

South Australia

Spent Convictions Bill 2008

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 2008*.

2—Commencement

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

Drafting note—

Subject to local variations.

3—Preliminary

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

10 *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;

15 *Commonwealth authority* means—

(a) a Commonwealth Minister; or

(b) a Commonwealth Department; or

(c) the Defence Force; or

20 (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 within the meaning of Schedule 1 to the *Workplace Relations Act 1996* of the Commonwealth or a branch of such an organisation; or

25 (iii) a transitionally registered association within the meaning of Schedule 10 to the *Workplace Relations Act 1996* of the Commonwealth; or

30 (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

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- (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
- 5 (i) a tribunal established under a Commonwealth law; or
- (j) the Supreme Court of the Australian Capital Territory; or
- (k) the Australian Federal Police.

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

10 **conviction** means a conviction, whether summary or on indictment, for an offence and includes a formal finding of guilt made by a court, or a finding by a court that a charge has been proved;

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;

15 **Court** means the District Court of South Australia;

Drafting note—

Subject to local variations.

20 **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
- 25 (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;

30 **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—

- 35 (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
- 5 (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;
- 10 (c) the Australian Customs 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;
- 15 (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 Attorney-General for the Commonwealth or a State;
- 20 (h) 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;
- (i) 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;
- 25 (j) the Australian Taxation Office, the Australian Securities and Investment Commission or the Australian Electoral Commission, in connection with any function associated with the prosecution of offences or assisting with the prosecution of offences;
- (k) the Department for Correctional Services or an equivalent entity in another State;
- 30 (l) the Department responsible for a training centre under the *Young Offenders Act 1993* or an equivalent entity in another State;
- (m) the Registrar or administrator of a Commonwealth or State court;
- (n) a person or body brought within the ambit of this definition by the regulations;

Drafting note—

Subject to local variations.

minor offence means an offence where, on conviction—

- (a) the defendant is discharged without penalty; or
- 40 (b) the only penalty imposed on the defendant (disregarding any demerit points that may apply) is a fine not exceeding—

spent, for a conviction—see section 4;

spent conviction order means an order under section 9;

State includes Territory;

this jurisdiction means South Australia;

tribunal means a tribunal constituted by law.

(2) 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).

Drafting note—

Subject to local variations

(3) In this Act, a reference to a conviction that is spent includes a reference to the charge to which the spent conviction related.

(4) 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.

(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 sex offence;

Drafting note—

This paragraph is required if it is decided that a sex offence cannot become spent under this Act.

- (c) a conviction prescribed by the regulations.

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- (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—
- 5 (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
- 10 (c) the operation of any disqualification, disability or other prohibition imposed in respect 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.
- 15 (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

- 20 (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.
- 25 (3) In the case of convictions for offences against the laws of any other jurisdiction (including the laws of another country), 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) This Act applies to convictions for offences whether such convictions occurred before or after the commencement of this Act.

30 Part 2—Requirements for a conviction to become spent

7—Determination of qualification period

- 35 (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.

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- (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 against the laws of another country; or
- (b) the offence is a minor offence; or
- (c) the conviction is quashed; or
- (d) 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 that has no correspondence to an offence against a law of this jurisdiction.

8—Spent conviction—general provision

A conviction for an offence, other than a prescribed eligible offence, is spent on completion of the qualification period for the conviction.

Drafting note—

- 5 The reference to a *prescribed eligible offence* should be deleted if it is decided that a sex offence cannot become spent under this Act.

9—Spent conviction for a prescribed eligible offence

Drafting note—

- 10 This section should be deleted if it is decided that a sex offence cannot become spent under this Act.

- (1) A conviction for a prescribed eligible offence is spent if, on application to the Court by the convicted person, the Court makes an order that the conviction is spent.
- (2) An application for an order under this section in respect of a conviction—
 - 15 (a) may not be made until the completion of the qualification period for the conviction; and
 - (b) may not be made if the Court has refused to make an order under this section in respect of the same conviction within the preceding 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.
- 20 (4) Schedule 1 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 Court and that discretion will be exercised having regard to—
 - 25 (a) the nature, circumstances and seriousness of the offence;
 - (b) the length and kind of sentence imposed in respect of the conviction;
 - (c) the length of time since the conviction;
 - 30 (d) 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;
 - (e) whether the conviction prevents or may prevent the applicant from engaging in a particular profession, trade or business or in a particular employment;
 - (f) whether there is any public interest to be served in not making an order.

10—Subsequent conviction after conviction becomes spent

- 35 (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

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- (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),

5 the status of the conviction for the first offence as a spent conviction under this Act is suspended until the qualification period for the later offence has been completed.

Part 3—Effect of a conviction becoming spent**Division 1—Disclosure****11—Person not required to disclose spent conviction**

10 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
- (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.

12—Unlawful disclosures—public records

(1) A person is guilty of an offence if—

- 30 (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; and
- (c) the person knew, or ought reasonably have known, at the time of the disclosure, that the information was about a spent conviction.

35 Maximum penalty: \$10 000.

(2) It is a defence to a charge for an offence against subsection (1) to prove that the disclosure was made with the consent of the person whose conviction is spent.

Drafting note—

An alternative enforcement mechanism might be adopted—for example, a complaint to a Privacy Commissioner or other authority.

13—Unlawful disclosures—business activities

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.

Division 2—Exclusions**14—Exclusions**

The following table sets out exclusions from the operation of Division 1 (to the extent specified in the relevant item).

Table**1—Justice agencies**

- (1) Sections 11 and 12 do 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) Sections 11, 12 and 13 do 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.

2—Specific Commonwealth agencies

Sections 11, 12 and 13 do 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;
- (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

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- (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) the Australian Government Solicitor, for the purpose of instituting or conducting proceedings for any offence.

3—Designated judicial authorities

- (1) Sections 11 and 12 do not apply in connection with proceedings before, or the making of any decision by, a designated judicial authority (including a decision concerning sentencing or 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

Sections 11, 12 and 13 do not apply in connection with proceedings before, or the making of any decision by, the Parole Board or an equivalent entity in another State.

Drafting note—

Local variations may be necessary to include bodies that can authorise the release of juvenile offenders.

5—Judicial and associated officers

Sections 11, 12 and 13 do not apply in relation to 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, employment and other activities

Sections 11, 12 and 13 do 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, custody, care, control or supervision of a child, or access to a child; or
- (b) a person undertaking, or seeking to undertake, (including without any fee or reward) work or any other activity that directly involves —
 - (i) the care, supervision or instruction of children; or
 - (ii) the care of aged persons or persons with a disability (including an intellectual disability), illness or impairment; or
- (c) 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—
 - (i) children; or
 - (ii) aged persons or persons with a disability (including an intellectual disability), illness or impairment; or

- (d) a person—
 - (i) employed as, or seeking employment as, a police officer; or
 - (ii) employed in, or seeking employment in, an office or position involving duties connected with the punishment, probation or paroling of offenders; or
- (e) a person who has obtained, or is seeking, registration or enrolment, or a licence or accreditation, in or in relation to an occupation, profession or position that requires the person, pursuant to statute, to be a fit and proper person or to be a person of good character; or
- (f) any disciplinary or fitness inquiry or investigation associated with a person within the ambit of a preceding paragraph.

7—Firefighting

Sections 11, 12 and 13 do 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.

8—Official Records

Sections 11 and 12 do 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.

9—Archives and libraries

Sections 11 and 12 do 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.

10—Reports and authorised publications

Sections 11 and 12 do 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.

11—Non-identifying information

Sections 12 and 13 do not apply if a disclosure does not contain any information that would tend to identify the convicted person.

12—Prescribed exclusions

The regulations may prescribe other exclusions from the operation of section 11, 12 or 13.

Part 4—Miscellaneous**15—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.

16—Prerogative of mercy not affected

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

17—Act does not authorise destruction of records

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

18—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—Provisions relating to proceedings for spent conviction orders**Drafting note—**

A jurisdiction may choose to make local variations, especially if the usual practice in that jurisdiction would be to provide for an application to be made to a judge of the relevant Court rather than to the Court itself.

1—Application may relate to more than 1 conviction

An application for a spent conviction order may be made in respect of more than 1 conviction.

2—Notice of application

- (1) The Attorney-General and the Commissioner of Police must each be served with an application for a spent convictions order.
- (2) The Attorney-General or the Commissioner of Police (or both of them) may intervene in an application for a spent conviction order and, in so doing, may be represented at the hearing of the application.

3—Conduct of proceedings

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

4—Principles governing hearings

- (1) In any proceedings for a spent conviction order—
 - (a) the Court is not bound by the rules of evidence but may inform itself as it thinks fit; and
 - 5 (b) the Court must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.
- (2) The Court may, if satisfied that an application for a spent conviction order is vexatious, misconceived or lacking in substance, dismiss the application without holding a hearing.