



Australian Government
Attorney-General's Department

Criminal Justice Division

09/16142

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Peter Hallahan
Committee Secretary
Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Mr Hallahan

Thank you for the opportunity to respond to the issues raised by the submissions to the Senate Legal and Constitutional Committee inquiry into the Crimes Amendment (Working with Children - Criminal History) Bill 2009 (the Bill).

The Bill has received wide support from a range of community organisations which have made submissions to the Committee. We acknowledge that there are also some important issues raised by several contributors. An outline of the objectives of the Bill and our response to these issues is set out below.

Objectives of the Bill and its operation

The safeguarding of children from sexual, physical and other abuse is a key priority for all Australian governments as demonstrated by the COAG agreement to enable the inter-jurisdictional exchange of further criminal history information for people working with children. The Bill implements the COAG decision by removing barriers to the sharing of criminal history information in the Commonwealth spent convictions scheme contained in Part VIIC of the *Crimes Act 1914*. The commencement of an expanded information exchange is approved as a one-year trial and the project will be reviewed by both the Implementation Working Group and the Minister for Home Affairs after that period.

The exchange of criminal history information for people working with children (ECHIPWC) Project Implementation Committee was consulted throughout the development of the Bill. This Committee comprised representatives from all jurisdictions, government departments, law enforcement agencies and organisations which currently undertake screening for working with children checks. In addition, CrimTrac and the Australian Federal Police were both consulted about the manner in which criminal history information is currently exchanged and the likely effect of the proposed amendments.

Concerns about expanding the types of conviction information used in child related employment screening

The Queensland Law Society and the Law Council of Australia have expressed concerns that the decision to include spent, quashed and pardoned conviction information in child related employment screening is based on insufficient evidence.

Assessment of the criminal history of people working or seeking to work with children is an important part of the overall strategy for managing risks to the safety and wellbeing of children. It is appropriate to consider a person's complete criminal history in assessing whether he or she poses a risk to children if employed in child related work. The nature and circumstances of the offence of which a person is convicted may be relevant in assessing the person's suitability to work with children even if it is not a violent or sexual offence. For example, convictions for a range of offences where the victim is a child may be relevant. Other types of offences such as drug trafficking offences or offences of menacing or harassing another person may also be relevant. Restricting the exchange of criminal history information to certain categories of offences may create a risk that relevant information would not be disclosed to a screening unit and could undermine the comprehensiveness of the screening process.

The fact that a person's conviction for an offence has been quashed or pardoned does not necessarily make the facts and circumstances of that offence irrelevant to an assessment of the risk that the person poses to children if employed in child related work. A person's conviction may be quashed for reasons that do not negate the credibility of evidence on which the conviction was based. Accordingly, non-conviction information may be useful in assessing the suitability of a person to work with children.

Recognising that it would be desirable to test the need for use of this expanded range of information in practice, COAG agreed to establish the expanded information exchange for a one year trial period to provide the opportunity to assess the effectiveness of the program. All jurisdictions have agreed to undertake a comprehensive review of the program following the trial period. To support the review process, all screening units will be required to record data about the volume of such inter-jurisdictional requests (including which jurisdictions were approached). As a further safeguard, the Bill provides that the Minister for Home Affairs will conduct a separate review of the program one year after it commences.

Balancing the interests of child safety against offender rehabilitation and the right to work

The Law Council of Australia and the Salvation Army have commented that there is no guidance in the Bill concerning the process of balancing the potential risks to children with the individual rights to privacy, employment and the opportunity to participate as a volunteer.

Protecting children from harm is the paramount objective of this Bill. At the same time, it is critical for society to afford every opportunity to offenders to rehabilitate themselves and find gainful employment.

The jurisdictional authorised screening units that assess a person's suitability to work with children are required to have risk assessment frameworks and appropriately skilled staff to assess risks to children's safety and to comply with the principles of natural justice. This will ensure that, when a screening unit receives a person's complete criminal history information, it undertakes a rigorous process to determine the relevance of a particular conviction to a person's suitability to work with children.

An applicant for a working with children check would always have an opportunity to access the criminal history information available to the screening unit and to respond to the veracity or circumstances of criminal history information relating to them that had been sourced by the screening unit.

The Attorney-General's Department has been advised that all current jurisdictional screening units have appeals processes in place for decisions made in relation to working with children checks. Each jurisdictional authorised screening unit is also required to undertake the following activities as part of their standard process, before a decision to issue a negative notice to an application is made:

- disclosure of the criminal history information to the individual
- allowing the individual a reasonable opportunity to be heard, and
- consideration of the individual's response prior to the finalisation of the screening decision.

Privacy concerns

The Law Council of Australia has raised concerns that the purported safeguards in the Bill offer little protection to individuals. The Office of the Privacy Commissioner has noted that it is important to establish safeguards regarding privacy and how disclosure and use of information will be controlled.

Section 85ZZGG of the Bill provides that the Minister for Home Affairs must be satisfied that a screening unit complies with privacy and records management legislation in the relevant jurisdiction before it can become a prescribed body under the Regulations. By virtue of the power to prescribe a screening unit, the Minister also has the power to remove a screening unit from the list of prescribed bodies where such an organisation fails to meet its ongoing obligation to comply with privacy laws. The Minister and the Implementation Working Group will undertake independent reviews after the 12 month trial period to ensure that the privacy safeguards set out in the Bill provide adequate protection to individuals. One of the factors relevant to the Reviews will be whether screening units are complying with privacy obligations.

Relevant use of disclosed information

The Queensland Law Society and Law Council of Australia have noted the importance of ensuring that any information excluded from the quashed, pardoned and spent convictions schemes is relevant to the purpose it will be used for. It was submitted that spent convictions should only be required to be disclosed when a causal link can be established between the offence and the type of employment applied for.

For the reasons outlined above, it is appropriate to consider a person's full criminal history in assessing whether he or she poses a risk to children if employed in child related work. The nature and circumstances of the offence of which a person is convicted may be relevant in assessing the person's suitability to work with children even if it is not a violent or sexual offence. For example, convictions for a range of offences where the victim is a child may be relevant. Other types of offences such as drug trafficking offences or offences of menacing or harassing another person may also be relevant. Screening units will undertake a rigorous process to assess the relevance of each conviction.

The disclosure and use of information under the Bill is for the very limited purpose of assessing a person's suitability to work with children. The information cannot be used for general probity checking. Accordingly, each jurisdiction has agreed that screening units must have appropriate legislation or business rules in place that ensure that information received under the amendments is used only to screen risks to the safety of children, and not for general employment suitability or probity screening.

Definitions within the Bill

The Queensland Law Society and Law Council of Australia submitted that there is a need to define the scope of the application of amendments and the meaning of 'working with children' so that it does not broaden the existing checking regime.

The Bill does not broaden the scope of persons who may need to undergo a working with children check as these requirements are defined in each jurisdiction. Defining 'working with children' in the Commonwealth Bill is not possible as there are some variations between jurisdictions in how the term is defined.

Potential inconsistency with other laws

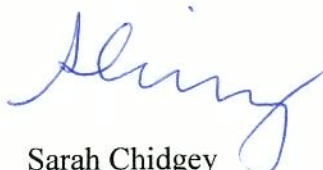
The Queensland Law Society has raised concerns that the Bill is inconsistent with Queensland criminal law which embodies the notion that a quashed or pardoned conviction should be treated as if it never occurred. The Law Council of Australia submitted that the Bill may be inconsistent with article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) which provides that a person should be treated as innocent until proven guilty.

With respect to concerns about conflict with state laws, the COAG agreement provides that all jurisdictions are to ensure that there are no legislative or administrative barriers to the release and exchange of information concerning spent, pardoned and quashed convictions. This Bill removes the current legislative barriers in the Commonwealth *Crimes Act 1914* in relation to convictions for Commonwealth offences and does not affect State or Territory laws.

Article 14(2) of the ICCPR provides that 'everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'. The Bill allows a screening unit to consider pardoned or quashed convictions in determining an individual's suitability to work with children. It does not override the presumption of innocence.

I trust that this information is of assistance to the Committee.

Yours sincerely



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