



Australian Government

Office of the Privacy Commissioner

**Crimes Amendment (Working
With Children – Criminal History)
Bill 2009**

**Submission to the Senate Legal
and Constitutional Affairs
Committee**

September 2009

Key Recommendations

1. The Office of the Privacy Commissioner (the 'Office') welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee on the Crimes Amendment (Working With Children – Criminal History) Bill 2009 (the 'Bill').
2. The Office acknowledges that the assessment of criminal history information for people working with, or seeking to work with children is an important public interest objective aimed at protecting children from sexual, physical and emotional harm. The Office also recognises that the amendments proposed in the Bill generally give effect to a Council of Australian Governments agreement in November 2008 to facilitate the inter-jurisdictional exchange of criminal history information for people working or seeking to work with children.
3. The Office makes the following suggestions which are intended to enhance this important public policy objective while recognising the potential for individuals to be stigmatised, embarrassed or discriminated against as a result of the potentially inappropriate use or disclosure of criminal record information:
 - i) Proposed section 85ZZGE of the Bill could be amended to state that before the Governor-General may prescribe a person or body as a 'screening unit', the Minister for Home Affairs must be satisfied that the person or body is subject to applicable Commonwealth, State or Territory law relating to privacy (see paragraphs 13 to 20 and 35). Should this approach not be adopted, screening units prescribed under proposed section 85ZZGE of the Bill should be required to comply with a set of publicly available guidelines on good privacy practice (see paragraphs 21 to 22).
 - ii) The Office is concerned that an individual's full criminal history information may not necessarily be relevant to assessing a person's suitability to work with children. It may be appropriate to provide prescribed screening units with clear, publicly available criteria to help the units identify the comparative relevance of particular criminal history information (see paragraphs 23 to 27).
 - iii) The Office suggests that when regulations are made prescribing a law referred to in proposed sections 85ZZGB, 85ZZGC or 85ZZGD of the Bill, the explanatory statement should note that the prescribed law contains certain privacy safeguards, including that screening units may only use criminal history information to assess a person's suitability to work with children (see paragraphs 28 to 32).
 - iv) Proposed section 85ZZGE of the Bill generally states that before a person or body may be prescribed as a screening unit, the Minister must be satisfied of certain matters, some of which safeguard individuals' privacy. The Office submits that the Explanatory

Memorandum could provide some further clarity around how these safeguards would be implemented (see paragraphs 33 to 39).

- v) The Office suggests it may be appropriate to repeal item 15 in Schedule 4 of the Crimes Regulations 1990, which contains an exclusion applying to screening for child-related work (see paragraphs 42 to 43).

Office of the Privacy Commissioner

1. The Office of the Privacy Commissioner ('the Office') is an independent statutory body whose purpose is to promote and protect privacy in Australia. The Office has responsibilities under the *Privacy Act 1988 (Cth)* (the 'Privacy Act'). The Privacy Act contains eleven Information Privacy Principles ('IPPs') which apply to Australian and ACT Government agencies. It also includes ten National Privacy Principles ('NPPs') which generally apply to all businesses with an annual turnover of more than \$3 million (and some small businesses).¹
2. The Privacy Commissioner also has an advisory and complaint handling role under the Commonwealth spent convictions scheme in Part VIIC of the *Crimes Act 1914* (the 'Crimes Act'). The Privacy Commissioner's main functions under the Crimes Act are to advise the Minister whether to grant an exclusion from the scheme and to handle, and where appropriate, conciliate complaints.²

Background

3. The Office appreciates the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee (the 'Committee') on the Crimes Amendment (Working With Children – Criminal History) Bill 2009 (the 'Bill') and related Explanatory Memorandum.³
4. The Office notes that the Senate Selection of Bills Committee recommended that the provisions of the Bill be referred to the Committee for inquiry and report on 'whether the requirement under the Bill for the reporting and exchange of information on spent, quashed and pardoned convictions is:
 - i) Consistent with the presumption of innocence and other rights of individuals and
 - ii) Consistent with the National Privacy Principles'.⁴
5. The Bill proposes amendments to Part VIIC of the Crimes Act to exclude prescribed uses and disclosures of criminal history information from the quashed and pardoned convictions scheme in division 2 and the spent convictions scheme in division 3. That is, where a person works or seeks to work with children, the Bill would permit prescribed persons or bodies (referred to in this submission as 'screening units') to collect, take account

¹ Information relating to the operation of the Privacy Act can be found on the Office's website at www.privacy.gov.au

² Division 5, Part VIIC of the Crimes Act.

³ See <http://parlinfo.aph.gov.au>

⁴ Selection of Bills Committee, *Report No. 13 of 2009*, 10 September 2009, http://www.aph.gov.au/Senate/committee/selectionbills_ctte/reports/2009.htm

of and disclose information about these convictions in accordance with prescribed laws.⁵

6. The Bill would repeal current sections 85ZZH (e) and (f) of the Crimes Act, which contain more limited exclusions from the spent convictions scheme to screen for child-related work.⁶ These exclusions were inserted in the Crimes Act in July 1990.⁷
7. The Bill would also extend the Privacy Commissioner's role under section 85ZZ (1)(b) of the Crimes Act to include receiving written requests for exclusion from the quashed and pardoned convictions scheme and advising the Minister whether an exclusion should be granted.⁸
8. The Office understands that the proposed amendments generally give effect to a Council of Australian Governments agreement in November 2008 to facilitate the inter-jurisdictional exchange of criminal history information for people working or seeking to work with children (the 'COAG agreement').⁹
9. The Office supports this initiative. In the Office's opinion comprehensively assessing the criminal history information of people working with or seeking to work with children clearly serves an important public interest objective aimed at protecting children from sexual, physical and emotional harm.
10. The Office also considers that it is important to ensure that any information excluded from the quashed, pardoned and spent convictions schemes is relevant to the purpose it will be used for. This is particularly important given the sensitivity attaching to this information and the potential for an individual to be stigmatised, embarrassed or discriminated against if it is mishandled.
11. The Office notes that a large number of Australians work or seek to work with children and the significant majority do not pose any risk to children (while the Bill is appropriately intended to identify the small minority who may pose such a risk). 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.

⁵ Proposed sections 85ZZGB, 85ZZGC and 85ZZGD in item 6, schedule 1 of the Bill.

⁶ Sections 85ZZH (e) and (f) provide partial exclusions from division 3 of Part VIIC of the Crimes Act (which relates to spent convictions). These provisions permit a person or body who engages staff in relation to the care, instruction or supervision of minors (or otherwise makes available care instruction or supervision for minors) to collect, disclose or take account of a person's conviction for a sexual offence or an offence against a minor for the purpose of finding out whether a person who is being assessed for that position has been convicted of such an offence.

⁷ Section 10 of the *Crimes Legislation Amendment Act 1989 (Cth)*.

⁸ Item 5, Schedule 1 of the Bill.

⁹ Council of Australian Governments, *Communique*, 29 November 2008 http://www.coag.gov.au/coag_meeting_outcomes/2008-11-29/#children and Explanatory Memorandum to the Bill.

12. In this submission, the Office suggests privacy safeguards which 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.

Coverage of the Privacy Principles

13. As noted above, the Privacy Act contains 11 IPPs applying to Australian and ACT Government agencies and 10 NPPs applying to many private sector organisations.
14. The Act provides limits around how agencies and organisations handle 'personal information'.¹⁰ The NPPs also contain certain limits around the handling of 'sensitive information', a subset of personal information which includes information or an opinion about a person's criminal record.¹¹ Specifically, NPP 10.1 states that an organisation must not collect sensitive information about an individual unless the individual has consented, the collection is required by law or another exception applies.
15. The Office notes that when handling information about a person's criminal history, agencies and organisations covered by the Act will need to comply with the IPPs and the NPPs respectively.¹²
16. As the Bill and the Explanatory Memorandum do not clarify which types of persons or bodies will be prescribed as screening units, it is also possible that some of these entities may not be covered by privacy law.
17. For example, the Privacy Act generally does not cover small businesses with an annual turnover of \$3 million or less, unless they are contracted service providers to a Commonwealth government agency or otherwise brought within the coverage of the Privacy Act.¹³ Also, it does not cover State or Territory government agencies other than ACT government agencies.¹⁴ While some entities that are exempt from the Privacy Act

¹⁰ 'Personal information' is defined in section 6 (1) of the Privacy Act as information or an opinion, whether true or not, about an individual whose identity is apparent or can be reasonably ascertained from that information.

¹¹ 'Sensitive information' is defined in section 6(1) of the Privacy Act.

¹² For more information on the interaction between the privacy principles in the Privacy Act and the spent convictions scheme in the Crimes Act, see *Compliance Note 1/91: Old conviction information and Commonwealth authorities* and *Compliance Note 2/91: Information About Old Convictions* (updated in November 2002), <http://www.privacy.gov.au/materials/types/compliancencotes?sortby=54>

¹³ Section 6D of the Privacy Act.

¹⁴ Section 6C(1) of the Privacy Act and section 23 of the *Australian Capital Territory Government Service (Consequential Provisions) Act 1994 (Cth)*.

may be covered by applicable State or Territory privacy laws¹⁵, others may not be.¹⁶

18. Given that screening units may handle sensitive criminal history information about a significant number of Australians under the Bill and the current protections in the quashed, pardoned and spent convictions schemes¹⁷ would not apply, the Office considers that it is important for all entities handling such information to be subject to the Privacy Act or another State or Territory privacy law.
19. The Office notes that proposed section 85ZZGE of the Bill states that before a person or body may be prescribed as a screening unit, the Minister must be satisfied that it complies with privacy legislation among other things. The Office suggests that this section 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.¹⁸
20. 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'¹⁹
 - 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'
 - 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

¹⁵ See for example *Privacy and Personal Information Protection Act 1998 (NSW)*, *Northern Territory Information Act 2002*, *Information Privacy Act 2009 (QLD)*, *Personal Information and Protection Act 2004 (Tas)* and *the Information Privacy Act 2000 (Vic)*.

¹⁶ For example most small business operators (as defined in section 6D of the Privacy Act) will not be covered by privacy laws. Also, the State public sector in Western Australia does not currently have a legislative privacy regime. South Australia has issued an administrative instruction requiring its government agencies to generally comply with a set of Information Privacy Principles and has established a privacy committee.

¹⁷ Division 2 and 3 of Part VIIC of the Crimes Act.

¹⁸ Proposed section 85ZZGE(d) in item 6, Schedule 1 of the Bill.

¹⁹ Section 6EA(2) of the Privacy Act.

because of section 6C) as if the authority or instrumentality were an organisation²⁰ or

iv) Where possible, be declared covered by a State or Territory privacy scheme.²¹

21. Should this approach not be adopted, the Office suggests that a set of publicly available guidelines be developed 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. Among other things, the guidelines could identify appropriate security safeguards to ensure against loss or unauthorised access of a person's criminal history information. They could also require a screening unit to inform applicants that applications for a position involving working with children will not be considered without a criminal history check and that the individual's consent is required to proceed with the check.
22. The guidelines could be developed by agencies most directly involved in the use and disclosure of criminal history information for the purposes of child-related work, with appropriate consultation with the Office.

Use and disclosure for a relevant purpose

23. The Office notes that 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.²² In the Office's view an individual's full criminal history information may not always be relevant to assessing a person's suitability to work with children.
24. For example, the Bill would permit the use and disclosure of quashed or pardoned conviction information to screen individuals who work or seek to work with children. The Office notes that protections relating to quashed and pardoned convictions were included in Part VIIC on the basis 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'.²³
25. 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.

²⁰ Section 6F(3) of the Privacy Act requires the Minister to be satisfied among other things, that the relevant State or Territory has requested that the authority or instrumentality be prescribed for those purposes, before it may be prescribed under section 6F(1).

²¹ See for example, section 9 of the *Information Privacy Act 2000 (Vic)*.

²² IPP 9 in section 14 of the Privacy Act.

²³ The Commonwealth Attorney-General, Mr Lionel Bowen, Crimes Legislation Amendment Bill 1989 – second reading speech, 11 May 1989.

26. The Bill would also permit the use and disclosure of an individual's full criminal history, irrespective of the type of offence.²⁴ The Office is unclear about whether information about all previous quashed, pardoned or spent conviction/s (such as a minor tax offence) would be relevant in assessing a person's suitability to work with children.
27. If such information is generally considered relevant, 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.

Privacy safeguards in prescribed laws

28. 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'.²⁵ The Office understands that these laws would be developed and prescribed in fulfilment of the COAG agreement.
29. As the Bill removes current prohibitions on taking some previous criminal record information into account, the Office is concerned to ensure that the prescribed laws contain appropriate privacy safeguards around how screening units will handle individual's criminal history information.
30. In particular the Office suggests the inclusion of the following safeguards in any prescribed 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'.²⁶ The Office notes that while this safeguard is referred to in the Explanatory Memorandum, it does not appear to be included in the Bill. The Office suggests it should be included in any prescribed laws.

²⁴ See proposed sections 85ZZGB, 85ZZGC and 85ZZGD in item 6, Schedule 1 of the Bill. The Office notes that currently, the exclusions in sections 85ZZH (e) and (f) of the Crimes Act relating to screening for child-related work only cover 'designated offences'. Section 85ZL of the Crimes Act states that a 'designated offence' is 'a sexual offence or any other offence against the person if the victim of the offence was under 18 at the time the offence was committed'.

²⁵ See proposed sections 85ZZGB, 85ZZGC and 85ZZGD in item 6, Schedule 1 of the Bill.

²⁶ Explanatory Memorandum to the Bill, section @85ZZGB.

- 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.
31. The Office believes these measures will help to ensure that screening units handle individuals’ criminal history information appropriately and only use it for relevant purposes. They will also help individuals to understand and be able to provide informed consent before undergoing the screening process.
32. The Office suggests that when these 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

33. The Office notes that under proposed section 85ZZGE of the Bill, the Minister must be satisfied of certain matters before a person or body may be prescribed as a screening unit. For example, a person or body may only be prescribed if the Minister is satisfied that it:
- i) ‘Complies with applicable Commonwealth law, State law or Territory law relating to privacy, human rights and records management’ and
 - ii) ‘Has risk assessment frameworks and appropriately skilled staff to assess risks to children’s safety’.²⁷
34. In the Office’s view the Bill and the Explanatory Memorandum could provide some further detail about how these safeguards are intended to apply.

²⁷ See proposed section 85ZZGE in item 6, Schedule 1 of the Bill.

35. In regards to complying with applicable privacy legislation, the Office reiterates its submission in paragraph 19 above 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.
36. If this is impracticable, the Office suggests that 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. This list 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. In the Office's opinion this would help to ensure the consistent and transparent application of this safeguard.
37. By way of ensuring there are risk assessment frameworks and appropriately skilled staff, the Office submits that 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:
- i) 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
 - ii) The person or body has policies, procedures and training programs in place to ensure that staff will handle individuals' criminal history information appropriately.
38. Finally, the Office notes that 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)'.²⁸ However, the Bill does not specifically refer to this criterion.²⁹
39. The Office suggests it may enhance consistency with the Explanatory Memorandum if this criterion were added to proposed section 85ZZGE of the Bill.

Privacy Commissioner's functions

40. Currently the Privacy Commissioner advises on applications for exclusion from the spent convictions scheme in division 3, Part VIIC of the Crimes Act.³⁰ The Bill would extend the Privacy Commissioner's role to include

²⁸ Explanatory Memorandum to the Bill, section @85ZZGB.

²⁹ See proposed section 85ZZGE in item 6, Schedule 1 of the Bill.

³⁰ Section 85ZZ (1)(b) of the Crimes Act.

receiving written requests for exclusion from the quashed or pardoned convictions scheme and advising the Minister whether an exclusion should be granted.³¹

41. The Office believes that it would be appropriate for the Privacy Commissioner to be consulted on any future proposed exclusions from the quashed or pardoned convictions scheme. However, the Office expects that this would not be a regular practice as, in the Office's view, while information about a person's spent convictions may be relevant in some circumstances, information about an offence for which a person has been completely exonerated could only be relevant in exceptional circumstances.

Current child-related employment exclusions

42. The Bill repeals the exclusions in sections 85ZZH (e) and (f) of the Crimes Act which currently apply to screening for child-related work.³² The Office notes that item 15 in Schedule 4 of the Crimes Regulations 1990 also contains an exclusion applying to screening for child-related work.
43. The Office suggests 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.

³¹ Item 5, Schedule 1 of the Bill.

³² See item 7, Schedule 1 of the Bill.