

South Australia

Spent Convictions (Decriminalised Offences) Amendment Act 2020

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 (Decriminalised Offences) Amendment Act 2020*.

2—Commencement

This Act comes 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 long title

Long title—delete ";" and substitute:

or if the conduct constituting the offence has been decriminalised

5—Amendment of section 3—Preliminary

(1) Section 3(1), definition of *designated sex-related offence*—after paragraph (b) insert:

or

(c) an offence against—

(i) section 69, 70 or 71 (other than section 70(1)(b) or (c)) of the *Criminal Law Consolidation Act 1935* before its repeal by the *Criminal Law Consolidation Act Amendment Act 1972* (No 94 of 1972); or

(ii) section 69 (other than section 69(1)(b)(ii) or (iii)) of the *Criminal Law Consolidation Act 1935* before its repeal by the *Criminal Law (Sexual Offences) Amendment Act 1975* (No 66 of 1975); or

(iii) any other provision, prescribed by regulation, that involves consensual sexual activity between persons of the same sex;
or

(d) an offence against the common law substantially corresponding to an offence referred to in paragraph (a) or (c); or

(e) an offence of attempting, or of conspiracy or incitement, to commit an offence mentioned in paragraphs (a) to (d);

(2) Section 3(1), definition of *eligible sex offence*—delete the definition and substitute:

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;

(3) Section 3(1)—after the definition of *overseas jurisdiction* insert:

prescribed public decency offence means an offence against public decency or morality by which homosexual behaviour could be punished (but does not include a sex offence);

6—Amendment of section 5—Scope of Act

(1) Section 5(1)—after paragraph (c) insert:

(d) a conviction for a prescribed public decency offence.

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

or a designated sex-related offence

7—Amendment of section 8A—Spent conviction for eligible sex offence

- (1) Section 8A(5)—delete "(subject to subsection (6))"
- (2) Section 8A(6)—delete subsection (6)

8—Insertion of sections 8B and 8C

After section 8A insert:

8B—Spent conviction for designated sex-related offence

- (1) A conviction for a designated sex-related offence is spent if, on application in accordance with the regulations, a qualified magistrate makes an order in accordance with subsection (5) that the conviction is spent.
- (2) The following persons may apply for an order under this section:
 - (a) the convicted person;
 - (b) a person specified in Schedule 2 clause 1A, in the circumstances specified.
- (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) A qualified magistrate must make an order that a conviction for an offence is spent if satisfied that—
 - (a) the offence is a designated sex-related offence; and
 - (b) the conduct engaged in by the convicted person or constituting the offence would not, at the time the application is considered, constitute an offence under the law of the State.
- (6) In considering matters in subsection (5)(b) relating to an offence that falls within the ambit of paragraph (c) or (d) of the definition of *designated sex-related offence* (or an offence of attempting, or of conspiracy or incitement, to commit such an offence), the qualified magistrate must have regard to—
 - (a) whether any person involved in the conduct that was the subject of the conviction did or did not consent to the conduct; and
 - (b) the ages and respective ages of any persons involved in the conduct that was the subject of the conviction; and
 - (c) any other matter the qualified magistrate reasonably considers relevant in the circumstances.

8C—Spent conviction for prescribed public decency offence

- (1) A conviction for a prescribed public decency offence is spent if, on application in accordance with the regulations, a qualified magistrate makes an order in accordance with subsection (6) that the conviction is spent.
- (2) The following persons may apply for an order under this section:
 - (a) the convicted person;
 - (b) a person specified in Schedule 2 clause 1A, in the circumstances specified.
- (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) An application for an order under this section may be made irrespective of whether the conviction the subject of the application has been spent under section 8.
- (5) Schedule 2 applies to an application under this section and to proceedings on an application.
- (6) A qualified magistrate must make an order that a conviction for an offence is spent if satisfied that—
 - (a) the offence is a prescribed public decency offence; and
 - (b) the convicted person would not have been charged with the offence but for the fact that the conduct engaged in by the person or constituting the offence was suspected of being, or being connected to, homosexual activity; and
 - (c) the conduct engaged in by the convicted person or constituting the offence would not, at the time the application is considered, constitute an offence under the law of the State.
- (7) Despite the fact that a conviction for a prescribed public decency offence may be spent under section 8, the qualified magistrate may make an order under subsection (6) that the conviction is spent under this section and, accordingly, the order applies for the purposes of Schedule 1 clause a1(1)(c).
- (8) In considering matters in subsection (6)(c), the qualified magistrate must have regard to the following:
 - (a) whether any person involved in the conduct that was the subject of the conviction did or did not consent to the conduct;
 - (b) the ages and respective ages of any persons involved in the conduct that was the subject of the conviction;
 - (c) any other matter the qualified magistrate reasonably considers relevant in the circumstances.

9—Variation of Schedule 1—Exclusions

- (1) Schedule 1, clause a1(1)(b)—delete "8A" and substitute:
8B
- (2) Schedule 1, clause a1(1)—after paragraph (b) insert:
 - (c) does not apply in relation to a prescribed public decency offence in relation to which an order has been made under section 8C, except as may be prescribed by the regulations.

10—Variation of Schedule 2—Provisions relating to proceedings before a qualified magistrate

- (1) Schedule 2, clause 1, definition of *spent conviction order*—after "8A" insert:
, 8B or 8C
- (2) Schedule 2—after clause 1 insert:

1A—Application for a spent conviction order—designated sex-related offences and prescribed public decency offences

- (1) The following persons, in addition to a convicted person, may apply for a spent conviction order to be made in respect of a conviction for a designated sex-related offence or a prescribed public decency offence:
 - (a) if the convicted person is a person with a mental incapacity—
 - (i) the convicted person's spouse or domestic partner; or
 - (ii) an adult who is a sibling or child of the convicted person; or
 - (iii) a person appointed as a guardian of the convicted person; or
 - (iv) any other person a qualified magistrate considers to be an appropriate person to make an application in the circumstances of the particular case;
 - (b) if the convicted person is deceased—
 - (i) the person who was the convicted person's spouse or domestic partner at the time of death; or
 - (ii) an adult who is a sibling or child of the convicted person; or
 - (iii) the executor or administrator of the convicted person's estate; or
 - (iv) any other person a qualified magistrate considers to be an appropriate person to make an application in the circumstances of the particular case.

- (2) For the purposes of this section, a person is, on a certain date, the ***domestic partner*** of another if—
- (a) the person is, on that date, in a registered relationship with the other; or
 - (b) the person is, on that date, living with the other in a close personal relationship.

- (3) In this section—

close personal relationship means the relationship between 2 adult persons (whether or not related by family and irrespective of their sex or gender identity) who live together as a couple on a genuine domestic basis, but does not include a relationship where 1 of the persons provides the other with domestic support or personal care (or both) for fee or reward, or on behalf of some other person or an organisation of whatever kind;

mental incapacity means the inability of a person to look after the person's own health, safety or welfare or to manage the person's own affairs, as a result of—

- (a) any damage to, or any illness, disorder, imperfect or delayed development, impairment or deterioration of, the brain or mind; or
- (b) any physical illness or condition that renders the person unable to communicate the person's intentions or wishes in any manner whatsoever;

registered relationship means a relationship that is registered under the *Relationships Register Act 2016*, and includes a corresponding law registered relationship under that Act.

- (3) Schedule 2, clause 4(3)—delete "applicant" and substitute:
convicted person