and
  - (b) in the case of an application that relates to clause 6 of Schedule 1—if the offence involved a child or children; and
  - (c) in the case of an application that relates to clause 7 of Schedule 1—if the offence involved a vulnerable person or persons; and
  - (d) if a victim impact statement was furnished to the sentencing court in connection with the sentencing of the applicant for the offence (and that statement is available to the qualified magistrate)—anything referred to in that statement; and
  - (e) any penalty imposed, and any other order or requirement made or imposed by a court, in relation to the offence; and
  - (f) all the circumstances of the applicant, including the circumstances of the applicant at the time of the commission of the offence and at the time of the application and whether the applicant appears to have rehabilitated and to be of good character; and
  - (g) whether the removal of the exclusion by operation of an order under this section might present a risk to children, vulnerable persons or the public more generally (and, if so, the extent of that risk); and

- (h) whether there is any public interest served in not making the order; and
  - (i) any other matter considered relevant by the qualified magistrate.
- (7) An order under this section will have effect according to its terms.

## 13—Insertion of Schedule 2

After Schedule 1 insert:

### **Schedule 2—Provisions relating to proceedings before a qualified magistrate**

#### **1—Interpretation**

In this Schedule—

*exemption order* means an order under section 13A;

*prescribed order* means an exemption order or a spent convictions order;

*spent conviction order* means an order under section 8A.

#### **2—Extent of application**

- (1) An application for an exemption order may relate to more than 1 relevant clause under Schedule 1 and be made in relation to more than 1 offence.
- (2) An application for a spent conviction order may be made in relation to more than 1 conviction.
- (3) An application for an exemption order and an application for a spent conviction order made by the same person may be heard jointly.

#### **3—Notice of application**

- (1) The Attorney-General and the Commissioner of Police—
  - (a) must each be served with a copy of an application for a prescribed order; and
  - (b) may each intervene in the proceedings relating to an application for a prescribed order and, in so doing, be represented at a hearing of the application.
- (2) In addition, in the case of an application for an exemption order that relates to clause 6 or 7 of Schedule 1, the designated Minister—
  - (a) must be served with a copy of the application; and
  - (b) may intervene in the proceedings relating to the application and, in so doing, be represented at a hearing of the application.

(3) In this clause—

***designated Minister*** means—

- (a) in relation to an application for an exemption order that relates to clause 6 of Schedule 1— the Minister for Children's Protection; and
- (b) in relation to an application for an exemption order that relates to clause 7 of Schedule 1— the Minister for Disabilities;

***Minister for Children's Protection*** means the Minister who has portfolio responsibility for the office within the public service that is primarily concerned with the provision of criminal history assessments for the purposes of Part 2 Division 3 of the *Children's Protection Act 1993*;

***Minister for Disabilities*** means the Minister who has portfolio responsibility for matters associated with the interests of persons with a disability.

#### **4—Conduct of proceedings**

- (1) An application for a prescribed order must be heard in private unless the applicant consents to the hearing being in public or the qualified magistrate considers that, in the circumstances of the case, the hearing should be in public.
- (2) If a hearing is held in private, the qualified magistrate may give directions as to who may be present.
- (3) If a hearing is held in public, the qualified magistrate may order that there must not be published by any means any particulars likely to lead to the identification of the applicant.

#### **5—Principles governing hearings**

- (1) In any proceedings for a prescribed order—
  - (a) the qualified magistrate is not bound by the rules of evidence but may inform himself or herself as the qualified magistrate thinks fit; and
  - (b) the qualified magistrate must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.
- (2) Without limiting subclause (1) and despite any other clause, but subject to subclause (3), a qualified magistrate may, if he or she thinks it appropriate, conduct all or part of any proceedings entirely on the basis of documents without the applicant or any representative attending or participating in a hearing.
- (3) Subclause (2) does not apply if the Attorney-General or another Minister, or the Commissioner of Police, has intervened in the proceedings.

- (4) A qualified magistrate may, if satisfied that an application for a prescribed order is vexatious, misconceived or lacking in substance, dismiss the application without holding a hearing.