CHAPTER 3

ISSUES

3.1 Submissions supporting the Bill were received from a broad range of organisations, ranging from child advocacy groups, childcare provider groups, and church and community and organisations which provide activities and services for children.

3.2 A number of other organisations, while supportive of the broad principle underlying the Bill, raised serious concerns with various aspects of the Bill. Issues raised included the breadth of disclosure and rationale supporting it, the implications for the presumptions currently in the Crimes Act in relation to quashed and pardoned convictions, human rights issues and the right to rehabilitation, the adequacy of privacy safeguards, the prescription of bodies receiving and using criminal history information, and definitional issues.

Submissions endorsing the Bill

3.3 Community Child Care Co-operative, which advocates for quality children's services, expressed support for the Bill stating that the safety of a child in a children's service and a child's own rights to safety outweighed a person's interest in putting the offence behind him or her via the normal application of the spent conviction scheme.[1]

3.4 The Salvation Army (Eastern Australian Territory) made a similar point, while acknowledging that there is a tension between conflicting interests:

> The Salvation Army maintains a strong belief in the possibility of change for all offenders regardless of the nature of the offence, and is opposed to any form of unnecessary discrimination against them. However we feel that the disclosure of spent, pardoned and quashed convictions across jurisdictions for people working or seeking to work with children, youth and other vulnerable persons is necessary for the protection of children.[2]

3.5 The Salvation Army explained that:

> … it is estimated that around 70% of prison inmates themselves report having experienced abuse as children, highlighting the devastating and long-term effects of childhood abuse. The damage done to them should be acknowledged, and every effort made to prevent similar effects on future generations.[3]

3.6 Some submissions, while supporting provisions of the Bill, expressed a view that consideration be given to a broader child-related screening framework.

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1 *Submission 2*, p. 2.

2 *Submission 8*, p. 2.

3 *Submission 8*, p. 2.

3.7 The Australian Childhood Foundation expressed the view that the Bill will significantly enhance the capacity of organisations to protect children accessing services and programs. The Foundation noted that:

> In our work with child related organisations, they welcome the structures and tools to manage risk to children, and view the content of prior criminal behaviour as pivotal in their capacity and confidence to provide safe environments for children. In our experience, if there is any unease for the children's services or activity providers, it is that there is not enough information available about applicants.
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> We believe that information relating to charges withdrawn or not proven should not be excluded. The decision to exclude such information does not take into account the prevalence of child sexual abuse and the overwhelmingly poor rate of prosecution and convictions for child sex offences.[4]

3.8 Dr Joe Tucci from the Australian Childhood Foundation elaborated on why the Foundation sees the need for the disclosure of information concerning spent convictions:

> From our point of view, we see adults who were sex offenders a long time ago who basically go underground or do not come to the attention of any authorities, not because they are not necessarily not engaging in sexual assault against children but because they have learnt how to avoid being caught. Over the period of time in which convictions can become spent it does not necessarily follow that they are not engaging in that kind of sexual assaulting and behaviour; it is just that we do not know about it. An early conviction can point to the ongoing risk that this person might pose to children. That kind of information needs to be made available across jurisdictions. It will also help those authorities that are responsible for making decisions around a working with children check or something similar so that they are able to make some evaluation of whether that person is fit to work with or support children. I do not think that we should just let that information slide by. It should be made available and then contextualised by the people who are in the decision-making position.[5]

3.9 While the submission received from Bravehearts gave thorough support to the provisions of the Bill, it also suggested further consideration of more extensive background checks, noting the limitations of a system based on criminal history checks only for persons working with children. Other areas for screening suggested in the submission included whether people had been subject to disciplinary hearings or diversionary programs, their employment history and also overseas checks.[6]

3.10 A submission from the Commissioner for Children Tasmania strongly supported the inclusion of non-conviction information in any screening of individuals

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4 *Submission 16*, pp 1-2.

5 Dr Joe Tucci, *Committee Hansard*, 10 November 2009, p. 13.

6 *Submission 7*, p. 1.

for child-related work and endorsed the scope of the Bill. The Commissioner did however observe that the expression 'risk assessment frameworks' in proposed s.85ZZGE is not defined, and recommended that:

> In order to be proclaimed a 'prescribed body' or 'prescribed person' the person or body's 'risk assessment frameworks' should be defined.[7]

3.11 Other submissions in support of the Bill or the COAG initiative were received from Hon. James Wood AO QC[8]; Family Daycare Australia[9]; Scouts Australia[10]; Surf Lifesaving Australia[11]; the Attorney-General and Minister for Corrective Services (WA)[12] and the Commissioner for Children and Young People and Child Guardian (Qld)[13]. A brief submission was also received from the Law Society of NSW advising that the Society's Criminal Law and Juvenile Justice Committees had reviewed the Bill and 'have no objection to the provisions of the Bill'.[14]

Concerns about aspects of the Bill

3.12 While there was widespread support for the Bill, a number of submissions while supporting endeavours to improve safety and protection to children from harm through child-related screening processes, raised concerns with the Bill's provisions.

3.13 These concerns focussed on the following issues:

- disclosure and use of information concerning pardoned and quashed convictions;
- disclosure and use of information concerning all spent convictions;
- definition of 'working with children'; and
- adequacy of privacy protections.

Disclosure and use of information concerning pardoned and quashed convictions

3.14 Section 85ZS of the Crimes Act currently provides that a person who has been granted a free and absolute *pardon* because they were wrongly convicted of an offence is:

- not required to disclose the fact that they were charged with, or convicted of the offence;

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7 *Submission 1*, p. 2.

8 *Submission 3*.

9 *Submission 5*.

10 *Submission 10*.

11 *Submission 11*.

12 *Submission 12*.

13 *Submission 14*.

14 *Submission 13*.

- able to claim that he or she was not charged with, or convicted of, the offence;
- not subject to any legal duty or disability to which he or she would not have been subject if he or she had not been convicted; and
- able to expect that other people may not take into account that the person was charged with or convicted of the offence, without consent.

3.15 Section 85ZU of the Crimes Act provides similar protections for a person whose conviction has been *quashed* in particular circumstances and it is lawful for a person to claim that they were not charged with, or convicted of, the offence, and other people may not disclose or take into account the fact that the person was charged or convicted, without their consent.

3.16 The Crimes Act does not currently provide any exceptions to the protections afforded under sections 85ZS and 85ZU.

3.17 The proposed new exceptions to allow the disclosure and use of information relating to a person's pardoned and quashed convictions caused concern for a number of submitters. The Law Council of Australia, the Queensland Council for Civil Liberties and the Queensland Law Society all raised issues about these proposed amendments.

3.18 The Law Council expressed support for endeavours to minimise the risk of harm to children by carefully screening persons involved with their care, supervision and instruction. However, the Council expressed concern that:

> … several of the Bill's provisions potentially interfere with a person's right to rehabilitation, privacy and employment without any demonstrated justification.[15]

3.19 The Law Council argued that the Second Reading Speech and the Explanatory Memorandum failed to explain why or how the fact that a person was once wrongly convicted of an offence should be taken into account in determining suitability to engage in child-related work.

3.20 Referring to the provisions in the Crimes Act regarding pardoned and quashed convictions which are discussed above, the Council reminded the committee that those provisions do not provide for any exceptions or exclusions, and 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.[16]

3.21 The Law Council summed up the implications of the proposal:

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15 *Submission 15*, p. 1.

16 *Submission 15*, p. 2.

> 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.[17]

3.22 It was further explained that these amendments may result in limiting a person's employment opportunities because of a prior criminal charge, even though they had been exonerated. The Council emphasised that it was 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.[18]

3.23 The Law Council also submitted that the approach in the Bill is potentially inconsistent with Australia's obligations under the International Covenant on Civil and Political Rights:

> This appears to be inconsistent with 14(2) of the International Covenant on Civil and Political Rights which provides that person should be treated as innocent until proven guilty. In that respect, the Law Council notes that those jurisdictions with Human Rights Acts, namely the ACT and Victoria, have both declined to participate in the exchange of information on non-conviction charges.
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> ….
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> 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.[19]

3.24 The Law Council concluded that:

> 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.[20]

3.25 The Queensland Council for Civil Liberties was also highly critical of this aspect of the Bill:

> The quashing of their conviction or a person's pardon must mean that they didn't commit the offence. How then it can in any rational sense be proper to require them to disclose the fact they were charged?[21]

3.26 The Queensland Law Society also expressed 'serious concerns' about aspects of the Bill and was also of the view that the requirement to disclose pardoned and

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17 *Submission 15*, p. 2.

18 *Submission 15*, p. 2.

19 *Submission 15*, pp 2-3.

20 *Submission 15*, p. 3.

21 *Submission 4*, p. 1.

quashed convictions for child related screening was not justified and had not been based on empirical evidence. The Society described the research which the Minister quoted in his Second Reading speech for justification for these amendments as 'limited and dated' and draws attention to the need for further discussion around the issue.[22]

3.27 The Queensland Law Society stated that the requirement to disclose pardoned and quashed convictions is inconsistent with section 5(1) of the *Queensland Criminal Law (Rehabilitation of Offenders) Act 1986*, which embodies the notion that when a conviction is quashed on appeal or pardoned, it should effectively be treated as if it never occurred.[23]

3.28 While supportive of the initiative to facilitate the inter-jurisdictional exchange of criminal history information, the Office of the Privacy Commissioner also questioned the relevance of including information about quashed and pardoned convictions in assessments. The Office's view is explained more completely in the subsequent section of this report entitled 'Privacy issues'.

Disclosure and use of information concerning all spent convictions

3.29 The Law Council of Australia and other submitters also commented on the proposed amendments relating to spent convictions.

3.30 The Law Council reminded the committee that the Crimes Act currently provides that when persons are being assessed for a position which relates to the care, instruction or supervision of minors, the assessment may have access to and take into account any information about prior convictions for a sex offence or an offence committed against a child, even though even though that offence would otherwise be regarded as a spent conviction. The Law Council noted that this provision was to be repealed and replaced with a significantly broader exception that would allow all spent convictions, not just sex offences or those against children, to be disclosed where the person was being assessed for suitability for working with children.[24]

3.31 The Law Council acknowledged that exemptions from the spent convictions regime were sometimes needed but questioned why it was necessary to disclose all convictions rather than those that might be relevant to the situation.

3.32 The Law Council submitted that no justification has been offered for why complete access to information about a person's spent convictions was needed. The Council noted the explanations offered in the Second Reading Speech. These were to the effect that the Australian Institute of Criminology report *Child sexual abuse: offender characteristics and modus operandi* had observed that incarcerated sexual offenders are more likely to have previous convictions for non-sexual offences than for sexual offences; and that law enforcement agencies have indicated that charges relating to offences against children are often withdrawn as a decision is made to

22 *Submission 9*, p. 1.

23 *Submission 9*, p. 1.

24 *Submission 15*, p. 5.

protect the child victim from the stress and trauma of giving evidence, cross-examination and simply waiting for committal and trial. However, the Law Council did not regard this explanation as empirically compelling, contending 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.[25]

3.33 The Law Council submitted that the danger of this broad disclosure of convictions is that it raises the risk that people will be discriminated against on the basis of old convictions, regardless of relevance to the inherent requirements of the position sought. The Law Council drew the committee's attention to the Australian Human Rights Commission (AHRC) submission on the draft Model Spent Convictions Bill, which provided a case study highlighting the nature of the risk:

> 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.[26]

3.34 The proposed safeguards that were proposed to apply in relation to compliance of a prescribed person or body with standards set in proposed s85ZZGE were acknowledged and welcomed, but described by the Law Council as offering limited protection. The Law Council also noted what it considered an omission from the Bill:

> …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.[27]

3.35 The Law Council submitted 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, and that the Senate should reject the proposed amendment. The Council stated that if the proposed amendment were to be passed, it supported the AHRC submission to the Government on the model. The AHRC's position, in essence, was that there should be a balancing amendment to the *Human*

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25 *Submission 15*, p. 6.

26 *Submission 15*, p. 7.

27 *Submission 15*, p. 7.

Rights and Equal Opportunity Act 1986 to make discrimination on the ground of criminal record unlawful.

3.36 The Queensland Council of Civil Liberties put a similar argument to that of the Law Council. It submitted that an inquiry should be conducted to assess what types of offences might signify that a person has a propensity to mistreat minors and also over what period that propensity might continue.[28]

3.37 The submission of the Queensland Law Society was similar in character, the Society submitting that a spent conviction should only be required to be disclosed when a causal link can be established between the offence and the type of employment sought. The Society's submission was scathing:

> The spent convictions scheme is built on the premise that historic convictions are not a reliable indicator for determining future behaviour and reliance upon such convictions has the potential to result in serious prejudice to a former offender. The use of criminal history information to exclude individuals from employment not only impacts upon a former offender's rehabilitation, but ultimately increases their risk of re-offending.
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> It is concerning that this Bill provides yet another example of a rapidly expanding criminal history checking regime that encroaches upon the spent convictions scheme without justification borne from relevant modern research.[29]

3.38 The submission of the Office of the Privacy Commissioner also expressed the view that it was unclear why the Bill permitted the use and disclosure of an individual's full criminal history irrespective of the type of offence. The Office's view is expounded more completely in the subsequent section of this report entitled 'Privacy issues'.

Government response regarding spent, pardoned and quashed convictions

3.39 The Attorney-General's Department submission responded to the issues raised about the proposed exemptions in respect of spent, pardoned and quashed convictions. In relation to the requirement that all convictions could be disclosed, not just those relating to sexual or child related offences, the Department told the committee that:

> 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

28 *Submission 4*, p. 2.

29 *Submission 9*, p. 6.

> be disclosed to a screening unit and could undermine the comprehensiveness of the screening process. [30]

3.40 At the public hearing, the Department also addressed the question of disclosure of all offences, not just those of obvious relevance to child related employment. Officers explained that it would be difficult to include only certain categories, as there may be other offences where the circumstances may make the offence relevant to assessing a person's suitability to work with children.[31] Officers advised that screening units, with skilled staff, would assess the relevance of convictions.

> We would also accept that there may be such offences where they may not be relevant and the job of the screening unit is to properly filter relevant offences from non-relevant offences. There is a full natural justice process that each of them comply with where individuals who are the subject of screening have the opportunity to respond to any adverse information and most processes have both their merits review and a judicial review of findings of screening units in place. So there is a full process for that to be worked through with the screening unit.[32]

3.41 Concerning the inclusion of quashed or pardoned convictions, a matter of considerable controversy for several submitters, the Department responded that:

> 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.[33]

3.42 Addressing the balance that is to be struck between the interests of child safety and rehabilitation and the right to work, the Department pointed to the safeguards built into the Bill:

> 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.
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> 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

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30 *Submission 17*, p. 2.

31 Ms Sarah Chidgey, *Committee Hansard*, 10 November 2009, p. 18.

32 Ms Sarah Chidgey, *Committee Hansard*, 10 November 2009, p. 18.

33 *Submission 17*, p. 2.

history information relating to them that had been sourced by the screening unit.[34]

3.43 In evidence before the committee, the Department emphasised that the 'bill has been designed to strike an appropriate balance between protecting children from harm and providing individuals with opportunities to find gainful employment.'[35]

3.44 The Department told the committee that it had been advised that all current jurisdictional screening units have appeals processes in place for decisions made in relation to working with children checks and that each jurisdictional authorised screening unit would be required to complete a number of specific tasks before making a decision to issue a negative notice to an application:

- 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.[36]

3.45 Responding to concerns that the Bill may breach Australia's Human Rights obligations, the Department maintained that this was not the case, as while the Bill allows a screening unit to consider pardoned or quashed convictions, 'it does not override the presumption of innocence'.[37]

Definition of 'working with children'

3.46 Proposed s85ZZGF of the Bill defines 'child' as a person who is under 18 years of age; and 'work' is defined broadly as including the following:

> **work** includes the following:
>
> (a) work:
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> (i) under a contract of employment, contract of apprenticeship or contract for services; or
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> (ii) in a leadership role in a religious institution, as part of the duties of a religious vocation or in any other capacity for the purposes of a religious institution; or
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> (iii) as an officer of a body corporate, member of the committee of management of an unincorporated body or association or member of a partnership; or
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> (iv) as a volunteer, other than unpaid work engaged in for a private or domestic purpose; or

34 *Submission 17*, pp 2-3.

35 Ms Sarah Chidgey, *Committee Hansard*, 10 November 2009, p. 17.

36 *Submission 17*, p. 2.

37 *Submission 17*, p. 4.

(v) as a self employed person;

(b) practical training as part of a course of education or vocational training;

(c) acting in a prescribed capacity or engaging in a prescribed activity.

3.47 However, the Bill does not define the term 'working with children'. The lack of a definition of this term was a matter of concern to a number of submitters.

3.48 The Law Council of Australia pointed out that under the current provisions of the Crimes Act, 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. However, the approach in the Bill is different, referring to 'work, or seek to work, with children.'

3.49 The Law Council was of the view that 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.[38] The Queensland Law Society made a similar observation, claiming that the breadth of the definition meant that it would 'encapsulate a vast number of individuals whose roles involve only indirect association with children', for example retail shop employees.[39]

3.50 At the hearing, Ms Rosemary Budavari of the Law Council provided the committee with some examples of the potential impact of this amendment:

> The broadness of the phrase might mean that a cleaner in a childcare centre may have to have their conviction disclosed or taken into account.
>
> … some of the hypothetical scenarios we considered when looking at this were things like someone working at McDonald's, where there is going to be a clientele of both adults and children; is that working with children? Or someone working in a retail outlet where some of the customers are going to be adults and some are going to be children—is that working with children, potentially?[40]

3.51 The Law Council submitted 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. It was of the view 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 or close contact with children. Ms Budavari advised the committee that the Law Council felt this approach was reasonable and proportionate to the risk being addressed.[41]

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38 *Submission 15*, p. 9.

39 *Submission 9*, p. 2.

40 Ms Rosemary Budavari, *Committee Hansard*, 10 November 2009, pp 4-5.

41 Ms Rosemary Budavari, *Committee Hansard*, 10 November 2009, p. 4.

3.52 The Queensland Law Society also thought that the breadth of the definition would be problematic in that it would require a much larger number of people to undergo screening, and strain the resources of screening organisations.

3.53 Dr Joe Tucci of the Australian Childhood Foundation also felt a definition of 'working with children' should be included in the Bill:

> I think it would be helpful, because I think then you give some purpose to what the legislation is about, and you can find some common dimensions across all of the jurisdictions. As you would know, many of the jurisdictions do have some form of working-with-children check now, and if they do not they are actively working on developing it, so I think having a definition of it would definitely give a focus to why this information needs to be exchanged.[42]

3.54 The Attorney-General's Department provided some explanation of this issue, advising the committee that:

> 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.[43]

3.55 The Department elaborated on this issue at the hearing, advising that the Bill was drafted to fit into the current screening processes that exist in each jurisdiction which operate under their own definitions.

> We examined those very closely and in fact circulated to states and territories a possible draft of the definition of 'working with children'. States and territories informed us that including that in a Commonwealth bill would create real difficulties for them because each of their jurisdictions has a slightly different definition and imposing our definition on them could create difficulties with the operation of their existing screening processes. They advised us quite strongly that they would prefer a system in which we pick up their existing legislative arrangements, basically, and have general requirements that our minister has to be satisfied of, but if we in our bill drafted a whole set of privacy requirements which applied to them, they could potentially conflict with their own definitions of 'working with children' and our own separate privacy requirements and create real difficulties for a workable system.[44]

3.56 While the Department is of the view that the current amendment will work appropriately, officers acknowledged that a consistent approach to the definition of 'working with children' between jurisdictions is an issue that could be considered further.[45]

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42 Dr Joe Tucci, *Committee Hansard*, 10 November 2009, pp 13-14.

43 *Submission 17*, p. 4.

44 Ms Sarah Chidgey, *Committee Hansard*, 10 November 2009, p. 18.

45 Ms Sarah Chidgey, *Committee Hansard*, 10 November 2009, p. 19.

Privacy issues

3.57 Item 5 of the Bill would amend paragraph 85ZZ(1)(b) of the Crimes Act to extend the Privacy Commissioner's role to include receiving written requests for exclusion from the quashed and pardoned convictions scheme and advising the Minister whether an exclusion should be granted. The Commissioner already has a similar function in respect of spent convictions.

3.58 The Office of the Privacy Commissioner (the Office) made a comprehensive submission to the inquiry in which it raised a number of issues in relation to privacy safeguards. The Office's submission is a useful document which provides a clear explanation of the operation of the privacy principles as they impinge on the proposals in this Bill. The committee thanks the Office for the submission, and commends it to Senators for close reading as part of the consideration of this Bill.

3.59 The Office expressed support for the initiative underlying the Bill, acknowledging the importance of the public interest objective aimed at protecting children from sexual, physical and emotional harm through comprehensively assessing the criminal history information of people working with or seeking to work with children. However, the Office also acknowledged the importance of ensuring that any information excluded from the quashed, pardoned and spent convictions schemes is relevant to the purpose for which it will be used, and is not mishandled. The Office highlighted the tensions that underlie the widening of the exclusions:

> The challenge is to ensure that individuals are not prevented from working with children because of a minor offence committed more than 10 years earlier which had no bearing on that risk.[46]

3.60 The Office's submission addressed a number of safeguards which it considered 'may help to ensure that screening units do not take account of irrelevant criminal history information, that such information will only be used for a relevant purpose and that the information is not misused in another way.'[47] The issues raised by the Office were as follows:

- coverage of the Privacy Principles;
- use and disclosure for a relevant purpose;
- privacy safeguards in prescribed laws;
- privacy safeguards and prescribed persons or bodies; and
- Privacy Commissioner's functions.

Coverage of the privacy principles

3.61 The Office pointed out that the Bill and the Explanatory Memorandum do not clarify which types of persons or bodies will be prescribed as screening units, and

46 *Submission 6*, p. 5.

47 *Submission 6*, p. 6.

submitted that it is also possible that some of these entities may not be covered by privacy law.

3.62 The Office gave the example of small businesses with an annual turnover of $3 million or less, which it said were not generally covered by the *Privacy Act 1988* unless they are contracted service providers to a Commonwealth government agency or otherwise brought within the coverage of the Privacy Act. The Office also advised that the Act does not cover State or Territory government agencies other than ACT government agencies. While some entities that are exempt from the Privacy Act may be covered by applicable State or Territory privacy laws, others may not.

3.63 To ensure appropriate coverage, the Office suggested that proposed section 85ZZGE of the Bill could be amended to require the Minister to be satisfied that a person or body 'is subject to' applicable Commonwealth, State or Territory privacy law before it may be prescribed as a screening unit.

3.64 The Office submitted that by way of meeting such a requirement, a person or body that seeks to be prescribed as a screening unit and that is not covered by privacy laws, could:

> i) If it is a small business, choose to be covered by the Privacy Act under section 6EA of the Privacy Act, which states that 'a small business operator may make a choice in writing given to the [Privacy] Commissioner to be treated as an organisation'
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> ii) If it is a small business, be prescribed as an 'organisation' for particular acts or practices under section 6E(2) of the Privacy Act, which states that 'this Act also applies, with prescribed modifications (if any), in relation to the prescribed acts or practices of a small business operator prescribed for the purposes of this subsection as if the small business operator were an organisation'
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> iii) If it is a State or Territory authority or instrumentality, be prescribed as an 'organisation' under section 6F(1), which states that 'this Act applies, with the prescribed modifications (if any), in relation to a prescribed State or Territory authority or a prescribed instrumentality of a State or Territory (except an instrumentality that is an organisation because of section 6C) as if the authority or instrumentality were an organisation' or
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> iv) Where possible, be declared covered by a State or Territory privacy scheme.[48]

3.65 The Office also suggested a fall-back position should its suggestion not be adopted, which would require the development, in consultation with the Office, of a set of publicly available guidelines on good privacy practice for all entities handling criminal history information under the Bill irrespective of whether they are covered by the Privacy Act or other privacy laws.

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48 *Submission 6*, pp 7-8.

Use and disclosure for a relevant purpose

3.66 The Office advised the committee of a fundamental principle in the privacy Act:

> …it is a fundamental principle of the Privacy Act that an individual's personal information should only be used for a purpose to which the information is relevant.[49]

3.67 In relation to the Bill, the Office submitted that in its view, an individual's full criminal history information may not always be relevant to assessing a person's suitability to work with children.

3.68 Addressing the proposed use and disclosure of quashed or pardoned conviction information as provided for in the Bill, the Office noted that the reasons given for inserting the original protections relating to the non-disclosure of this information were that 'if it is subsequently found that a person was wrongly convicted and a pardon is granted on that basis, justice requires that the person should be put in the same position as if he or she had never been convicted at all.'[50] On this basis, the Office questioned the relevance of including information about quashed and pardoned convictions in assessments:

> In the Office's opinion where an individual has been exonerated in relation to a particular offence, that person may have a reasonable expectation that this information will not need to be collected or taken into account by others. The Office is also unsure of the relevance of such information in assessing a person's suitability to work with children.[51]

3.69 This view had similarities to that put by the Law Council and others, which are described earlier in this report.

3.70 The Office suggested that if this information was, however, judged to be relevant, then screening staff should be provided with publicly available criteria for determining relevance:

> The Office would suggest that screening unit staff handling this information be provided with clear publicly available criteria to help them identify the comparative relevance of particular criminal history information in assessing a person's suitability to work with children and make consistent decisions.[52]

Privacy safeguards in prescribed laws

3.71 The Office noted that the Bill refers to 'prescribed Commonwealth, State and Territory laws' which require or permit a screening unit to 'deal with information about persons who work, or seek to work, with children'. The Office advised the

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49 *Submission 6*, p. 8.

50 *Submission 6*, p. 8. The submission was referring to the second reading speech for the Crimes Legislation Amendment Bill 1989.

51 *Submission 6*, p. 8.

52 *Submission 6*, p. 9.

committee that it understood that laws would be developed and prescribed in fulfilment of the COAG agreement. It expressed concern that these laws should contain appropriate privacy safeguards, and suggested the inclusion of the following safeguards in any such laws:

> i) **Publicly available assessment criteria** – The prescribed laws should contain publicly available criteria to assist screening units to assess an individual's suitability for child-related work. Such criteria should reflect that assessing a person's criminal history is a risk management tool and not a guarantee that an individual is suitable or unsuitable to work with children.
>
> ii) **Use for a limited purpose** – A screening unit should 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. The information may not be used for the purpose of a general probity or employment suitability check'.
>
> iii) **Clearly require or authorise uses or disclosures** – If a prescribed law is intended to require or permit the use or disclosure of a person's criminal history information, it should clearly and unambiguously require or authorise such use or disclosure and identify the circumstances in which this information may be used or disclosed. This measure will help to clarify whether a particular use or disclosure falls within the 'required or authorised by or under law' exceptions to the use and disclosure privacy principles in IPP 10.1(c), 11.1(d) and NPP 2.1(g).
>
> iv) **Natural justice and appeals** – Natural justice should apply where a screening unit intends to make an adverse decision about an individual on the basis of their criminal history information. This may include obtaining the individual's consent before undertaking the suitability assessment, disclosing criminal history information considered as part of the assessment, allowing the individual a reasonable opportunity to be heard, considering the individual's response before finalising a decision and allowing a right to appeal a decision.[53]

3.72 In relation to safeguard ii, the 'use for limited purpose' safeguard, the Office stated that while this is referred to in the Explanatory Memorandum, it does not appear to be included in the Bill, and suggested that it be included in any prescribed laws.

3.73 The Office also suggests that when the laws are prescribed by regulation, the explanatory statement should state that the prescribed laws contain these privacy safeguards.

Privacy safeguards and prescribed persons or bodies

3.74 The Office advised the committee that in its view, the Bill and Explanatory Memorandum could provide more detail about safeguards relating to the prescription by the Minister of a person or body as a screening unit in proposed s85ZZGE of the

53 *Submission 6*, pp 9-10.

Bill. The Office reiterated its suggestion that the Minister should be satisfied that a person or body is 'subject to' applicable privacy laws before it is prescribed as a screening unit. The Office stated that if this was impractical, the Explanatory Memorandum could include a non-exhaustive list of the factors the Minister could take into account in determining whether a person or body complies (or is likely to comply) with applicable privacy laws.

3.75 The Office submitted the following comments:

- that the list of factors to be considered by the Minister could include whether the prescribed person or body has appropriate policies and procedures in place for the handling of information about individuals' criminal history and has appropriate complaint handling practices.
- to ensure there are risk assessment frameworks and appropriately skilled staff, the Explanatory Memorandum could include a non-exhaustive list of the factors the Minister may consider when assessing this criterion. These factors could include whether:
    - The person or body has policies, procedures and training programs in place to help staff determine from a risk management perspective, if particular criminal history information is relevant to assessing the suitability of a person to work with children; and
    - The person or body has policies, procedures and training programs in place to ensure that staff will handle individuals' criminal history information appropriately. [54]

3.76 The Office also drew the committee's attention to a possible omission in the Bill, noting that while the Explanatory Memorandum states that 'a person or body will only be prescribed for the purpose of enabling them to receive conviction information if the person or body has a legislative basis for screening that prohibits further release or use of the information (except for legislated child protection functions in exceptional circumstances)', the Bill does not specifically refer to this criterion. The Office suggested that it may enhance consistency with the Explanatory Memorandum if this criterion were added to proposed section 85ZZGE of the Bill.[55]

Functions of the Privacy Commissioner

3.77 On the basis of the Office's submission, it is not clear whether there was any consultation with the Office of the Privacy Commissioner about its intended new role under the Bill, especially since the Office submitted that it considered it would be appropriate for the Privacy Commissioner to be consulted on any future proposed exclusions from the quashed or pardoned convictions scheme.[56]

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54 *Submission* 6, pp 10-11.

55 *Submission* 6, p. 11.

56 *Submission* 6, p. 12.

Current child-related employment exclusions

3.78 The Office noted that the Bill proposes to repeal the exclusions in sections 85ZZH (e) and (f) of the Crimes Act which currently apply to screening for child-related work, and drew the committee's attention to item 15 in Schedule 4 of the Crimes Regulations 1990, which also contains an exclusion applying to screening for child-related work. The Office suggested that it may be appropriate to repeal item 15 in Schedule 4. This may help to ensure there is a consistent approach to applying exclusions from Part VIIC of the Crimes Act for individuals who work or seek work with children.

Government response to privacy issues

3.79 The Attorney-General's Department did not respond individually to all of the points made in the Office of the Privacy Commissioner's submission, but did make a number of comments in relation to the Office's comments relevant to issues raised in the Office's submission that it is important to establish safeguards regarding privacy and how disclosure and use of information will be controlled. The Department submitted that:

> 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.[57]

3.80 The Department responded briefly in the public hearing on the Bill to the Office's suggestions for enhancing privacy safeguards:

> Issues were raised about why our bill does not have very detailed privacy requirements that all jurisdiction screening units have to comply with …The reason is that this bill is very much fitting into screening processes that exist in every jurisdiction. Most jurisdictions have their own privacy legislation that governs the operation of their screening units...[58]

3.81 The Department disagreed with the Office of the Privacy Commissioner's suggestion to repeal item 15 of Schedule 4 of the Crimes Regulations 1990. Ms Chidgey noted at the hearing that this item:

> … certainly overlaps to a degree with this bill. That covers a narrower range of convictions but a slightly broader category of people, and it just

57 *Submission 17*, p. 3.

58 Ms Sarah Chidgey, *Committee Hansard*, 10 November 2009, p. 18.

> covers spent convictions. It is important that that be there if there are jurisdictions—Victoria, for instance—where they do not necessarily want the full range of pardoned or quashed convictions. It also covers some categories that the bill will not pick up. So, if we remove that, we could inadvertently limit some of the existing flow of information.[59]

Committee comments

3.82 The committee acknowledges that a number of respected organisations such as the Law Council have raised significant concerns about this Bill, and does not dismiss these concerns lightly. However, on this occasion the safeguarding children from abuse must outweigh those concerns, and the committee is therefore of the view that the Bill should be supported.

3.83 In coming to this view the committee was persuaded by the evidence of two organisations in particular, these being the sensible and balanced analysis of the Salvation Army (Australian Eastern Territory), and the Australian Childhood Foundation.

3.84 For its part, the Salvation Army pointed to the need for informed risk management:

> It is important to emphasise that disclosure is intended to allow this information to be known and taken into account for risk management rather than to automatically preclude employment, particularly when the conviction was many years in the past with no subsequent convictions and the applicant has shown evidence of positive change. However disclosure can give the prospective employer opportunity to make a more accurately informed decision and to ensure that appropriate risk management strategies are in place where necessary.[60]

3.85 The Australian Childhood Foundation reminded the committee of the unfortunate reality that necessitates the proposed amendments. While quoted earlier in this chapter, Dr Tucci's evidence is of sufficient weight to quote again in this conclusion:

> From our point of view, we see adults who were sex offenders a long time ago who basically go underground or do not come to the attention of any authorities, not because they are not necessarily not engaging in sexual assault against children but because they have learnt how to avoid being caught. Over the period of time in which convictions can become spent it does not necessarily follow that they are not engaging in that kind of sexual assaulting and behaviour; it is just that we do not know about it. An early conviction can point to the ongoing risk that this person might pose to children.[61]

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59 Ms Sarah Chidgey, *Committee Hansard*, 10 November 2009, p. 19.

60 *Submission* 8, p. 2.

61 Dr Joe Tucci, *Committee Hansard*, 10 November 2009, p. 13.

3.86 The Committee also notes the evidence of the officers of the Attorney-General's Department which pointed out that most jurisdictions already have screening arrangements in place which take account of their own pardoned and quashed convictions. The initiatives in this bill will build on what is already in place, allowing the details of Commonwealth convictions to be provided to other jurisdictions and facilitating the exchange of information between jurisdictions. As such, the Bill is not a radical departure from existing principles. As noted by the Department representative:

> I think there has been some misunderstanding that this sets up a sort of national scheme for the Commonwealth controlling all checks to do with working with children. All this bill does is remove Commonwealth legislative barriers to the provision of some categories of Commonwealth conviction information. It does not regulate any state or territory conviction information. We have carefully avoided trying to impose a Commonwealth checking regime over the top of the existing state and territory ones. We have left state and territory checking regimes intact. The idea is that we simply prescribe those regimes so that we can give them our pardoned, quashed and additional categories of spent convictions—Commonwealth convictions—information.[62]

3.87 The committee was also reassured by Attorney-General's Department evidence that the Bill will not lead to unwarranted disclosure of a person's criminal history, and this information will be confined to the qualified screening assessment units. Prospective employers will receive only a yes or no answer as to whether a person is suitable for working with children.[63]

3.88 The committee also notes that the Senate Standing Committee for the Scrutiny of Bills reported on this Bill in Report No. 12 of 2009, and published a comprehensive response received from the Minister to issues raised in Alert Digest No. 11. That committee appears to have been satisfied with the Minister's response, noting '…the processes in place in screening units in other jurisdictions which are designed to provide natural justice to those affected by the operation of the provisions.' [64]

3.89 The committee noted the detailed submission of the Office of the Privacy Commissioner concerning the need to ensure stringent privacy safeguards are in place, and the department's response that most jurisdictions already have their own privacy legislation. The committee was unable to reconcile these views, which are apparently conflicting. The committee suggests that Minister and the Implementation Working Group independent reviews referred to in the Department's submission use the standards described by the Office as a yardstick to determine whether screening units are adequately complying with privacy obligations.

3.90 The committee was persuaded by the evidence of the Office of the Privacy Commissioner that a review of the legislation after 12 months of operation may not be

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62 Ms Sarah Chidgey, *Committee Hansard* , p. 23.

63 Ms Sarah Chidgey, *Committee Hansard* , pp 18-19.

64 Senate Standing Committee for the Scrutiny of Bills, Report No. 12 of 2009, p. 512.

sufficient due to the possibility that evidence after this period may be limited, and that a three-year review should be conducted. The committee recommends accordingly.

Recommendation 1

3.91 The committee recommends that the Bill be amended to provide for a further review of the legislation after three years of operation, in addition to that provided for by proposed section 85ZZGG.

Recommendation 2

3.92 The committee recommends that subject to recommendation 1, the Senate pass the Bill.

Senator Trish Crossin

Chair