



Australian
Human Rights
Commission

everyone, everywhere, everyday

Model Spent Convictions Bill

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Australian Human Rights Commission Submission
to the Standing Committee of Attorneys-General

5 February 2009

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Standing Committee of Attorneys-General in its Inquiry into the model Spent Convictions Bill 2008.
2. The Commission strongly supports the introduction of a uniform spent convictions scheme. The introduction and implementation of this uniform scheme in all jurisdictions should be a matter of national priority.
3. As stated by the Australian Law Reform Commission in its report entitled *Spent Convictions*:¹

...there is a strong case for doing something about the problems faced by former offenders. If nothing were done, society would be needlessly depriving itself of the talents and energies of people in whose positive development it has a distinct interest.
4. Over the last four years, complaints to the Commission regarding criminal record discrimination have almost tripled. In 2007-08, 73 criminal record complaints were received which represents a 35 per cent increase in comparison with the previous year.²
5. In 2005 the Commission undertook a research and consultation project on discrimination on the ground of criminal record. The Commission produced *On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal record*.³ This publication provides practical guidance on how to prevent criminal record discrimination in the workplace.
6. A number of submissions to the Commission's project highlighted the importance of uniform spent conviction laws in Australia, particularly in light of the lack of anti discrimination legislation in the area. The submissions indicated that the jurisdictional differences in current spent conviction laws have caused confusion, misunderstanding and errors in their application.
7. The Commission welcomes the opportunity to comment on the draft model Spent Convictions Bill, and makes the following submissions:
 - The model Spent Convictions Bill should apply to all convictions. The Commission considers the eligibility requirements for the scheme to be unduly restrictive.

¹ Australian Law Reform Commission, *Spent Convictions*, Report No 37, 1987, p 4.

² Australian Human Rights Commission, *Annual Report 2007 – 2008*, p 58. These complaints are dealt with under Part II, Division 4 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act) relating to discrimination in employment.

³ November, 2005:

http://www.humanrights.gov.au/human_rights/criminalrecord/on_the_record/index.html

- The exemptions to the scheme are too widely cast. If these exemptions are retained in the Bill they should be balanced by the introduction of protections at a federal level from unlawful criminal record discrimination.
- Clause 11(4)(d) contains no enforcement mechanism or grievance procedure. A person who is refused employment because of a spent conviction in breach of clause 11(4)(d) has no remedy under the draft Bill.
- The implementation of the model Spent Convictions Bill should be accompanied by a comprehensive community education strategy.

2 Eligibility for the spent convictions scheme

8. The Explanatory Note to the Bill states that ‘some offences are too serious to become spent.’⁴ Under the Bill, whether an offence is capable of becoming spent depends on the sentence imposed in the particular case. The Bill proposes that the following convictions are capable of becoming spent:⁵
 - a conviction where a person, if tried as an adult, was sentenced to 12 months imprisonment or less; or
 - a conviction where a person, if tried as a juvenile, was sentenced to 24 months imprisonment or less.
9. Difficulties arise in excluding convictions on the basis of the sentence imposed. Sentences for the same crime committed in apparently similar circumstances might vary from judge to judge within an appropriate range, or from State to State. Accordingly, any particular sentence selected as a cut off point could produce substantially different results. For example, sentencing policy under Commonwealth law stresses heavy fines rather than prison sentences for certain kinds of serious offences.⁶
10. The Commission submits that the model spent convictions scheme should apply to all convictions. The scheme should not exclude convictions on the basis of the sentence imposed, or on any other basis. All convictions should be *capable* of becoming spent.⁷ Provision can then be made for more serious offences by providing that serious offences can only be spent if a court so orders (in accordance with the procedure set out at clause 9). The issue of the appropriate mechanism for dealing with serious offences is dealt with below.

⁴ *Model Spent Convictions Bill – Draft consultation paper*, p 2.

⁵ CI 5(1).

⁶ Australian Law Reform Commission, *Spent Convictions*, Report No 37, 1987, p 29.

⁷ Note the *Spent Convictions Act 1988* (WA) provides that all convictions are capable of becoming spent, save for a conviction where the penalty imposed is a sentence of life imprisonment.

Recommendation 1: That the model Spent Convictions Bill should apply to all convictions.

3 Mechanism for dealing with serious offences

11. The Explanatory Note invites comment on whether a separate mechanism should be included in the Bill for dealing with more serious offences (namely, sex offences).⁸
12. The Bill proposes two alternatives to deal with sex offences. The first is to include clause 5(2)(a) which provides that sex offences cannot become spent under the Act. The second is to allow sex offences to become spent in the following limited circumstances.⁹ After the elapse of the qualifying period of good behaviour,¹⁰ the offender would be eligible to apply for a court order for the conviction to become spent. The application would be notified to the Attorney-General and the Commissioner for Police, in case they wish to make a submission.¹¹ The making of the order is at the court's discretion and that discretion will be exercised having regard to:¹²
 - the nature, circumstances and seriousness of the offence;
 - the length and kind of sentence imposed for the conviction;
 - the length of time since conviction,
 - all the circumstances of the applicant (including whether the applicant appears to have rehabilitated);
 - whether the conviction prevents or may prevent the applicant engaging in a particular trade, profession or in a particular employment; and
 - any public interest to be served in not making an order.
13. If the court rejects the application, the person cannot reapply for another two years.¹³
14. The Commission accepts that special attention has to be given to serious offences in designing any spent convictions scheme. Serious offences can be defined either by reference to the category of the offence, or on the basis of

⁸ *Model Spent Convictions Bill – Draft consultation paper*, p 3.

⁹ Cl 9.

¹⁰ Cl 7: five consecutive years for a juvenile offender, 10 consecutive years for an adult offender.

¹¹ Schedule 1, Clause 2.

¹² Cl 9(5).

¹³ Cl 9(2)(b).

the sentence imposed. It is important to recognise that there are difficulties involved in making the distinction on either of these bases.

15. To exclude a conviction on the basis of the category of the offence could be unfair. A particular category of offence covers a range of behaviour. For example, it is possible that the term 'sex offence' could include cases of consensual sex between 15 year olds which constitutes the offence of carnal knowledge. The Commission would query whether this offence should never be permitted to be spent.
16. Differences on the basis of the sentence imposed proceed on a more rational basis, but difficulties remain. As set out above, any particular sentence selected as a cut off point could produce substantially different results.
17. In recognition of these difficulties, and the possibility of arbitrary and unfair outcomes, the Commission recommends that provision be made for serious offences (either by reference to the category of the offence, or by reference to the length of the sentence), by providing that such offences can only be spent if a court so orders (in accordance with the procedure set out at clause 9). This procedure allows for concerns about serious offences to be accommodated flexibly, on a case by case basis. It allows for an assessment of the circumstances of the conviction and the circumstances of the applicant when deciding whether a conviction should be spent.

Recommendation 2: Provision be made for serious offences by providing that serious offences can only be spent if a court so orders (in accordance with the procedure set out at clause 9).

18. The Commission further notes that if serious offences are defined by reference to the category of the offence, care should be taken in defining the offence. Significant difficulties arise in leaving the interpretation of these categories of offences to employers or other decision makers. For example, the *Accountability Principles 1998* made under the *Aged Care Act 1997* (Cth) provide that an aged care provider must not allow a person to become a staff member, or to continue as a staff member, if the person has been:¹⁴
 - convicted of murder or sexual assault; or
 - convicted of, and sentenced to imprisonment for, any other form of assault.
19. The term 'sexual assault' is not defined in the legislation.
20. Complaints made to the Commission have highlighted the difficulties faced by employers in interpreting the scope of the term 'sexual assault'. For example, it is not clear whether the offence of carnal knowledge is a sexual assault for the purposes of the *Accountability Principles 1998*. Employers are placed in the difficult situation of balancing their obligations under the *Accountability*

¹⁴ *Accountability Principles 1998*, Part 4.

Principles 1998 with their obligation not to discriminate against employees on the basis of irrelevant criminal record.

4 Exemptions to the spent convictions scheme

21. The Commission acknowledges the need for exemptions from the spent convictions scheme in the interests of community safety and the effective administration of justice. However, the Commission is concerned that the exemptions to the draft Bill are too widely cast.
22. In relation to some exemptions, this concern could be cured by more careful drafting. For example, clause 14(1) provides that ‘sections 11 and 12 do not apply to the performance of a function or the exercise of a power by ... a justice agency’. The Explanatory Note states that the purpose of this exemption is to allow for the investigation and prosecution of offences. ‘It is considered that a person’s full record should be available for use in criminal investigation processes, for the protection of the public.’¹⁵
23. However, as presently drafted clause 14(1) allows for the disclosure of spent convictions by justice agencies in the performance of all of their functions. It is not limited to the investigation or prosecution of offences. It suggests, for example, that police would be able to disclose spent convictions in responding to requests for criminal record checks.

Recommendation 3: That clause 14(1) be amended as follows ‘sections 11 and 12 do not apply to the performance of a function or the exercise of a power by a justice agency in connection with the investigation or prosecution of an offence.’

24. The Commission is also concerned about the scope of the exemption at clause 14(6) of the Bill. Clause 14(6) provides a very broad exemption to the spent convictions scheme for, amongst other things:
 - a person seeking work or any other activity that directly involves the care supervision or instruction of children, aged persons, or persons with a disability, illness or impairment; or
 - a person seeking registration or enrolment, or a licence or accreditation, in or in relation to an occupation, profession or position that requires the person, pursuant to statute, to be a fit and proper person or to be a person of good character.

¹⁵ *Model Spent Convictions Bill – Draft consultation paper*, p 4.

25. The Commission is concerned that this exemption operates regardless of the relevance of the spent conviction to the inherent requirements of the particular employment.
26. The Commission is aware from the complaints it receives that unsatisfactory outcomes result from employers taking into account irrelevant criminal records. The Commission provides a case study below.

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.

27. The Commission recognises there are significant difficulties in including a relevance test within the terms of the clause 14(6) exemption. This is because it is difficult to see who would make the assessment of whether the disclosure of the spent conviction was relevant to the person's ability to perform the inherent requirements of the job.
28. In the circumstances, the Commission submits that the inclusion of this broad exemption within the model spent convictions scheme must be balanced by an amendment to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act) to make unlawful discrimination on the ground of criminal record. Section 3 of the HREOC Act would need to be amended to include criminal record within the definition of 'unlawful discrimination'. This amendment would provide individuals with access to the regime for resolving complaints of unlawful discrimination at section 46P-PO of the HREOC Act before the Commission, the Federal Court and the Federal Magistrates Court.
29. Further, having Federal Court jurisprudence on the circumstances in which a criminal record is relevant to the person's ability to perform the inherent requirements of the job would provide greater certainty for employers.
30. At present, the Commission may inquire into complaints alleging discrimination in employment on the ground of criminal record under a different regime to that applying to cases of 'unlawful discrimination' under the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth).¹⁶ The Commission may find that certain conduct is discriminatory, if the complaint is unable to be conciliated. However, the Commission's actions are limited to preparing a report with recommendations to the Attorney-General for tabling in Parliament.¹⁷ The Commission is not

¹⁶ HREOCA Act, ss 31(b), 32(1).

¹⁷ HREOC Act, ss 31(b)(ii), 35(2).

empowered to enforce its recommendations and a complainant does not have access to the Federal Court or the Federal Magistrates Court.

31. The Commission submits that it is essential that criminal record discrimination is made unlawful at the federal level. This will ensure that employers with access to spent convictions make decisions based on the relevance of the conviction to the person's ability to perform the inherent requirements of the particular job.
32. Protection at a federal level is particularly important in light of the absence of comprehensive protection at a State and Territory level. Only Tasmania and the Northern Territory have laws that specifically prohibit discrimination on the ground of criminal record.¹⁸ Western Australia and the ACT have legislation that prohibits discrimination on the ground of spent convictions.¹⁹

Recommendation 4: That the inclusion of s 14(6) be balanced by an amendment to the HREOC Act to make unlawful discrimination on the ground of criminal record.

5 Clause 11(4)(d) Effect of a conviction becoming spent

33. Clause 11(4)(d) provides as follows:

If a conviction of a person is spent – ...

(d) the spent conviction, or the non-disclosure of the spent conviction, is not a proper ground for –

- (i) refusing the person any appointment, post, status or privilege; or
- (ii) revoking any appointment, status or privilege held by the person, or dismissing the person from any post.

34. The Commission has two concerns in relation to this provision.
35. First, the Commission submits that the scope of clause 11(4)(d) is unclear. The Commission submits that the clause should be amended to make clear that it includes refusing the person employment, dismissing the person from employment, or subjecting the person to any other detriment.

Recommendation 5: That clause 11(4)(d) be amended to include refusing the person employment, dismissing the person from employment, or subjecting the person to any other detriment.

¹⁸ *Anti-Discrimination Act 1992* (NT), s 19(q); *Anti-Discrimination Act 1998* (Tas), s 16(q).

¹⁹ *Spent Convictions Act 1988* (WA); *Discrimination Act 1991* (ACT), s 7(1)(o).

36. Second, clause 11(4)(d) is a stand alone provision that contains no enforcement mechanism. A person aggrieved by a breach of clause 11(4)(d) has no grievance procedure or process to provide redress. The provision appears to acknowledge that a person should not be discriminated against on the basis of a spent conviction, but it provides no remedy when this occurs.
37. The Commission submits that a person that has, for example, been refused employment on the basis of a spent conviction in breach of clause 11(4)(d) must have access to a complaint mechanism and a remedy, including compensation. The model Bill could provide its own complaint mechanism for breaches of clause 11(4)(d) as part of the uniform spent conviction scheme or it could provide for complaints to go to State anti discrimination tribunals.
38. Alternatively, the HREOC Act could be amended to make unlawful discrimination on the ground of criminal record (consistently with **Recommendation 4**). As set out above, this would provide individuals who have been discriminated against on the basis of irrelevant criminal record with access to the regime for resolving complaints of unlawful discrimination at section 46P-PO of the HREOC Act before the Commission, the Federal Court and the Federal Magistrates Court.

Recommendation 6: That a complaint mechanism which provides for an enforceable remedy, including compensation, be introduced for breaches of clause 11(4)(d).

6 Education strategy

39. The submissions made to the Commission's inquiry into criminal record discrimination highlighted a high level of confusion and misunderstanding in the community about spent conviction laws in Australia. Moreover, complaints made to the Commission of criminal record discrimination have revealed that employers and people with a criminal record have difficulty understanding and implementing the different laws relating to spent convictions.
40. Unification of spent conviction laws will address some of the difficulties that people currently face.
41. The Commission submits that the implementation of the model Spent Convictions Bill should be accompanied by a comprehensive community education strategy. This education strategy should target employers, record keepers, decision makers and people with a criminal record to assist them to understand their rights and obligations under a spent convictions scheme.

Recommendation 7: The Commission recommends that the implementation of the model Spent Convictions Bill should be accompanied by a comprehensive community education strategy aimed at employers, record keepers, decision makers and people with a

criminal record to assist them to understand their rights and obligations under a spent convictions scheme.

7 Appendix - Recommendations

Recommendation 1: That the model Spent Convictions Bill should apply to all convictions.

Recommendation 2: That provision be made for serious offences by providing that serious offences can only be spent if a court so orders (in accordance with the procedure set out at clause 9).

Recommendation 3: That clause 14(1) be amended as follows ‘sections 11 and 12 do not apply to the performance of a function or the exercise of a power by a justice agency in connection with the investigation or prosecution of an offence.’

Recommendation 4: That the inclusion of s 14(6) be balanced by an amendment to the HREOC Act to make unlawful discrimination on the ground of criminal record.

Recommendation 5: That clause 11(4)(d) be amended to include refusing the person employment, dismissing the person from employment, or subjecting the person to any other detriment.

Recommendation 6: That a complaint mechanism which provides for an enforceable remedy, including compensation, be introduced for breaches of clause 11(4)(d).

Recommendation 7: That the implementation of the model Spent Convictions Bill should be accompanied by a comprehensive community education strategy aimed at employers, record keepers, decision makers and people with a criminal record to assist them to understand their rights and obligations under a spent convictions scheme.