

South Australia

# Statutes Amendment (Assessment of Relevant History) Act 2013

An Act to amend the *Children's Protection Act 1993*, the *Disability Services Act 1993* and the *Spent Convictions Act 2009*.

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## Contents

### Part 1—Preliminary

- 1 Short title
- 2 Commencement
- 3 Amendment provisions

### Part 2—Amendment of *Children's Protection Act 1993*

- 4 Amendment of section 8A—General functions of the Chief Executive
- 5 Amendment of section 8B—Powers and obligations of responsible authority in respect of relevant history
- 6 Insertion of section 8BA
  - 8BA Obligations of certain performers of prescribed functions in respect of relevant history
- 7 Amendment of section 8C—Obligations of certain organisations

### Part 3—Amendment of *Disability Services Act 1993*

- 8 Insertion of sections 5B and 5C
  - 5B Powers and obligations of responsible authority in respect of relevant history
  - 5C Obligations of certain performers of prescribed functions in respect of relevant history
- 9 Substitution of section 10
  - 10 Regulations

### Part 4—Amendment of *Spent Convictions Act 2009*

- 10 Amendment of section 13—Exclusions
- 11 Amendment of section 13A—Exclusions may not apply
- 12 Amendment of Schedule 1—Exclusions
  - 9A Screening units

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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 (Assessment of Relevant History) 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 *Children's Protection Act 1993***

### **4—Amendment of section 8A—General functions of the Chief Executive**

Section 8A(j)—delete "about the criminal history of employees and volunteers who work with children in government or non-government organisations" and substitute:

in connection with an assessment of a person's relevant history (whether under section 8B or 8BA or otherwise)

### **5—Amendment of section 8B—Powers and obligations of responsible authority in respect of relevant history**

- (1) Section 8B(1)—delete "criminal" and substitute:

relevant

- (2) Section 8B(2)—delete "criminal" and substitute:

relevant

- (3) Section 8B(5)(a)—delete "criminal" and substitute:

relevant

- (4) Section 8B(6)(b)—after "care" insert:

, cultural, entertainment or party

- (5) Section 8B(6)—after paragraph (b) insert:

and

(c) non-government organisations of a class prescribed by regulation.

- (6) Section 8B(7)—delete "Regulations made for the purposes of this section" and substitute:

The regulations

- (7) Section 8B(7)(a)—delete "prescribe the manner in which an assessment of a person's criminal" and substitute:

make provision in relation to the manner in which an assessment of a person's relevant

- (8) Section 8B(7)(b)—delete "criminal history assessments for the purposes of this section" and substitute:

assessments of a person's relevant history for the purposes of this section or section 8BA, or any other purpose prescribed by regulation and relating to the care and protection of children

- (9) Section 8B(7)—after paragraph (b) insert:
- (ba) require a specified organisation, or an organisation of a specified class, to use a specified person or body to undertake relevant history assessments for the purposes of this section; and
  - (bb) make provision in relation to the issue of certificates relating to assessments of a person's relevant history; and
- (10) Section 8B(7)(c) and (d)—delete "criminal" wherever occurring and substitute in each case:
- relevant
- (11) Section 8B(7)(e)—delete "relating to a person's criminal history" and substitute:
- relating to, or obtained in the course of an assessment of, a person's relevant history
- (12) Section 8B(7)(f)—delete paragraph (f)
- (13) Section 8B(8), definition of *employment*—delete the definition
- (14) Section 8B(8), definition of *managing authority*—after "vested" insert:
- (and, in the case of a board, committee or body that is not incorporated, each member of the board, committee or body will be taken to be a managing authority of the organisation)
- (15) Section 8B(8), definition of *prescribed position* and *responsible authority*—delete the definitions and substitute:
- prescribed position*, in an organisation, means—
- (a) a position that requires or involves the performance of 1 or more prescribed functions; or
  - (b) a position, or a position of a class, in a government organisation designated (by notice in the Gazette) by the responsible authority for the government organisation as a prescribed position for the purposes of this section;
- relevant history*, of a person, means—
- (a) in the case of an assessment of a person's relevant history undertaken by a person or body authorised by the regulations to undertake relevant history assessments—information of the following kinds:
    - (i) findings of guilt for offences committed by the person in South Australia or elsewhere (whether those findings of guilt relate to offences committed before or after the commencement of this section);
    - (ii) offences alleged to have been committed (whether before or after the commencement of this section) by the person in South Australia or elsewhere and with which the person has been charged but which have not yet been finally determined;
    - (iii) information relating to findings of guilt and charges referred to in a preceding subparagraph;

- (iv) information relating to charges for offences alleged to have been committed by the person in South Australia or elsewhere (whether those charges relate to offences alleged to have been committed before or after the commencement of this section and regardless of the outcome of those charges);
  - (v) information lawfully obtained or held for any purpose by a person or body prescribed by regulation (being information that is relevant to whether a person is a suitable person to perform prescribed functions);
  - (vi) information provided by the person for the purposes of an assessment of his or her relevant history; or
- (b) in the case of an assessment of a person's relevant history undertaken by a person or body other than a person or body authorised by the regulations to undertake relevant history assessments—information of the following kinds:
- (i) findings of guilt for offences committed by the person in South Australia or elsewhere (whether those findings of guilt relate to offences committed before or after the commencement of this section);
  - (ii) offences alleged to have been committed (whether before or after the commencement of this section) by the person in South Australia or elsewhere and with which the person has been charged but which have not yet been finally determined;
  - (iii) information provided by the person for the purposes of an assessment of his or her relevant history,

but does not, in respect of a relevant history assessment of a kind specified in the regulations, include information, or information of a class, declared by the regulations to be excluded from the ambit of this definition;

***responsible authority*** means—

- (a) for a government organisation that is a department—the chief executive of that department;
- (b) for a government organisation that is an agency or instrumentality—the managing authority of that agency or instrumentality;
- (c) for a non-government organisation—
  - (i) the managing authority of the organisation; or
  - (ii) if the managing authority has delegated its responsibilities under this section to a body approved by regulation for the purposes of this definition—that body.

(16) Section 8B—after subsection (8) insert:

- (9) Information of a kind referred to in paragraph (b) of the definition of **relevant history** may, despite any other Act or law, be disclosed to a person or body that is undertaking an assessment of a person's relevant history (whether under this section or otherwise).
- (10) Any information (whether of a kind referred to in the definition of **relevant history** or otherwise) may, despite any other Act or law, be disclosed to a person or body authorised by the regulations to undertake relevant history assessments.

## 6—Insertion of section 8BA

After section 8B insert:

### **8BA—Obligations of certain performers of prescribed functions in respect of relevant history**

- (1) This section applies to the following persons:
  - (a) a natural person who, in the course of carrying on a business as a sole trader or in partnership, performs 1 or more prescribed functions;
  - (b) a natural person who, as a volunteer, performs a prescribed function;
  - (c) a responsible authority for an organisation to which section 8B applies who is a natural person.
- (2) This section does not apply to the following persons:
  - (a) a person appointed to, or engaged to act in, a prescribed position (within the meaning of section 8B(1));
  - (b) a person, or person of a class, declared by the regulations to be a person or class of persons to whom this section does not apply.
- (3) A person to whom this section applies must not perform a prescribed function unless—
  - (a) an assessment of the person's relevant history has been undertaken in accordance with the regulations within the preceding 3 years; or
  - (b) the person has obtained a criminal history report prepared by South Australia Police or CrimTrac within the preceding 3 years.

Maximum penalty: \$10 000.

- (4) An assessment referred to in subsection (3)(a) must be undertaken by a person or body authorised by the regulations to undertake assessments of a person's relevant history for the purposes of this section or section 8B.

- (5) A person to whom this section applies must, on request made—
- (a) by a person who is, or purports to be, a prescribed person; and
  - (b) while the person to whom this section applies is performing the prescribed function; and
  - (c) in accordance with the regulations,

produce for inspection evidence of a prescribed kind of his or her compliance with subsection (3).

Maximum penalty: \$10 000.

- (6) In this section—

*CrimTrac* means the CrimTrac Agency established under the *Public Service Act 1999* of the Commonwealth;

*prescribed function* has the same meaning as in section 8B;

*prescribed person* means a parent, guardian or carer of a child in respect of whom a prescribed function is, or may be, performed;

*responsible authority* has the same meaning as in section 8B.

## 7—Amendment of section 8C—Obligations of certain organisations

Section 8C(4)—delete subsection (4) and substitute:

- (4) This section applies to—
- (a) government organisations; and
  - (b) non-government organisations that provide health, welfare, education, sporting or recreational, religious or spiritual, child care, cultural, entertainment or party or residential services wholly or partly for children; and
  - (c) non-government organisations of a class prescribed by regulation.

## Part 3—Amendment of *Disability Services Act 1993*

### 8—Insertion of sections 5B and 5C

Before section 6 insert:

#### **5B—Powers and obligations of responsible authority in respect of relevant history**

- (1) The responsible authority for a prescribed disability service provider must ensure that, before a person is appointed to, or engaged to act in, a prescribed position (whether as an employee, volunteer, agent, contractor or subcontractor) in the provider, an assessment of the person's relevant history is undertaken in accordance with the regulations.

Maximum penalty: \$10 000.

- (2) The responsible authority for a prescribed disability service provider may, at any time, as the authority thinks necessary or desirable for the purpose of ensuring the safety and welfare of persons for whom disability services are provided, cause an assessment of the person's relevant history to be undertaken in accordance with the regulations of any person who—
- (a) occupies or acts in a prescribed position (whether as an employee, volunteer, agent, contractor or subcontractor) in the provider; or
  - (b) carries out, or is to carry out, as an indirect service provider, prescribed functions for the purposes of the provider.
- (3) The Chief Executive may, at the request of the responsible authority for a prescribed disability service provider, exercise powers of the responsible authority under this section if satisfied that—
- (a) the responsible authority has sought, but failed to obtain, the cooperation of a person in respect of whom the responsible authority is required or authorised to cause a relevant history assessment to be undertaken in accordance with the regulations; or
  - (b) there is some other good reason for doing so.
- (4) The regulations may (without limitation)—
- (a) make provision in relation to the manner in which an assessment of a person's relevant history may be undertaken; and
  - (b) provide for the authorisation of persons or bodies to undertake assessments of a person's relevant history for the purposes of this section or section 5C, or any other purpose prescribed by regulation and relating to the provision of disability services; and
  - (c) require a specified prescribed disability service provider, or a prescribed disability service provider of a specified class, to use a specified person or body to undertake relevant history assessments for the purposes of this section; and
  - (d) make provision in relation to the issue of certificates relating to assessments of a person's relevant history; and
  - (e) make provision in relation to the release of information relating to a person's relevant history to another jurisdiction; and
  - (f) make provision in relation to the use of information relating to a person's relevant history received from another jurisdiction; and
  - (g) make provision in relation to confidentiality of information relating to, or obtained in the course of an assessment of, a person's relevant history.

- (5) The Chief Executive may develop and issue standards to be observed in dealing with information obtained in connection with an assessment of a person's relevant history (whether under this section, section 5C or otherwise).

- (6) In this section—

**Chief Executive** means the chief executive of the administrative unit of the Public Service that is, under the Minister, responsible for the administration of this Act;

**indirect service provider**—a person carries out functions as an indirect service provider if the person carries out the functions for some other body or person which, in turn, makes the person's services available to the prescribed disability service provider;

**managing authority** of a prescribed disability service provider, means the board, committee or other body or person in which the management of the provider is vested (and, in the case of a board, committee or body that is not incorporated, each member of the board, committee or body will be taken to be a managing authority of the provider);

**prescribed functions** means—

- (a) regular contact with people with a disability or working in close proximity to people with a disability on a regular basis, unless the contact or work is directly supervised at all times; or
- (b) supervision or management of people in positions requiring or involving regular contact with people with a disability or working in close proximity to people with a disability on a regular basis; or
- (c) access to records of a kind prescribed by regulation relating to people with a disability; or
- (d) functions of a type prescribed by regulation;

**prescribed position**, in a prescribed disability service provider, means—

- (a) a position that requires or involves the performance of 1 or more prescribed functions; or
- (b) a position, or position of a class, in a government department, agency or instrumentality designated (by notice in the Gazette) by the responsible authority for the government department, agency or instrumentality as a prescribed position for the purposes of this section;

**relevant history**, of a person, means—

- (a) in the case of an assessment of a person's relevant history undertaken by a person or body authorised by the regulations to undertake relevant history assessments—information of the following kinds:

- (i) findings of guilt for offences committed by the person in South Australia or elsewhere (whether those findings of guilt relate to offences committed before or after the commencement of this section);
  - (ii) offences alleged to have been committed (whether before or after the commencement of this section) by the person in South Australia or elsewhere and with which the person has been charged but which have not yet been finally determined;
  - (iii) information relating to findings of guilt and charges referred to in a preceding subparagraph;
  - (iv) information relating to charges for offences alleged to have been committed by the person in South Australia or elsewhere (whether those charges relate to offences alleged to have been committed before or after the commencement of this section and regardless of the outcome of those charges);
  - (v) information lawfully obtained or held for any purpose by a person or body prescribed by regulation (being information that is relevant to whether a person is a suitable person to perform prescribed functions);
  - (vi) information provided by the person for the purposes of an assessment of his or her relevant history; or
- (b) in the case of an assessment of a person's relevant history undertaken by a person or body other than a person or body authorised by the regulations to undertake relevant history assessments—information of the following kinds:
- (i) findings of guilt for offences committed by the person in South Australia or elsewhere (whether those findings of guilt relate to offences committed before or after the commencement of this section);
  - (ii) offences alleged to have been committed (whether before or after the commencement of this section) by the person in South Australia or elsewhere and with which the person has been charged but which have not yet been finally determined;
  - (iii) information provided by the person for the purposes of an assessment of his or her relevant history,

but does not, in respect of a relevant history assessment of a kind specified in the regulations, include information, or information of a class, declared by the regulations to be excluded from the ambit of this definition;

*responsible authority* means—

- (a) for a government department—the chief executive of that department;
  - (b) for a government agency or instrumentality—the managing authority of that agency or instrumentality;
  - (c) for any other prescribed disability service provider—
    - (i) the managing authority of the provider; or
    - (ii) if the managing authority has delegated its responsibilities under this section to a body approved by regulation for the purposes of this definition—that body.
- (7) Information of a kind referred to in paragraph (b) of the definition of *relevant history* may, despite any other Act or law, be disclosed to a person or body that is undertaking an assessment of a person's relevant history (whether under this section or otherwise).
- (8) Any information (whether of a kind referred to in the definition of *relevant history* or otherwise) may, despite any other Act or law, be disclosed to a person or body authorised by the regulations to undertake relevant history assessments.

### **5C—Obligations of certain performers of prescribed functions in respect of relevant history**

- (1) This section applies to the following persons:
- (a) a natural person who is a prescribed disability service provider and who, in the course of carrying on a business as a sole trader or in partnership, performs 1 or more prescribed functions;
  - (b) a natural person who is a prescribed disability service provider and who, as a volunteer, performs a prescribed function;
  - (c) a responsible authority for a prescribed disability service provider who is a natural person.
- (2) This section does not apply to the following persons:
- (a) a person appointed to, or engaged to act in, a prescribed position (within the meaning of section 5B(1));
  - (b) a person, or person of a class, declared by the regulations to be a person or class of persons to whom this section does not apply.
- (3) A person to whom this section applies must not perform a prescribed function unless—
- (a) an assessment of the person's relevant history has been undertaken in accordance with the regulations within the preceding 3 years; or

- (b) the person has obtained a criminal history report prepared by South Australia Police or CrimTrac within the preceding 3 years.

Maximum penalty: \$10 000.

- (4) An assessment referred to in subsection (3)(a) must be undertaken by a person or body authorised by the regulations to undertake assessments of a person's relevant history for the purposes of this section or section 5B.
- (5) A person to whom this section applies must, on request made—
  - (a) by a person who is, or purports to be, a prescribed person; and
  - (b) while the person to whom this section applies is performing the prescribed function; and
  - (c) in accordance with the regulations,

produce for inspection evidence of a prescribed kind of his or her compliance with subsection (3).

Maximum penalty: \$10 000.

- (6) In this section—

***CrimTrac*** means the CrimTrac Agency established under the *Public Service Act 1999* of the Commonwealth;

***prescribed disability service provider*** includes a person, or person of a class, declared by the regulations to be included in the ambit of this definition;

***prescribed function*** has the same meaning as in section 5B;

***prescribed person*** means—

- (a) a person with a disability; or
- (b) a parent, guardian or carer of a person with a disability,

in respect of whom a prescribed function is, or may be, performed;

***responsible authority*** has the same meaning as in section 5B.

## 9—Substitution of section 10

Section 10—delete the section and substitute:

### 10—Regulations

- (1) The Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this Act.
- (2) Without limiting the generality of subsection (1), the regulations may make provision for or relating to—
  - (a) exemptions (conditional or unconditional) from specified provisions of this Act; and

- (b) fees in respect of any matter under this Act and their payment, recovery or waiver; and
  - (c) fines, not exceeding \$10 000, for offences against the regulations; and
  - (d) expiation fees (not exceeding \$315) for alleged offences against the regulations; and
  - (e) facilitation of proof of the commission of offences against the regulations.
- (3) The regulations may—
- (a) be of general application or vary in their application according to prescribed factors;
  - (b) provide that a matter or thing in respect of which regulations may be made is to be determined according to the discretion of the Minister, a specified person or the holder of a specified office.
- (4) The regulations may refer to or incorporate, wholly or partially and with or without modification, a code, standard or other document prepared or published by a prescribed body, either as in force at the time the regulations are made or as in force from time to time.
- (5) If a code, standard or other document is referred to or incorporated in the regulations—
- (a) a copy of the code, standard or other document must be kept available for public inspection, without charge and during ordinary office hours, at an office or offices specified in the regulations; and
  - (b) evidence of the contents of the code, standard or other document may be given in any legal proceedings by production of a document apparently certified by the Minister to be a true copy of the code, standard or other document.

## **Part 4—Amendment of *Spent Convictions Act 2009***

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

- (1) Section 13—after subsection (2) insert:
- (2a) Subsection (2) does not apply in relation to the operation of clause 9A of Schedule 1.
- (2) Section 13(3a)—delete "and 4" and substitute:
- , 4 and 9A

## 11—Amendment of section 13A—Exclusions may not apply

Section 13A—after subsection (7) insert:

- (8) An order under this section does not limit the operation of clause 9A of Schedule 1 in any respect.

## 12—Amendment of Schedule 1—Exclusions

Schedule 1—after clause 9 insert:

### 9A—Screening units

- (1) Part 3 Division 1 does not apply—
  - (a) to the performance of a function or the exercise of a power by a prescribed screening unit in prescribed circumstances; or
  - (b) in relation to an entity acting in prescribed circumstances on the basis of information furnished by a prescribed screening unit.
- (2) However, if a prescribed screening unit is in possession of information relating to—
  - (a) a conviction that has been quashed, or in relation to which the person has been granted a pardon for the offence; or
  - (b) 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); or
  - (c) a conviction for an offence in relation to which an order has been made under section 13A,

the exclusion constituted under subclause (1) will not apply unless the prescribed screening unit is satisfied that there are good reasons for the exclusion to have effect under this Act.

- (3) In acting under subsection (2)—
  - (a) the prescribed screening unit must, when considering whether good reasons exist for the purposes of that subclause, give strong weight to the fact that the conviction or circumstances relate to—
    - (i) a conviction that no longer applies in relation to the person (in the case of a quashed conviction or pardon); or
    - (ii) circumstances that did not lead to an actual conviction (in the case of circumstances to which section 3(5) applies), or
    - (iii) circumstances where a qualified magistrate has been willing to make an order under section 13A, as the case may be; and

- (b) if the prescribed screening unit decides that there are good reasons for the exclusion to have effect, the prescribed screening unit must provide reasons in accordance with the regulations.
- (4) In this clause—  
***prescribed screening unit*** means an entity (including an entity constituted under, or for the purposes of, a law of another jurisdiction) prescribed by the regulations for the purposes of this definition.