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Submission on Spent Convictions Bill 2008

Principles behind a spent convictions regime

The reintegration of former offenders into the community must be a high priority for all governments in Australia. Governments across the world are recognising the importance re-engaging former offenders in employment and accommodation to reduce the risk of reoffending. At the same time, however, employers and other agencies are using criminal histories to determine access to jobs and other services, thereby reducing access to these vital resources. This is a problem for all former offenders, but particularly for Indigenous communities, where criminal convictions pose further limitations on community development.

The proposed uniform spent convictions legislation prepared by the Standing Committee of Attorneys General (SCAG) is therefore an important step in the process of facilitating reintegration and reducing reoffending, whilst only addressing one aspect of the problem.

Legislation should clearly state that a person must not be punished further, once the sentence of the court has been served; the reporting of a criminal history after completion of sentence should only be relevant to a real risk of future offending.

In Victoria there has been no legislative process for either the release of criminal history information or for withholding information about particular offences due to the passing of time. Most other Australian jurisdictions have such regimes already.

It is important that all states have a spent convictions regime in place, and that the regime is both nationally consistent, and supportive of the reintegration of former offenders.

The Draft Bill does not address the issue of release of criminal history information. In view of the stigma and prejudice attached to any criminal history the release of such information should itself be firmly linked to the relevance of the criminal history to the specific purpose – eg the nature of proposed employment – and to the real level of risk posed by that criminal history. Many jurisdictions have anti-discrimination regimes in place which prohibit decision making based on irrelevant criminal history. The Committee is referred to a recent publication by myself and colleagues arguing for a more targeted regime of criminal history release, focussed on relevance and risk, rather than the current process of blanket release.¹

The following submission begins from the principle that the provision of information about previous offending should be strictly regulated by reference to risk, that the passage of time substantially reduces the relevance of most records for future behaviour, and that offences should be regarded as 'spent' unless there are exceptional reasons not do so.

¹ Naylor, Paterson and Pittard, 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2008) 32 *Melbourne University Law Review* 171-198.

Which offences could become spent?

General offences: The Draft Bill proposes that any offence punished by up to 12 months imprisonment (or with no custodial sentence) should be eligible to become spent. The time period should be consistent across jurisdictions, and should – on the principles outlined above – provide maximum coverage. The Commonwealth and Queensland schemes set the eligibility criterion at 30 months imprisonment or less.²

It is submitted that, in the absence of evidence that these schemes have led to unacceptable levels of risk, the uniform scheme should adopt the 30 months criterion as a minimum.

Sexual offences: There is no evidence that sex offences in general are more predictive of reoffending than other offences, or that the Queensland approach which does not treat sexual offences differently from general offences has led to community concern.

It is submitted that sex offences should therefore be capable of being spent in the same way as any other offence. The Draft Bill makes exceptions for specific professions, and these would prevent sexual offences being spent in these situations; as a general rule however they should not be treated differently from other offences.

SCAG should not include restrictions here simply in response to political pressures unrelated to the justification for the regime.

If it is considered that sexual offences nonetheless require special attention, it is submitted that the establishment of an administrative process for determining whether the conviction could be spent after expiry of the eligibility period would be appropriate. There should be a legislative presumption that convictions be spent, subject to clear criteria for a contrary finding.

Such a process could be limited to specified sexual offences only, being the most serious sexual offences, and offences with a clear link to recidivism and risk. It should not be necessary for less serious offences.

Minor offences where no conviction is recorded: it is submitted that these should not appear on a criminal record at all, but should be treated as spent immediately.

A non-conviction disposition is a specific sentencing decision recognising the judge's assessment of the low level of seriousness of the offence and intended to mitigate the impact of a formal record on a person's future. In Victoria a finding of guilt without conviction is stated not to be equivalent to a conviction (*Sentencing Act 1991* (Vic) s.8(2)). In NSW, for example, a finding of guilt without conviction is regarded as spent immediately the court's finding is made (*Criminal Records Act 1991* (NSW) s.8(2)), and a finding of guilt and release on a good behaviour bond is regarded as spent upon completion of the period of the bond (s.8(4)). It is submitted that this should be the approach taken in the Uniform Bill.

What period of good behaviour is required?

I am not aware of any evidence underlying the choice of a ten-year good behaviour period before which an adult conviction can be spent. This is a common time period across other Australian jurisdictions, but many European countries, and some states in the US, employ staggered 'good behaviour' periods beginning at less than ten years and linked to the length of the sentence.³ In New Zealand the eligibility period is seven years without conviction, but it is noted that the eligible offences exclude any that attracted a custodial sentence (*Criminal Records (Clean Slate) Act 2004* NZ).

² *Crimes Act 1914* (Cth) s 85ZM; *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(2)(b).

³ For a summary see Sentencing and Offences Unit, Home Office, United Kingdom, *Breaking the Circle: A Report of the Review of the Rehabilitation of Offenders Act* (2002) 65–74.

What about a minor offence?

I support the proposal that commission of a minor offence, whether or not a conviction was recorded, should not be treated as interrupting the qualifying period.

What about interstate offences?

I agree that the Uniform scheme must apply across Australia. It is noted, however, that differences in sentencing approaches may mean that an offence receiving a light/ non-custodial sentence in one jurisdiction may receive a longer custodial sentence in another jurisdiction and therefore lead to differential operation of the scheme for equivalent offences.

Sex offence convictions

If the scheme includes provision for application to have a sex offence declared spent it is agreed that such application would be made in the jurisdiction in which the conviction was incurred.

Overseas offences

The Consultation Paper notes the problem of dealing with overseas offences that do not correspond with any local offence. Other problematic issues are overseas offences that are punished more severely by statute than any equivalent offence in Australia, and the assessment of sentences for eligibility where judicial approaches to sentencing may be significantly different.

It is submitted that it would be preferable to establish an administrative process for evaluating equivalence and determining whether a conviction can be treated as spent in line with the Australian scheme.

Exceptions

The Uniform scheme should adopt, at a minimum, the Australian scheme currently most supportive of offender reintegration. The proposed Division 2 is more restrictive than the administrative regime currently operated by Victoria Police, and it will be submitted that the Bill should be substantially redrawn.

Permitting general criminal history information to be provided in all the proposed areas is also contrary to the prohibition on decision making based on 'irrelevant convictions' or criminal history not related to the 'inherent requirements' of a job under state and federal anti-discrimination legislation.

It is submitted that the exemptions should be restricted to, at most, the release of *relevant* convictions, that is, convictions relevant to specific types of reoffending. For example, the provision in Draft ss.14(6)(a)-(c) for release of all convictions where the former offender seeks to work with children or aged people is too broad; it should be limited to release of relevant sexual and/or violent offences, if these are the behaviours of concern.

It is further submitted that specialised schemes for professional and occupational licensing – children and aged care, real estate and transport licensing etc – which already evaluate the specific relevant convictions should have priority over any general scheme such as that proposed by the Draft Bill. Victoria's Working with Children Check scheme is a good example of a targeted and balanced regime which evaluates different categories of relevant offences and includes provision for appeal and review.

Similarly, it is submitted that Draft ss.14(6)(e) and (f) allowing release of all prior convictions under a 'fit and proper' test are too broad, and should only permit release of information specific to the occupation or profession. The proposal in Draft s.14(7) to disclose arson-related convictions to a fire-fighting authority is a better model.

Consequences

Disclosure

It is submitted that the proposed s.11(a) should refer to ‘a question about the person’s criminal history *however expressed*’ to include questions about ‘charges’ and about ‘any contact with the criminal justice system’.

Other jurisdictions have found that both offenders and employers are unclear about how spent convictions regimes apply in specific cases. The Australian scheme must therefore minimise the risk of illegal disclosures, and failures to disclose, by providing wideranging education about the scheme.

It is submitted that the scheme should provide protection for a former offender who mistakenly treats a conviction as spent, for example by providing that an employer cannot dismiss for dishonesty in such situations. In addition the scheme could provide that a person can obtain a certificate for their records, by administrative process, confirming the status of specific convictions as spent.

Unlawful disclosures

There will be significant interest in accessing information, even illegally, and the legislation must provide clear sanctions for such behaviour. A range of sanctions and remedies is provided in the Commonwealth *Crimes Act* 1914 (Part VIIC) which should be considered here. It is submitted that:

- The legislation should penalise the action of publishing spent convictions on the internet (at least where the person publishing is based in Australia), and accessing and use of such information (whatever the source country) in decision making;
- Draft s.11(d) should include appropriate sanctions for reliance on a spent conviction in relation to any appointment, licence application or accreditation process, and any such reliance should constitute prohibited discrimination within all jurisdictions’ anti-discrimination legislation.
- Draft s.13 which deals with unlawful disclosure in the course of business activities should be defined to ensure that ‘person’ includes both natural and corporate persons, and anyone operating a website.

SCAG is to be congratulated on their initiative in developing a national spent convictions scheme. The individual schemes put in place in the UK and some Australian jurisdictions in the 1970s-80s were inspired by concerns to protect ex-offenders from discrimination and to maximise their reintegration, and this must continue to be a focus. The new Australian legislation must ensure the proper balance of protection against risk, and facilitation of the reintegration of former offenders, in the best interests of the community.

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