

Our reference: 2005/ 182-1

Ms Sarah Chidgey  
Assistant Secretary  
Criminal Law Branch  
Attorney-General's Department  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600

Dear Ms Chidgey

### **Comments on the draft Model Spent Convictions Bill 2008**

My Office welcomes the opportunity to comment on the draft model *Spent Convictions Bill 2008* (the 'draft model Bill').

We note that in the *Model Spent Convictions Bill - Draft Consultation Paper*, you have requested general comments on the draft model Bill as well as comments in relation to some specific matters. A copy of the Office's comments is attached. In summary, we make the following suggestions:

1. The proposed uniform spent convictions scheme should enable individuals to complain to the relevant Privacy or Information Commissioner in that jurisdiction (or, in the absence of such bodies, to another oversight body such as the Ombudsman) that information about a spent conviction has been mishandled.
2. The Australian Privacy Commissioner (or equivalent Privacy or Information Commissioner in the relevant jurisdiction) should have power to assess and advise on proposed exclusions to the proposed uniform scheme as currently occurs under Part VIIC of the *Crimes Act 1914 (Cth)*.
3. The Office supports the suggestions of the Privacy & FOI Branch of the Department of Prime Minister & Cabinet made in April 2008, that a 'fit for purpose' test and a 'relevant offences' test should be incorporated into the exclusions in clause 14, and that some guidance be provided on the objective test(s) to be met to secure an exclusion.
4. The Office supports the proposal made by the Privacy & FOI Branch of the Department of Prime Minister & Cabinet in April 2008, that the draft model Bill include a "no detriment" transition provision (unless this is provided for elsewhere).
5. In considering whether sexual offences should ever be permitted to become spent, it may be more appropriate for automatic exclusions to operate by reference to the severity of the sentence, than by reference to a type of offence. There could also be an exclusion for specific offences from the spent convictions scheme where they meet a prescribed purpose such as offences against minors.

6. A conviction for an offence which does not correspond to an offence under Australian law, should become spent on application to a court.

The Office would also welcome further information on the policy reasons for limiting the definition of an 'eligible adult offence' to those with a sentence of less than 12 months.

Finally, the Office would appreciate being kept informed on the progress of the draft model Bill and would be happy to provide further comments. It would also welcome the opportunity to provide comments on any proposed regulations or other relevant materials as they become available. The Office also consents to this submission being made public, and intends to publish it on its website.

If you would like to discuss any of the issues raised here, please do not hesitate to contact Nina Rassaby on (02) 9284 9796 or at [nina.rassaby@privacy.gov.au](mailto:nina.rassaby@privacy.gov.au).

Yours sincerely

Karen Curtis  
Australian Privacy Commissioner

22 January 2009

## **Comments from the Office of the Privacy Commissioner regarding the draft model Spent Convictions Bill 2008**

### **Background**

The Office of the Privacy Commissioner (the 'Office') provided comments to the Attorney General's Department on previous versions of the draft model Bill by letters in September 2007 and April 2008. The Office has also provided comments on the 'Uniform Spent Convictions: a Proposed Model Discussion Paper 2004'.

These comments expressed the Office's support for uniformity across jurisdictions in relation to the handling of personal information about spent convictions, subject to appropriate regard being given to the protection of individuals' privacy. In particular, the Office noted the sensitivity that may attach to personal information that relates to an individual's criminal record history. This is reflected in the *Privacy Act 1988 (Cth)*, which defines information about a person's criminal record as 'sensitive information'<sup>1</sup>. Such information is especially sensitive because it could lead to individuals being stigmatised, embarrassed or discriminated against, and therefore it should be handled with particular care.

The Office also made suggestions in its comments of April 2008 and September 2007, about how individuals' privacy might be better protected under the proposed uniform scheme. The Office believes that these suggestions provide important safeguards against the inappropriate handling of sensitive personal information.

### **Role of the Privacy Commissioner**

In its comments of April 2008, the Office submitted that an important element of the current Commonwealth spent convictions scheme in Part VIIC of the *Crimes Act 1914* (the 'Crimes Act') is the Australian Privacy Commissioner's advisory and regulatory role. The Australian Privacy Commissioner's main functions under Part VIIC of the Crimes Act are to:

- a. Investigate an act or practice of a person that may breach division 2 or 3 of Part VIIC of the Crimes Act, which, in general terms, prohibit anyone from disclosing information about another person's spent, quashed or pardoned conviction to any other person, Commonwealth authority or State authority, or, from taking account of another person's spent, quashed or pardoned conviction<sup>2</sup>;
- b. Advise the Minister regarding whether to grant an exclusion to the spent convictions scheme<sup>3</sup>; and
- c. Consider, investigate and make determinations in relation to complaints that the handling of an individual's criminal records may breach division 2 or 3 of Part VIIC<sup>4</sup>.

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<sup>1</sup> See section 6(1) of the *Privacy Act 1988 (Cth)*.

<sup>2</sup> See section 85ZZ(1)(a) of the *Crimes Act 1914 (Cth)*.

<sup>3</sup> See section 85ZZ(1)(b) of the *Crimes Act 1914 (Cth)*.

<sup>4</sup> See division 5, Part VIIC of the *Crimes Act 1914 (Cth)*.

In contrast, the draft model Bill appears to provide a limited role for the Privacy Commissioner, referring only to a potential complaint handling function in the drafting note following clause 12. Instead, the draft model Bill creates offences for breaching the proposed uniform scheme. While the Office recognises that introducing criminal offences may provide an appropriate deterrent and remedy for egregious mishandling of personal information, it may not offer aggrieved individuals the possibility of a personal, direct and timely redress.

The Office proposes two suggested changes to the draft model Bill, which it considers will provide an important balance between addressing the privacy issues that arise from the proposed uniform scheme and ensuring that its policy aims are achieved.

Firstly, the Office suggests that the proposed uniform scheme should enable individuals to complain to the relevant Privacy or Information Commissioner in that jurisdiction (or, in the absence of such body, to another oversight body such as the Ombudsman) that:

- a. A person was required to disclose information about a spent conviction, or was refused an appointment, post, status or privilege (or this was revoked) on the grounds of a spent conviction<sup>5</sup>;
- b. Information about a spent conviction was disclosed by a person with access to public records, where he or she knew, or ought reasonably to have known that the information was about a spent conviction<sup>6</sup>;
- c. Information about a spent conviction was disclosed by a person in the course of carrying on a business involving the disclosure of information about offences, where he or she knew, or ought reasonably to have known that the information was about a spent conviction<sup>7</sup>; or
- d. Information about a spent conviction was fraudulently or dishonestly obtained from records of convictions kept by, or on behalf of a public authority<sup>8</sup>.

In the Office's view, a complaint handling mechanism is likely to provide an opportunity for a personal, direct and timely redress for aggrieved individuals. This would also provide a mechanism to enforce clause 11 of the draft model Bill, which generally provides that an individual must not be required to disclose information about a spent conviction. Currently, clause 11 appears to have no enforcement mechanism.

Secondly, the Office considers that the Australian Privacy Commissioner (or equivalent Privacy or Information Commissioner in the relevant jurisdiction) should have power to assess and advise on proposed exclusions to the spent convictions scheme as currently occurs under Part VIIC of the Crimes Act. In the Office's opinion, this would provide an important oversight mechanism for ensuring that exclusions are not excessive or without justification so as to maintain community trust in the exclusions. Moreover, as information about a person's criminal history is highly sensitive, the Australian Privacy Commissioner (or equivalent Commissioner in the relevant jurisdiction), as

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<sup>5</sup> See clause 11 of the draft model Bill.

<sup>6</sup> See clause 12 of the draft model Bill.

<sup>7</sup> See clause 13 of the draft model Bill.

<sup>8</sup> See clause 13 of the draft model Bill.

an independent party, could closely examine the public policy implications of any proposed exclusion on a case by case basis.

This is consistent with recommendations made by the Law Reform Commission in Report No. 37- Spent Convictions, 1987, which stated:

The underlying rationale for the spent convictions scheme requires that, before there can be an exemption for a particular class of decision maker, the relevance of the spent conviction to the decision making process, and the public interest in allowing its consideration, must be clearly demonstrated. Any claim for each further exemption should be scrutinised by an expert body to ensure that it is demonstrably justified on these grounds<sup>9</sup>.

Where a jurisdiction does not have an office equivalent to the Australian Privacy Commissioner, provision could be made for jurisdictions to have regard to the Australian Privacy Commissioner's advice when considering exclusions.

### **Convictions that may be spent**

In general under the draft model Bill, only a conviction for which a sentence of imprisonment is not imposed, or where the sentence is less than 12 months' imprisonment (or 24 months for juveniles), is eligible to become a spent conviction. In contrast, under Part VIIC of the Crimes Act, a conviction for which a sentence is not more than 30 months' imprisonment, is eligible to become a spent conviction (there is no separate criterion for juvenile offenders).

It therefore seems likely that many offences which are currently spent under the Commonwealth scheme, would be excluded from the operation of the proposed uniform scheme. This means that the proposed scheme is likely to have an impact on a greater number of individuals than the current Commonwealth scheme.

The Office reiterates its previous comments that it would welcome further information as to the policy justification for limiting the definition of an 'eligible adult offence' to those with a sentence of less than 12 months.

Further, clause 6 (4) of the draft model Bill suggests that convictions which were previously spent under the Crimes Act, may no longer be spent under the draft model Bill. The Office considers that this may unfairly disadvantage individuals who have not previously needed to declare convictions which have become spent under the Commonwealth scheme.

The Office therefore supports the proposal made by the Privacy & FOI Branch of the Department of Prime Minister & Cabinet in April 2008, that the draft model Bill include a "no detriment" transition provision (unless this is provided for elsewhere). Subject to the Office's comments above regarding the definition of 'eligible adult offence', the Office considers that this would be an appropriate and fair way to accommodate individuals who have convictions that have become spent under existing schemes.

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<sup>9</sup> See <http://www.austlii.edu.au/au/other/alrc/publications/reports/37/> at paragraph 43.

## **Exclusions**

In its comments on a previous draft version of the Bill in April 2008, the Privacy & FOI Branch of the Department of Prime Minister & Cabinet suggested that a 'fit for purpose' test and a 'relevant offences' test should be incorporated into the exclusions in clause 14 . The Department also suggested some guidance be provided on the objective test(s) to be met to secure an exclusion.

The Office supports these suggestions, which it considers would help to ensure that individuals are not unduly or unfairly disadvantaged by old, minor convictions.

## **Sexual offences**

The Office understands that the Standing Committee of Attorneys-General is considering whether sexual offences should ever be permitted to become spent.

While the Office recognises the significant community concern associated with sexual offences, it considers that it may be more appropriate for automatic exclusions to operate by reference to the severity of the sentence, than by reference to a type of offence. This is because the length of a sentence imposed by a Court will usually reflect the community's perception of the seriousness of an offence in particular circumstances. Moreover, serious sexual offences would be excluded from the spent convictions scheme due to the sentences usually imposed.

As an alternative to a blanket exclusion of all sexual offences, the Office considers that the exclusion of specific offences from the spent convictions scheme may be appropriate where this meets a prescribed purpose. The prescribed purpose could more closely reflect the community's expectations about the specific circumstances in which details of a type of offence may need to be disclosed. For example, section 85ZZH of the Crimes Act provides that the spent convictions provisions in division 3 of Part VIIC do not apply in relation to the disclosure of information to or by, or the taking into account of information by:

A person or body who employs or otherwise engages other persons in relation to the care, instruction or supervision of minors, for the purpose of finding out whether a person who is being assessed by the person or body for that employment or engagement has been convicted of a [sexual offence or any other offence against a victim who was under 18 at the time] (emphasis added).

## **Overseas offences**

The Office understands that the Standing Committee of Attorneys-General is considering how the draft model Bill should treat an offence under foreign law that does not correspond to an offence under Australian law.

Currently, the draft model Bill provides that for the purposes of determining the qualification period for an offence to become spent:

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<sup>10</sup>.

In the Office's view, a person should not need to disclose a conviction for an offence under a foreign law, where that offence does not correspond to an offence under Australian law.

In practice, it may be difficult for individuals to determine whether or not particular offences correspond to Australian offences. The Office therefore supports the proposal suggested in the *Model Spent Convictions Bill- Draft Consultation Paper* that these convictions could become spent on application to a court. The Office further suggests that in considering such an application, courts should take into account the equivalent penalties for similar offences under Australian law.

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<sup>10</sup> See clause 7(6)(b) of the draft model Bill.