

CHAPTER 2

OVERVIEW OF THE BILL

Background

2.1 At its meeting of 29 November 2008, COAG agreed to an implementation plan for its agreement in relation to the inter-jurisdictional exchange of criminal history information for people who work or seek to work with children. The plan required each jurisdiction to prepare, introduce and seek passage of legislative amendments within nine months, to enable the information exchange to commence in 12 months. All jurisdictions, except Victoria and the Australian Capital Territory, would exchange information on non-conviction charges for screening of people working with children.¹

2.2 The Minister for Home Affairs, in his second reading speech, referred to the Scoping Study and Implementation Plan which preceded the COAG agreement. This study identified the safeguarding of children from sexual, physical and other abuse as a key priority for all Governments. The Minister explained that the study:

... noted that assessment of the criminal history of people working with children or seeking to work with children is an important part of the overall strategy for managing risks to the safety and wellbeing of children.²

2.3 The Minister acknowledged that child-related employment screening is a difficult and challenging process. He observed that it:

...requires careful balancing of potential risks to children with individual rights to privacy, employment and the freedom to participate in the community as a volunteer.³

2.4 He further noted that:

The exchange of information permitted by the Bill is subject to stringent safeguards to ensure that the information is dealt with appropriately and to limit any potential misuse of the information.⁴

2.5 At the public hearing, the Attorney-General's Department provided background on how the bill will impact on the existing arrangements. Ms Sarah Chidgey clarified the purpose of the bill, emphasising that it builds on systems already in place in the States:

1 Communique, Council of Australian Governments' Meeting, Canberra, 29 November 2008, pp 11-12.

2 The Hon Brendan O'Connor MP, Minister for Home Affairs, *House Hansard*, 20 August 2009, p. 8475.

3 The Hon Brendan O'Connor MP, Minister for Home Affairs, *House Hansard*, 20 August 2009, p. 8475.

4 The Hon Brendan O'Connor MP, Minister for Home Affairs, *House Hansard*, 20 August 2009, p. 8476.

... most jurisdictions already have screening assessments in place for those working with children and risk assessment frameworks operating in accordance with each jurisdiction's privacy requirements. This bill simply allows these three categories of Commonwealth convictions to be provided to other jurisdictions. It is the case at the moment that a number of jurisdictions, in their own jurisdictions, already take into account their own pardoned and quashed convictions. The idea behind the COAG agreement was to ensure that jurisdictions exchange that same level of information with each other.

...

Our understanding is that, under the existing regime—which will continue in this new regime with an expanded range of information—employers will simply receive a yes or no about somebody's suitability for employment. They are not given a person's criminal history. None of that information goes beyond the qualified screening assessment units.⁵

Summary of Provisions

2.6 The proposed amendment to section 85ZS deals with the effect of pardons for persons wrongly convicted. This section currently provides that:

where a person is convicted of an offence but is later pardoned because he or she was wrongly convicted of the offence, in particular circumstances and for particular purposes:

- the person is not required to disclose the fact that he or she was charged with, or convicted of the offence;
- it is lawful for the person to claim that he or she was not charged with, or convicted of, the offence;
- the person is 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
- other people may not disclose or take into account (for the particular purpose) the fact that the person has been charged or convicted, without his or her consent.⁶

2.7 The Bill proposes to amend S85ZS so that it is subject to certain exclusions from the current non-disclosure requirements. This proposed amendment would have the effect of allowing agencies, such as the CrimTrac and the Australian Federal Police, to disclose the *pardoned* convictions of a person who works with children or who is seeking to work with children.

2.8 Item 3 of the Bill proposes amendments to section 85ZT(1) and (2) concerning *quashed* convictions so that it is subject to the same exclusions as section 85ZS.⁷ This section currently provides that where a person's conviction has been

5 Ms Sarah Chidgey, *Committee Hansard*, 10 November 2009, pp 17-18.

6 Explanatory Memorandum, p. 4.

7 See Item 6, proposed new Subdivision A – Exclusions (Divisions 2 and 3).

quashed, the person is not required to disclose the fact that they have been charged with, or convicted of, the offence. Under this amendment, a person seeking or engaged in child-related work would have to disclose a quashed conviction for the purpose of assessing the risk they may pose to the safety and well-being of children.

2.9 Similarly, Item 4 amends section 85ZU dealing with the effect of quashed convictions, making it subject to the exclusions in Subdivision A of Division 6. This section currently provides that:

Where a person's conviction has been quashed, in particular circumstances and for particular purposes:

It is lawful for the person to claim that he or she was not charged with, or convicted of, the offence, and

Other people may not disclose or take into account (for the particular purpose) the fact that the person has been charged or convicted, without his or her consent.⁸

2.10 Under the proposed amendment, the new exclusions will permit agencies, such as the Australian Federal Police and CrimTrac, to disclose quashed convictions for the purpose of assessing the suitability of persons for work with children.

2.11 Currently, the Privacy Commissioner examines requests to exclude a person from being obliged to disclose their spent conviction. Item 5 would extend the Privacy Commissioner's role to considering requests where the conviction was pardoned or quashed.

2.12 The explanatory memorandum considers this amendment would implement an important safeguard:

... against broader dissemination of pardoned and quashed convictions, extending the existing safeguard which applies to spent convictions.⁹

2.13 As outlined in Chapter 1, the current Act does not allow for the disclosure of criminal history information about pardons or quashed convictions, and for spent convictions, only allows disclosure in relation to a person working with children for a designated offence. This includes a sexual offence or an offence against the person where the victim was under 18 years at the time the offence was committed.

2.14 The Minister in his second reading speech indicated that the jurisdictions at COAG determined that it 'was appropriate to consider a person's full criminal history, including non-conviction information, in assessing whether he or she poses a risk to children if employed in child related work.'¹⁰ He cited a 2001 report of the Australian Institute of Criminology which noted that incarcerated sexual offenders were more likely to have previous convictions for non-sexual offences than for sexual offences.

8 Explanatory Memorandum, p. 5.

9 Explanatory Memorandum, p. 5.

10 The Hon Brendan O'Connor MP, Minister for Home Affairs, *House Hansard*, 20 August 2009, p. 8476.

2.15 Item 6 would insert new section 85ZZGB which would provide for the disclosure of information about a person's pardoned, quashed or spent convictions *to* a prescribed person or body, where that information is disclosed for the purpose of obtaining or dealing with such information in accordance with the prescribed law.

2.16 Item 6 would also insert new section 85ZZGC which would provide the same conditions on disclosure as new section 85ZZGB, but in relation to a prescribed person or body taking into account criminal history information received through the information exchange as required or permitted by law.

2.17 Similarly, proposed section 85ZZGD provides the same exclusions as the 85ZZGB, except that these are in relation to the disclosure of information *by* a prescribed person or body. The Explanatory Memorandum explains that this section would allow:

a prescribed person or body to disclose information received under the exchange 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.¹¹

2.18 Proposed new section 85ZZGE provides a safeguard for the individual with regard to prescribed persons and bodies. The Explanatory Memorandum explains that:

A comprehensive regime for assessing people who work, or seek to work with children must be balanced with a person's right to rehabilitation, privacy and employment. Accordingly, the use and disclosure of extended criminal history information will be subject to stringent safeguards and conditions.¹²

2.19 This Item would require that before a person or body is prescribed by the Governor-General for the purposes of sections 85ZZGB, 85ZZGC or 85ZZGD to receive conviction information, certain requirements must be met. These requirements are specified in S85ZZGE, and are listed in full in paragraph 2.24.

2.20 Section 85ZZGF of the Bill provides the following definitions for Subdivision A.

child means a person who is under 18.

work includes the following:

(a) work:

- (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

11 Explanatory Memorandum, p. 8.

12 Explanatory Memorandum, p. 6.

- (iv) as a volunteer, other than unpaid work engaged in for a private or domestic purpose; or
- (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.

2.21 As discussed in the Explanatory Memorandum, the definition for the term 'child' is consistent with the definition used by the exchange of criminal history information for people working with children working group. The Explanatory Memorandum further explains that the broad definition of the term 'work':

... will assist in comprehensive child-related employment screening and ensure that all forms of work which involve children are captured by the definition. This item also provides the capacity to prescribe additional roles and activities to ensure that emerging forms of child-related work can be included.¹³

2.22 Proposed section 85ZZGG requires the Minister to begin a review of the operation of Subdivision A by 30 June 2011, complete it within three months, and table the report in Parliament. The Explanatory Memorandum states that:

Given the sensitive nature of the information that will be available under the information exchange it is important to assess the effectiveness of the regime, and ensure that information is being dealt with appropriately.¹⁴

2.23 Item 7 of the Bill repeals paragraphs 85ZZH(e) and (f) of the Act which contain the current limited exceptions to the application of Division 3 regarding spent convictions. The proposed exceptions contained in Item 6 will apply more broadly to 'a person who works, or seeks to work, with children' than the current scheme. The new exceptions will also cover all offences and will not be limited to those defined as 'designated offences' which include a sexual offence or an offence against the person where the victim was under 18 at the time the offence was committed.

Safeguards under the Bill

2.24 The Minister's second reading speech demonstrates that the Government is aware that the proposals in this bill potentially infringe on a person's right to rehabilitation, privacy and employment. The Minister's speech emphasised the safeguards which are part of this proposal, which are intended to ensure the information is dealt with appropriately, and to limit any potential misuse. He described the safeguards as having three key features:

Firstly, the COAG agreement requires that a person or body will only be prescribed in each jurisdiction for the purposes of enabling them to receive conviction information if the person or body:

- is authorised by the government of the state or territory in which it operates;

13 Explanatory Memorandum, p. 8.

14 Explanatory Memorandum, p. 9.

- has a legislative basis for screening that prohibits further release or use of the information (except for legislated child protection functions in exceptional circumstances);
- complies with applicable privacy, human rights and records management legislation;
- reflects principles of natural justice; and
- has risk assessment frameworks and appropriately skilled staff to assess risks to children's safety.

Secondly, to reinforce the importance of these safeguards, before a person or body in a state or territory can be prescribed in regulations to allow them to deal with Commonwealth criminal history information, I must first be satisfied that they meet all of these safeguards in their own jurisdiction. In particular, I will require their assessment processes to reflect principles of natural justice, including access to a merits review or appeal process by an independent arbiter.

Thirdly, the information can only be used to assess a person's suitability to work with children and cannot be used for a general employment suitability or probity assessment.¹⁵

2.25 The Minister acknowledged that sensitive information will be available under the information exchange, and that it will be important to assess the effectiveness of the regime, and ensure that information is being dealt with appropriately. The Bill provides for a three month review of the new provisions, to commence no later than 30 June 2011.

2.26 The committee notes two minor errors in section headings in the Explanatory Memorandum. The section dealing with the proposed definitions of 'children' and 'work' should be labelled 'Section 85ZZGF'; and the section dealing with the review of the operation of subdivision A of the Bill should be labelled 'Section85ZZGG'.

15 The Hon Brendan O'Connor MP, Minister for Home Affairs, *House Hansard*, 20 August 2009, p. 8476.