



## Crimes Amendment (Working With Children—Criminal History) Bill 2009

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### Contents

Purpose . . . . .	2
Background . . . . .	2
Spent convictions scheme . . . . .	2
Review of spent convictions scheme . . . . .	3
Basis of policy commitment . . . . .	6
Financial implications . . . . .	7
Commentary . . . . .	8
Main provisions . . . . .	10
Schedule 1 – Amendments to the <i>Crimes Act 1914</i> . . . . .	10
Concluding comments . . . . .	13

## Crimes Amendment (Working With Children—Criminal History) Bill 2009

**Date introduced:** 20 August 2009

**House:** House of Representatives

**Portfolio:** Home Affairs

**Commencement:** The day after Royal Assent.

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

The purpose of the Bill is to make relevant amendments to Part VIIC of the *Crimes Act 1914* to create an exception to the spent convictions scheme for convictions of persons who work, or seek to work, with children.<sup>1</sup> The amendments will require those convictions to be disclosed to (and taken into account by) Commonwealth, State and Territory screening agencies in determining whether the person is suitable to work with children.

### Background

#### Spent convictions scheme

Specific criminal convictions which are over a certain age may be regarded as 'spent' if certain prerequisites are met. The rationale behind the spent convictions scheme is that old convictions have little value in determining how a former offender will behave in the future, and reliance on old convictions may result in serious prejudice to the former offender, which could outweigh their value. Furthermore,

the concept of spent conviction laws is linked to a value which has considerable influence in our society that people who do wrong should be given a second chance because they have the capacity to reform their ways.<sup>2</sup>

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1. Note there already some limited exceptions to the current spent convictions scheme in relation to the 'care, instruction or supervision of minors' already contained in Part VIIC, but this Bill introduces a broader range of exceptions regarding working with children.
  2. <http://www.austlii.edu.au/au/journals/PLPR/1994/80.html>

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It is for this reason that the Commonwealth and most States and Territories have enacted legislation to counter any discrimination that may be caused to an offender who declares a conviction which is a number of years old.<sup>3</sup> In terms of Commonwealth legislation, Part VIIC of the Crimes Act operates that, in general, a person whose criminal conviction is 'spent' or quashed, or where the person is pardoned, they do not have to disclose this conviction, and third persons cannot disclose the conviction or take it into account, except with the convicted person's consent.

Under the Commonwealth spent convictions scheme, a person's conviction is automatically 'spent' on the expiration of a 'waiting period'. The waiting period is five years if the offender was a juvenile when convicted of the offence, or 10 years if the offender was an adult when convicted of the offence, regardless of when the offence was committed. The scheme only applies to convictions which did not result in the offender being sentenced to imprisonment at all, or where a term of imprisonment was not more than 30 months and the waiting period has expired.

Depending on the nature of a subsequent offence, the waiting period may be extended. Explicitly, if an offender is convicted of a further summary offence within the waiting period, then a court may order that the earlier conviction is not spent until the waiting period for the later offence has ended. If an offender is convicted of an indictable offence within the waiting period, then it is extended until the relevant time after the expiration of the waiting period for the subsequent offence. However, this only applies to further convictions imposed by a court exercising federal jurisdiction or a court of a Territory. It does not cover further offences against State legislation. If the subsequent conviction relates to an offence against a State law (whether that conviction was dealt with summarily or on indictment), the earlier conviction becomes spent only after the expiration of the waiting period for the subsequent offence.

The Commonwealth scheme, like those of New South Wales and the Northern Territory, expressly exclude from their provisions convictions by body corporates.

### **Review of spent convictions scheme**

The Standing Committee of Attorneys-General has been considering a national model for a spent convictions scheme. A draft Bill that has been circulated for consultation includes an exclusion section as it relates to working with children.<sup>4</sup> The discussion paper justifies

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3. For a dated but clear overview of the arrangements between the jurisdictions, see Knowler, J. 'Living down the past - Spent convictions schemes in Australia', *Privacy Law and Policy Reporter*, 1994, 80. <http://www.austlii.edu.au/au/journals/PLPR/1994/80.html> viewed 1 September 2009.

4. The link to the draft model Bill can be found at the SCAG Secretariat website: [http://www.scag.gov.au/lawlink/SCAG/ll\\_scag.nsf/vwFiles/Spent\\_convictions\\_Model\\_Bill.pdf/\\$file/Spent\\_convictions\\_Model\\_Bill.pdf](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/Spent_convictions_Model_Bill.pdf/$file/Spent_convictions_Model_Bill.pdf) viewed 1 September 2009.

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this on the grounds that that there are some types of employment where the individual's interest in putting the offence behind him or her via the normal application of the spent conviction scheme is outweighed by the public interest in community safety.<sup>5</sup> Once the Model Bill is finalised, all jurisdictions will consider whether to implement the model provisions. This Bill will not frustrate the operation of a new spent convictions scheme if the Commonwealth elects to adopt the model provisions.

The following table outlines the current approach to Working with Children Checks across the various jurisdictions in Australia.<sup>6</sup>

<b>ACT</b>	No relevant Act	No formal Act or screening program, however, individual employers may require police checks at their discretion.  In August 2009, the ACT government released a community discussion paper on a proposed system of background checking of people working with vulnerable people (including children). <sup>7</sup>
<b>NSW</b>	<i>Commission for Children and Young People Act 1998</i> (NSW)	The NSW Working With Children Check is an employer driven "point-in-time" system entailing background checks of employees and the permanent exclusion of prohibited persons from child-related occupations.
<b>NT</b>	<i>Care and Protection of Children Act 2007</i> (NT)	Individuals are required to apply for a Working With Children Check, known as a 'Clearance Notice' in the Northern Territory. A Clearance Notice is valid for two years,

5. The discussion paper can be found at the Attorney-General's Department website: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Model+Spent+Convictions+Bill++Draft+consultation+paper.pdf/\\$file/Model+Spent+Convictions+Bill++Draft+consultation+paper.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Model+Spent+Convictions+Bill++Draft+consultation+paper.pdf/$file/Model+Spent+Convictions+Bill++Draft+consultation+paper.pdf) viewed 1 September 2009.
6. Table adapted from C. Berlyn, P. Holzer, and D. Higgins, *Pre-employment screening: working with children checks*, National Child Protection Clearinghouse (published by the Australian Institute of Family Studies), Resource Sheet Number 13, May 2009, viewed 1 September 2009, <http://www.aifs.gov.au/nch/resources/police/policechecks.html>; and *Working with Children Checks* (Care for Kids website), viewed 1 September 2009, <http://www.careforkids.com.au/articlesv2/article.asp?ID=82>.
7. J. Stanhope, *Greater protection for vulnerable people in the ACT*, media release, 19 August 2009, viewed 1 September 2009, <http://www.chiefminister.act.gov.au/media.php?v=8335>

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		and applies to employers and volunteers in child-related employment settings.
<b>Qld</b>	<i>Commission for Children and Young People and Child Guardian Act 2000 (Qld)</i>	Individuals are required to apply for a Working With Children Check, known as a 'Blue Card' in Queensland. Valid for two years, Blue Cards entitle individuals to engage in child-related occupations/volunteering.
<b>SA</b>	<i>Children's Protection Act 1993 (SA)</i>	The South Australian system is an employer driven 'point-in-time' system requiring employers and responsible authorities to obtain criminal history checks for those engaging in child-related occupations/volunteering.
<b>Tasmania</b>	No relevant Act	No formal Act or screening program, however, individual employers may require police checks at their discretion.  In 2005 the Commissioner for Children Tasmania released a consultation paper discussing proposals for the Government to introduce screening procedures for Tasmanian organisations who want to employ people to work with children.
<b>Victoria</b>	<i>Working With Children Act 2005 (Vic.)</i>	Individuals are required to apply for a Working With Children Check. Valid for five years, the Check entitles individuals to engage in child-related occupations/volunteering.
<b>WA</b>	<i>Working with Children (Criminal Record Checking) Act 2004 (WA)</i>	Individuals are required to apply for a Working With Children Check. Valid for three years, the Check entitles individuals to engage in child-related occupations/volunteering.

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It is important to note the difference between Police Checks and Working with Children Checks. Essentially, Working with Children Checks are both more extensive and more targeted than Police Checks.<sup>8</sup> The latter identify and release relevant criminal history information relating to convictions, findings of guilt or pending court proceedings but are limited in the information they can provide due to, for example, the Spent Convictions Scheme (under which prior convictions are not to be disclosed where 10 years have passed from the date of the conviction).<sup>9</sup> Working with Children Checks draw together information from various sources, but may include a primary focus on certain types of offences (e.g., sexual offences, offences related to the harm or mistreatment of a child).<sup>10</sup>

### **Basis of policy commitment**

This Bill implements the Council of Australian Governments' (COAG) agreement of 29 November 2008.<sup>11</sup> That agreement sought to facilitate the inter-jurisdictional exchange of criminal history information for people working with children, including information about spent, pardoned and quashed convictions:

COAG at this meeting affirmed the importance of an inter-jurisdictional exchange being put in place as soon as possible, and endorsed a set of implementation actions, the establishment of a project implementation committee under the auspices of COAG and an implementation plan. The implementation plan includes that jurisdictions will prepare, introduce and seek passage of legislative amendments within nine months, to enable the information exchange to commence in 12 months. COAG noted that all jurisdictions, with the exception of Victoria and the Australian Capital Territory, would exchange information on non-conviction charges for screening of people working with children.<sup>12</sup>

This followed an agreement in April 2007 to a framework to improve access to inter-jurisdictional criminal history information by child-related employment screening schemes. According to a spokesperson from the Commonwealth Attorney-General's Department, there is currently only limited exchange of information in relation to working

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8. C. Berlyn, P. Holzer, and D. Higgins.

9. C. Berlyn, P. Holzer, and D. Higgins.

10. C. Berlyn, P. Holzer, and D. Higgins.

11. [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-11-29/#children](http://www.coag.gov.au/coag_meeting_outcomes/2008-11-29/#children)

12. A spokesperson for the Victorian Government confirmed that while Victoria welcomes and supports the sharing of information, it does not support the sharing of information relating to non-convictions. Victoria believes that this would be inconsistent with the principle of innocent until proven guilty and is inconsistent with Victoria's Charter of Human Rights, specifically section 25(1).

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with children checks between jurisdictions.<sup>13</sup> This, she says, ‘undermine(s) the integrity of child-related employment screening’.<sup>14</sup>

In the second reading speech on the Bill, the Minister for Home Affairs, the Hon. Brendan O’Connor MP, noted two main reasons for COAG’s agreement on a framework that allowed for consideration of a person’s full criminal history, *including non-conviction information*:

- evidence that ‘incarcerated sexual offenders are more likely to have previous convictions for non-sexual offences than for sexual offences’ and
- indications from law enforcement agencies that charges relating to offences against children ‘are often withdrawn as a decision is made to protect the child victim from the stress and trauma of giving evidence, cross-examination and simply waiting for committal and trial’.<sup>15</sup>

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

## Financial implications

The Explanatory Memorandum states that the amendments in this Bill have no financial impact on Government revenue.<sup>17</sup> However, if the working with children checks are to apply to volunteers as the Bill intends, it is possible that the government will need to consider the reimbursement of the administrative compliance costs through the tax system.

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13. Quoted in R. Viellaris, ‘More blue card checks: sweeping laws set to reveal criminal histories nationwide’, *Courier Mail*, 21 August 2009.

14. R. Viellaris.

15. Hon B. O’Connor, Minister for Home Affairs, Crimes Amendment (Working With Children—Criminal History) Bill 2009, House, *Debates*, 20 August 2009.

16. Australian Institute of Criminology, *Trends and issues No.193: Child Sexual Abuse: Offender Characteristics and Modus Operandi*, Canberra, February 2001, p. 2, <http://www.aic.gov.au/en/publications/current%20series/tandi/181-200/tandi193.aspx>

17. Explanatory Memorandum, p. 2.

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## Commentary

There appears to be broad acceptance of the necessity of some form of working with children check in ensuring the safety of children. Nevertheless, there appears to be an emerging debate about issues related to the expansion of criminal records checks in general. In Australia, there has been a significant increase in requests for criminal records checks in recent years. Between 2004-05 and 2007-08, requests to CrimTrac, the national criminal record agency, increased by 73 per cent (1.5 million to 2.6 million).<sup>18</sup> Requests to the Australian Federal Police increased by 57 per cent (350,000 to 550,000) in the same period.<sup>19</sup> Other countries have also experienced significant increases. For example, in England and Wales between 2002-03 and 2008-09, the number of such checks nearly tripled from 1.4 million to 3.85 million.<sup>20</sup>

One general concern with expanding the extent of criminal checks of people working with children is the increased cost and administrative burden on employers, charities and other organisations. For example, the increasing volume of checks, together with substantial fee increases, has meant that the cost of fees paid for such checks in England and Wales tripled from £41 million in 2002-03 to £131 million in 2008-09.<sup>21</sup> It has been argued that this has led to delays in processing job applications and acted as a deterrent to potential volunteers and employees.<sup>22</sup>

There are some parallels with the issue of mandatory reporting of suspected cases of child abuse and neglect. There are mandatory reporting requirements of some description in every state and territory.<sup>23</sup> In 2007, the Wood inquiry into child protection services in NSW found that the NSW Department of Community Services (DoCS) Helpline had been

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18. CrimTrac, Annual report 2007-08, p. 15.

19. Australian Federal Police, *Annual report 2007-08*, p. 110; Australian Federal Police, *Annual report 2004-05*, p. 93. Note that the number of Australian Federal Police criminal records checks was 600,000 in 2006-07, meaning that there was a fall in the number of checks between that year and 2007-08 of 50,000 checks.

20. J. Doward, 'Children's care crisis as criminal vetting fees approach £600m', *The Observer*, 23 August 2009.

21. J. Doward.

22. J. Doward.

23. D. Higgins, L. Bromfield, N. Richardson, P. Holzer and C. Berlyn, *Mandatory reporting of child abuse*, National Child Protection Clearinghouse (published by the Australian Institute of Family Studies, Resource Sheet Number 3, February 2009, viewed 3 September 2009, <http://www.aifs.gov.au/nch/pubs/sheets/rs3/rs3.html>)

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overwhelmed with reports, too many of which did ‘not warrant the exercise of its considerable statutory powers’.<sup>24</sup> As a result, Justice Wood argued:

... much effort and cost is expended in managing these reports, as a result of which the children and young people the subject of them receive little in the way of subsequent assistance, while others who do require attention from DoCS may have their cases closed because of competing demands on the system.<sup>25</sup>

In other words, Wood found that DoCS had been forced to spend an excessive amount of time and resources on reports of child abuse, thereby diverting attention away from other important areas of child protection. In response to the findings of the Wood inquiry, the NSW government announced a number of changes, including increasing the reporting threshold for matters reported to DoCS to ‘risk of significant harm’.<sup>26</sup> An important lesson from this experience is that the resource implications of changes to child protection services can be significant and, if not adequately addressed, can have a detrimental impact on the overall quality of services provided.

A further concern is that the expanding use of criminal history information can undermine the principle that people who have ‘served their time’ are entitled to make a fresh start.<sup>27</sup> This point was reportedly made earlier this year by Federal Human Rights Commissioner, Graeme Innes, in a letter to Attorney-General, Robert McClelland, in which he expressed concern about the increasing use of police checks by employers to deny jobs to people with past convictions (including for less serious offences that had little bearing on the job involved).<sup>28</sup> Further, as Naylor, Paterson and Pittard argue:

... the use of this information to exclude people from employment damages an ex-offender’s prospects of rehabilitation and increases their risk of reoffending, along with all of the economic and social costs associated with recidivism.<sup>29</sup>

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24. J. Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW: Executive Summary and Recommendations*, November 2008, p. iii, viewed 2 September 2009, <http://www.lawlink.nsw.gov.au/cpsinquiry>
  25. J. Wood, p. iii.
  26. N. Rees, Premier of New South Wales, *230 million plan for child protection reform*, media release, 3 March 2009, viewed 2 September 2009, [http://www.premier.nsw.gov.au/Newsroom/Articles/2009/March/090303\\_230\\_million\\_plan\\_for\\_child\\_protection\\_reform.html](http://www.premier.nsw.gov.au/Newsroom/Articles/2009/March/090303_230_million_plan_for_child_protection_reform.html)
  27. B. Naylor, M. Paterson and M. Pittard, ‘In the shadow of a criminal record: proposing a just model of criminal record employment checks’, *Melbourne University Law Review*, 32:1, 2008, p. 171.
  28. S. Ryan, ‘Ex-crimis ‘need protection too’’, *Australian*, 16 January 2009.
  29. B. Naylor, M. Paterson and M. Pittard, p. 172.

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Clearly, each of the above concerns should be balanced against the need to take appropriate steps to protect children from abuse. However, it is also worth noting that to date there has been little debate about the appropriate use of criminal record checks in Australia and that there would be some value in further public discussion about the various issues involved.<sup>30</sup>

## Main provisions

### Schedule 1 – Amendments to the *Crimes Act 1914*

**Item 1** will remove the reference to section 85ZR of the Crimes Act in section 85ZS and substitute it with the words ‘(1) Subject to Division 6’. Division 6 outlines the exclusions to the spent convictions scheme. This will have the effect that agencies can disclose the pardoned convictions of a person who seeks to work with children. **Item 2** will make a consequential amendment to the end of section 85ZS.

**Item 3** will amend existing subsections 85ZT(1) and (2) so that the exclusions in Division 6 may be used. That is, where a person’s conviction has been quashed, agencies can disclose the quashed convictions of a person who seeks to work with children. Further, **item 4** will also amend section 85ZU (which deals with the effect of quashed convictions) to make it clear that

- (a) a person is not able to claim that he or she was not charged with, or convicted of, an offence and
- (b) other people are able to disclose or take into account the fact that the person has been charged or convicted, without the first person’s consent.

**Item 5** will allow the Privacy Commissioner to receive and examine any written requests for complete or partial exclusion of persons from the application of Division 2 of Part VIIC, relating to the non-disclosure of pardoned and quashed convictions. The Explanatory Memorandum notes that this is a ‘safeguard against broader dissemination of pardoned and quashed convictions’.<sup>31</sup>

**Item 6** will insert a new **Subdivision A** entitled ‘Exclusions (Divisions 2 and 3)’ into Part VIIC. **Proposed section 85ZZGA** clearly states that the object of this Subdivision is to help protect children from sexual, physical and emotional harm by permitting criminal history information to be disclosed and taken into account in assessing the suitability of persons for work with children. Divisions 2 and 3 set out how the spent convictions scheme applies to pardoned, quashed and general spent convictions

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30. B. Naylor, M. Paterson and M. Pittard, p. 173.

31. Explanatory Memorandum, p. 5.

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**Proposed section 85ZZGB** inserts a new exclusion section in Division 6 that states that Divisions 2 and 3 do not apply in relation to the *disclosure of information* to a prescribed person or body if:

- (a) the person or body is required or permitted by or under a prescribed Commonwealth law, a prescribed State law or a prescribed Territory law, to deal with information about persons who work, or seek to work, with children and
- (b) the disclosure is required by or under a Commonwealth law, a State law or a Territory law.

The Explanatory Memorandum notes that this section will implement the COAG agreement to facilitate the inter-jurisdictional exchange of criminal history information for people working, or seeking to work, with children.<sup>32</sup>

**Proposed section 85ZZGC** inserts the same exclusion as **proposed section 85ZZGB** except in so far as it relates to a prescribed person or body *taking into account* information. Prescribed persons or bodies must be able to take into account the criminal history information in order to assess the risk that a person may pose to children if permitted to engage in child related work.<sup>33</sup>

Further, **proposed section 85ZZGD** allows for *disclosure of information* by a prescribed person or body where there is a statutory obligation to use or disclose information for the protection of a particular child or class of children, as part of a legislated child protection function.

**Proposed section 85ZZGE** is essentially a safeguard provision for the individual. It requires that the Minister, before prescribing a person or body for the purposes of section 85ZZGB, 85ZZGC or 85ZZGD, must be satisfied that person or body meets the following criteria:

- (c) is required or permitted by or under a Commonwealth law, a State law or a Territory law to obtain and deal with information about persons who work, or seek to work, with children; and
- (d) complies with applicable Commonwealth law, State law or Territory law relating to privacy, human rights and records management; and
- (e) complies with the principles of natural justice; and

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32. Explanatory Memorandum, p. 6.

33. Explanatory Memorandum, p. 7.

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- (f) has risk assessment frameworks and appropriately skilled staff to assess risks to children's safety.

**Proposed section 85ZZGC** will insert two new definitions to facilitate the interpretation of the provisions in this Bill.

'Child' is defined to mean a person who is under 18.

'Work' is defined very broadly. It includes working (including acting) in the following capacities:

- (i) under a contract of employment, contract of apprenticeship or contract for services; or
- (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
- (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
- (iv) as a volunteer, other than unpaid work engaged in for a private or domestic purpose; or
- (v) as a self-employed person.

Working can also include practical training as part of a course of education or vocational training. It can also be prescribed (presumably by legislative instrument) as a person working in particular capacity or in a particular activity.

The broad definition of work is problematic as it does not exclude adults who work alongside children such as in a supermarket or take-away food restaurant. It is likely that the Government intends the working with children relationship to cover those adults who have a direct and unsupervised engagement with children however this is not explicit in the Bill. An amendment to make this intention clearer is recommended.

**Proposed section 85ZZGG** requires the Minister to cause a review to be conducted on the operation of these new provisions. The review must start not later than 30 June 201 and be completed, by way of a written report, within 3 months.<sup>34</sup> That report must then be tabled in Parliament within 15 sitting days after the day on which the Minister receives the report.

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34. Presumably this is how the legislation is intended to operate, although as the way the provision is drafted it is only the review that must be completed within 3 months, not necessarily the written report of the review.

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**Item 7** repeals paragraphs 85ZZHE(e) and (f) which contain the current limited exceptions to the existing spent convictions scheme in relation to the ‘care, instruction or supervision of minors’. These provisions are now proposed to be replaced by the broader range of ‘working with children’ exceptions contained in the Bill.

## **Concluding comments**

This Bill will implement the November 2008 COAG agreement to share criminal history information between jurisdictions where it relates to a person seeking to work with children. The Bill is broad in its application and may serve as a model for other jurisdictions to adopt. Ensuring the protection and safety of children is always a desirable outcome and this legislation is unlikely to field much criticism. However, as noted on page 7 of this Digest, the justification for aspects of this Bill appears to be based on very limited relevant evidence. The only source of evidence provided relies on dated studies (only one of which was Australian). Given the importance of striking a balance between the rights of the individual, including the right to privacy, against the interests of the community, it is reasonable to expect that more substantial evidence than this could have been provided in support of such a change. At the very least, the expansion of criminal checks in recent years suggests the need for greater public discussion on how to get this balance right. The general issue is one that deserves a comprehensive and reasoned debate in Parliament.

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