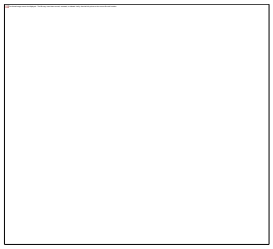

Peter Hallahan
Secretary
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Hallahan

Thank you for your letter of 11 September 2009 inviting the Law Council to comment on the Crimes Amendment (Working With Children—Criminal History) Bill 2009 ("the Bill"), which is currently under consideration by the Senate Legal and Constitutional Affairs Committee.

The purported aim of the Bill is to enhance child protection in Australia by facilitating the inter-jurisdictional exchange of criminal history information about people working with or seeking to work with children.

The Law Council is supportive of endeavours to minimise the risk of sexual, physical and emotional harm to children by carefully screening the suitability of those tasked with their care, supervision and instruction.

However, the Law Council is concerned that several of the Bill's provisions potentially interfere with a person's right to rehabilitation, privacy and employment without any demonstrated justification.

Specifically, the Law Council is concerned with those amendments which relate to:

- the disclosure and use of information about pardoned and quashed convictions;
- the disclosure and use of information about spent convictions regardless of type; and
- the scope of the phrase "work with children".

The Law Council's concerns are explained in greater detail below.

<u>Disclosure and Use of Information about Pardoned and Quashed Convictions</u>

Under the current provisions of the *Crimes Act 1914*, where a person has been granted a free and absolute pardon for an offence on the basis that he or she was wrongly convicted:

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- The person is not required to disclose that he or she was charged with or convicted of the offence;
- No other person may disclose to a third party or a Commonwealth or state authority that he or she was charged with or convicted of the offence, unless he or she consents to the disclosure; and
- No other person may take into account that he or she was charged with or convicted of the offence, unless he or she consents.[1]

The same protections are afforded a person whose conviction has been quashed.[2]

Currently, these sections of the *Crimes Act* do not provide for any exceptions or exclusions.[3]

The provisions reflect the principle that if a person has been pardoned (on the basis of a wrongful conviction) or their conviction has been quashed or set aside by a higher court on review, they are entitled to the full benefit of that decision. That requires that the person be treated as if the conviction had never occurred. Any different approach would mean that, once convicted, a person's guilt can never be fully expunged even where the process by which the conviction was secured is found to have been flawed.

Notwithstanding that general principle, the Bill proposes to amend these provisions to create an exception which would allow for information about pardoned or quashed convictions to be disclosed to, and taken into account by, a prescribed person or body which is required or permitted by law to obtain and deal with information about persons who work, or seek to work, with children.[4]

In essence, the effect of the proposed amendments is that agencies such as CrimTrac and the Australian Federal Police will be permitted to disclose information about pardoned and quashed convictions so that it can be taken into account in assessing a person's suitability to engage in child-related work.

Neither the Second Reading Speech nor the Explanatory Memorandum offers any justification for this amendment. No explanation is provided about why or how the fact that a person was once wrongly convicted of an offence should be taken into account in determining their suitability to engage in child-related work.

It is important to note that these amendments relate to offences of all types and are not confined to pardoned or quashed convictions for offences against children.

The result of these amendments is that a person's employment opportunities may be curtailed on the basis of a prior criminal charge, even though ultimately the person was exonerated.

The Law Council submits that this appears to be inconsistent with article 14(2) of the International Covenant on Civil and Political Rights which provides that a person should be treated as innocent until proven guilty. In that respect, the Law Council notes that

[1] Sections 85ZR and 85ZS
[2] Section 85ZT and 85ZQ
[3] There is one minor exception to this. Section 85ZZK provides that "the publication of a fair and accurate report of the circumstances in which a person was granted a pardon (on any ground), or a person's conviction was quashed, and of any related court proceedings, is not a breach of Division 2 or 3."

[4] See items 1,3 and 4 and proposed sections 85ZZGB, 85ZZGC and 85ZZGD.

those domestic jurisdictions with Human Rights Acts, namely the ACT and Victoria, have both declined to participate in the exchange of information on non-conviction charges.[5]

The Law Council acknowledges that under the proposed amendments the Minister will only be able to prescribe a person or body as someone to whom criminal history information may be disclosed if the Minister is satisfied that the person or body:

- complies with applicable Commonwealth law, State law or Territory law relating to privacy, human rights and records management; and
- complies with the principles of natural justice; and
- has risk assessment frameworks and appropriately skilled staff to assess risks to children's safety.[6]

However, the Law Council submits that these purported safeguards offer little protection in the circumstance.

The amendments, by their very nature, declare that it will sometimes be legitimate (and therefore compliant with applicable privacy, human rights and natural justice principles) to take into account, including to a person's disadvantage, a charge in relation to which that person was ultimately exonerated.

In the Second Reading Speech, the Minister for Home Affairs, the Hon. Brendan O'Connor MP talked in broad terms about screening processes necessarily involving the *"careful balancing of potential risks to children with individual rights to privacy, employment and the freedom to participate in the community as a volunteer."*[7]

Similarly, the Explanatory Memorandum asserts that "*a comprehensive regime for assessing people who work, or seek to work with children must be balanced with a person's right to rehabilitation, privacy and employment."*

However, in neither case is *any* guidance offered about when that balancing process might appropriately require that in interests of child protection, a person can be discriminated against on the basis of a past wrongful or quashed conviction.

In the absence of evidence demonstrating that these amendments will deliver improved child protection outcomes which warrant interference with fundamental rights, the Law Council submits that the proposed exceptions to the prohibition on the disclosure and use of information relating to pardoned or quashed convictions should not be passed.

<u>Disclosure and Use of Information about Spent Convictions regardless of type</u>

Under the current provisions of the Crimes Act, where a person has been convicted of an offence but that conviction has become "spent":

- The person is not required to disclose that he or she was charged with or convicted of the offence;

[5] Statement of Meeting Outcomes, Council of Australian Governments' Meeting 29 November 2008, available at: http://www.coag.gov.au/coag_meeting_outcomes/2008-11-29/#children
[6] 85ZZGE
[7] Crimes Amendment (Working with Children – Criminal History) Bill 2009, Second Reading Speech, The Hon. Brendan O'Connor MP, 20 August 2009

- No other person may disclose to a third party or a Commonwealth or state authority that he or she was charged with or convicted of the offence, unless he or she consents to the disclosure; and
- No other person may take into account that he or she was charged with or convicted of the offence, unless he or she consents.[8]

A conviction is regarded as spent when:

- the person has been granted a pardon for a reason other than that the person was wrongly convicted of the offence; or
- the person was not sentenced to imprisonment for the offence, or was not sentenced to imprisonment for the offence for more than 30 months, and the waiting period for the offence has ended.

The "waiting period" is generally five years from the date of conviction for a person who was convicted as juvenile and ten years in all other circumstances.[9] However, the waiting period may be extended where a person commits a further offence before the period has expired.[10]

The central objective of the spent conviction regime is to allow offenders convicted of relatively minor offences, who have subsequently functioned in the community for a considerable period without committing another offence, the opportunity to engage in society without the stigma of a criminal conviction.

The provisions encourage and reward the rehabilitation of offenders. They attempt to reduce the risk that a person's opportunities to participate in the community, including through employment, will be unfairly limited on the basis of an earlier mistake which is not relevant to, or indicative of, their likely future conduct.

The rehabilitative motive behind the spent conviction regime is particularly critical in respect of persons who have been convicted of a minor offence in their youth.

It is important to note that, by encouraging the reintegration of offenders into society, the spent convictions regime not only serves the interests of the individuals affected, but also the broader community. This point was succinctly made by the Australian Law Reform Commission in its report on spent convictions. The ALRC stated:

> *...there is a strong case for doing something about the problems faced by former offenders. If nothing were done, society would be needlessly depriving itself of the talents and energies of people in whose positive development it has a distinct interest.*[11]

The *Crimes Act* currently allows a number of exceptions to the general prohibition on the disclosure and use of information relating to spent convictions.

Relevantly, for the purposes of this Bill, the Crimes Act currently provides that the spent convictions regime does 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:

[8] Sections 85ZV and 85ZW
[9] Section 85ZL
[10] Section 85ZX and ZY
[11] Australian Law Reform Commission, *Spent Convictions,* Report No 37, 1987, p 4

- *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 designated offence*.[12]
- *otherwise makes available care, instruction or supervision services for 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 designated offence.*[13]

A "designated offence" means a sexual offence or an offence against the person committed against a minor.[14]

In essence, the *Crimes Act* currently provides that where a person is being assessed for a position which relates to the care, instruction or supervision of minors, the person or body conducting the assessment may have access to and take into account information about a prior conviction for a sex offence or an offence committed against a child – even though that offence would otherwise be regarded as "spent".

The Bill proposes to repeal these provisions and insert a significantly broader exception which would allow for information about *all* spent convictions, regardless of their type, to be disclosed to, and taken into account by, a prescribed person or body which is engaged in assessing whether a person is suitable to work with children.[15]

The Law Council acknowledges that the interests of community safety will sometimes require exemptions from the spent convictions regime. However, the Law Council submits that a spent conviction should only be required to be disclosed, or should only be permitted to be taken into account, where it can be demonstrated the offence is relevant to the exempt situation.

The Law Council submits that no justification has been offered for why those engaged in assessing a person's suitability to work with children require complete access to information about a person's spent convictions.

As above, no explanation is provided about why or how the fact that a person was once convicted of *any* minor offence, regardless of its nature, should be taken into account in determining their suitability to engage in child-related work.

In the Second Reading Speech two assertions are made in support of the amendments.

First it is claimed that:

"the Australian Institute of Criminology, in its report 'Child sexual abuse: offender characteristics and modus operandi', noted that incarcerated sexual offenders are

[12] Section 85ZZH(e)
[13] Section 85ZZH(f)
[14] 85ZL
[15] See items 7 and proposed sections 85ZZGB, 85ZZGC and 85ZZGD.

more likely to have previous convictions for non-sexual offences than for sexual offences."

Further it is claimed that:

"law enforcement agencies have indicated that charges relating to offences against children are often withdrawn as a decision is made to protect the child victim from the stress and trauma of giving evidence, cross-examination and simply waiting for committal and trial."

The Bill's Digest highlights the lack of compelling empirical data to support these claims:

"... the evidence that incarcerated sexual offenders are more likely to have previous convictions for non-sexual offences than for sexual offences is based on an Australian Institute of Criminology report that was published in 2001 which made this statement based on studies conducted in 1992, 1997, 1998 and 2000. Indeed only one of those studies was Australian. The Government has not referred to more recent evidence to support this statement. Furthermore, neither the second reading speech nor the Explanatory Memorandum provides any detail of law enforcement agencies' 'indications' that charges are often withdrawn to protect the child from court proceedings."[16]

However, the Law Council submits that, even if the accuracy of these claims is accepted, they establish nothing further than that the absence of prior convictions for sexual offences is not, in itself, a reliable indicia of whether a person is suitable to work with children.

These claims, even if accepted, do not in any way establish the relevance of convictions, which:

- are over ten years old (or five years in the case of a juvenile conviction);
- did not result in the imposition of a period of imprisonment of over thirty months (and may not have resulted in the imposition of any period of imprisonment); and
- do not relate to a sexual offence or an offence committed against a child

to assessing a person's suitability to care for, supervise or instruct children.

The danger of allowing all spent convictions to be disclosed, regardless of type, is that it increases the risk that people will be discriminated against on the basis of an old conviction regardless of its relevance to the inherent requirements of the position they are seeking appointment to.

This risk was highlighted by the Australian Human Rights Commission (AHRC) in its submission on the draft Model Spent Convictions Bill which was released for consultation earlier this year by the Standing Committee of Attorney-Generals.[17]

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[16] Parliament of Australia Department of Parliamentary Services, Bills Digest *Crimes Amendment (Working With Children – Criminal History) Bill 2009* at p.7

[17] AHRC submission on the Model Spent Convictions Bill, 5 February 2009, p8, available at: http://www.humanrights.gov.au/legal/submissions/2009/20090205_model.html#fn1

In that submission, the Commission stated that it was aware from the complaints it receives that unsatisfactory outcomes result from employers taking into account irrelevant criminal records. The Commission provided the following case study:

> *Employment as a youth worker: The complainant was employed as a locum caseworker for a State Government Department. He disclosed his criminal convictions and provided information regarding the circumstances surrounding his convictions. He states that he then applied for a permanent position. He was told that due to his criminal history, a drug possession (marijuana) charge 16 years ago, he would not be appointed to the position and could no longer have one-on-one contact with clients. The complainant's employment was then terminated.*

As above, the Law Council acknowledges and welcomes the proposal that under the amendments the Minister will only be able to prescribe a person or body as someone to whom criminal history information may be disclosed if the Minister is satisfied that the person or body:

- complies with applicable Commonwealth law, State law or Territory law relating to privacy, human rights and records management; and
- complies with the principles of natural justice; and
- has risk assessment frameworks and appropriately skilled staff to assess risks to children's safety.[18]

However, the Law Council submits that, without the inclusion of further guidance, the protection afforded by this safeguard is limited. This is because the amendments expressly allow for *all* spent convictions regardless of type, age or seriousness to be taken into account.

Further, the Law Council notes that while the Explanatory Memorandum provides that a prescribed person or body may only use a person's criminal history information '*for the limited purpose of assessing the risk that [the] person may pose in working with children*" and that the "*information may not be used for the purpose of a general probity or employment suitability check*", this prohibition is not reflected in the Bill itself.

The Law Council submits that in the absence of evidence demonstrating that a particular type of spent conviction is relevant to assessing a person's suitability to care for, supervise or instruct children, such a conviction should not be able to be disclosed or taken into account.

On that basis the Law Council submits that the amendments should not be passed.

However, in the event the amendments are passed, the Law Council supports the submission made by the AHRC on the Model Spent Convictions Bill. In that submission the AHRC recommended that, if a broad exemption to the spent convictions regime is to be introduced, it must be balanced by an amendment to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act) to make unlawful discrimination on the ground of criminal record.

[18] 85ZZGE

Specifically, the AHRC recommended that section 3 of the HREOC Act be amended to include criminal record within the definition of 'unlawful discrimination'. This amendment would provide individuals with access to the regime for resolving complaints of unlawful discrimination at section 46P-PO of the HREOC Act before the Commission, the Federal Court and the Federal Magistrates Court.

In support of this recommendation the AHRC submitted as follows:[19]

> *At present, the Commission may inquire into complaints alleging discrimination in employment on the ground of criminal record under a different regime to that applying to cases of 'unlawful discrimination' under the Racial Discrimination Act 1975 (Cth), the Sex Discrimination Act 1984 (Cth), the Disability Discrimination Act 1992 (Cth) and the Age Discrimination Act 2004 (Cth).[20] The Commission may find that certain conduct is discriminatory, if the complaint is unable to be conciliated. However, the Commission's actions are limited to preparing a report with recommendations to the Attorney-General for tabling in Parliament.[21] The Commission is not empowered to enforce its recommendations and a complainant does not have access to the Federal Court or the Federal Magistrates Court.*
>
> *The Commission submits that it is essential that criminal record discrimination is made unlawful at the federal level. This will ensure that employers with access to spent convictions make decisions based on the relevance of the conviction to the person's ability to perform the inherent requirements of the particular job.*
>
> *Protection at a federal level is particularly important in light of the absence of comprehensive protection at a State and Territory level. Only Tasmania and the Northern Territory have laws that specifically prohibit discrimination on the ground of criminal record.[22] Western Australia and the ACT have legislation that prohibits discrimination on the ground of spent convictions.*[23]

The AHRC also noted that having Federal Court jurisprudence on the circumstances in which a criminal record is relevant to the person's ability to perform the inherent requirements of the job would provide greater certainty for employers.

<u>No Limitation on the Phrase "Work with Children"</u>

Under the current provisions of the *Crimes Act*, and under the draft Model Spent Convictions Bill,[24] relevant exemptions to the spent conviction regime are drafted so that they only apply to the assessment of people engaged in or seeking to engage in a job or activity which involves '*the care, instruction or supervision'* of children.[25]

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[19] AHRC submission on the Model Spent Convictions Bill, 5 February 2009, p9, available at: http://www.humanrights.gov.au/legal/submissions/2009/20090205_model.html#fn1
[20] HREOCA Act, ss 31(b), 32(1).
[21] HREOC Act, ss 31(b)(ii), 35(2).
[22] *Anti-Discrimination Act 1992* (NT), s 19(q); *Anti-Discrimination Act 1998* (Tas), s 16(q).
[23] *Spent Convictions Act 1988* (WA); *Discrimination Act 1991* (ACT), s 7(1)(o).
[24] Available on the SCAG website at http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/Spent_convictions_Model_Bill.pdf/$file/Spent_convictions_Model_Bill.pdf
[25] Crimes Act 1914 Sections 85ZZH(e) and (f) and Model Spent Conviction Bill cl.6

The current Bill provides an exemption for disclosure to a prescribed person or body which is required or permitted by or under law, to deal with information about persons who '*work, or seek to work, with children*'.

The Bill provides a definition of 'work'[26] but it does not provide a definition of the critical phrase 'work with children'. This phrase is very broad and could encompass large parts of the workforce who work alongside or in contact with people under the age of 18, but who have no direct responsibility for them.

The Law Council submits that there is no need or child protection imperative for breaching the privacy of this broader class of persons by subjecting them to criminal history checks, let alone in circumstances where their pardoned, quashed and spent convictions may be disclosed and taken into account.

For that reason, the Law Council submits that a definition of 'work with children' should be added to the Bill which provides that the phrase only encompasses those directly engaged in the care, supervision or instruction of children.

Further exclusions from Division 2

Currently under the *Crimes Act*, the Privacy Commissioner is given a number of functions in relation to the operation of the provisions relating to pardoned, quashed and spent convictions. For example, section 85ZZ(1)(b) provides that one of the functions of the Privacy Commissioner is:

"*to receive and examine any written requests for complete or partial exclusion of persons from the application of Division 3* [which deals with spent convictions] *and advise the Minister whether an exclusion should be granted and whether there should be any restrictions on the circumstances in which an exclusion would apply."*

Under item 5 of the Bill it is proposed to amend section 85ZZ(1)(b) so that the Privacy Commissioner may also receive, examine and advise on any written requests for complete or partial exclusion of persons from Division 2, which deals with the non-disclosure of pardoned and quashed convictions.

The Explanatory Memoranda explains that *"this amendment is necessary as no exclusions previously applied to Division 2."*

The Law Council would, however, be very concerned if this amendment was intended to foreshadow that even further exclusions from the general prohibition on the disclosure of pardoned and quashed convictions may be permitted outside the context of this Bill.

The Law Council notes that s 85ZZH provides for exclusions from the operation of Division 3 [relating to limitations on disclosure of spent convictions] for a range of purposes including purposes prescribed by regulation. Regulation 8 of the *Crimes Regulations 1990* provides that a further range of purposes is excluded from the limitations on disclosure in Division 3 (but not Division 2).

The relationship (if any) between the Privacy Commissioner's role under 85ZZ(1) (b) and the Government's role in making regulations for exclusions pursuant to s 85ZZH is not

[26] See proposed section 85ZZGF

clear to the Law Council and we suggest that the Committee examines the implications of any such relationship.

The possibility of a role for the Privacy Commissioner in relation to advising on the prescription of bodies for the purpose of the new ss 85ZZGB, 85ZZGC and 85ZZGD [dealing with exclusions from the limitations of disclosure under Divisions 2 and 3], and whether such bodies comply with applicable privacy laws, is also not clear to the Law Council and we suggest that the Committee examine such a possibility.

Reporting Requirements

If the amendments proposed in the Bill are passed, the Law Council supports the proposal to commence a review of their operation by June 2011, in order to ensure that information disclosed under the relevant provisions is being used, handled, stored and destroyed appropriately.

Yours sincerely,

Bill Grant
Secretary-General

6 October 2009