Harmonising spent convictions laws in Australia: submission to the Standing Committee of Attorneys General on the Draft Model Spent Convictions Bill 2008 (SA)

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work on Spent Convictions Regimes

PIAC has a long-standing interest in the operation of spent convictions regimes. In March 2005, PIAC provided a detailed submission to the Human Rights and Equal Opportunity Commission inquiry into discrimination in employment on the basis of criminal record (the HREOC submission), a copy of which is attached. At part 5.1 of the HREOC submission, PIAC reviewed the inter-relationship between the *Privacy Act 1998* (Cth), the *Privacy and Personal Information Act 1998* (NSW), spent convictions regimes and anti-discrimination laws[1], specifically in relation to employment.

Research base

PIAC's experience is that a large number of individuals are prevented from obtaining employment and achieving social inclusion on the basis of their criminal record. This was recently confirmed to HPLS in its discussions with over 200 people who had experienced homelessness, with whom interviews were conducted by HPLS in preparing its response to the Federal Government's Green Paper on Homelessness.[2]

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1 See, for example, clause 4(a) of the *Human Rights and Equal Opportunity Commission Regulation 1989* (Cth), which includes criminal record in the list of identified characteristics for the purposes of the definition of discrimination in subsection 3(1) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). Note: the *Anti-Discrimination Act 1977* (NSW) does not prohibit discrimination on the basis of criminal record.

2 Commonwealth Government, *Which Way Home? A New Approach to Homelessness* (2008).

When asked how their homelessness could have been prevented, many of those interviewed confirmed experiences of discrimination when attempting to obtain employment. One person said 'having a criminal record stops people getting employment, creates social judgment and leaves people with no options'. Another spoke of the decision that many people who have criminal records face about whether or not to disclose this record to potential employers. In their words 'getting a job through an [Jobs Network] agency means employers know of your past, but it is difficult to get a job without an agency's help'.

Discrimination related to criminal record

In 2009, HPLS is planning project to examine a more effective means of ensuring that individuals who have experienced homelessness are protected from discrimination in New South Wales. The first stage of this project will be to document the experiences of homeless people who have been discriminated against not only on the basis of prior criminal convictions, but also on the basis of their status as a homeless person. On the strength of the information that HPLS receives, a report will be developed setting out the extent and impacts of discrimination against homeless people, together with recommendations for law and policy reform.

The key focus of this work will be to develop proposals for consideration by the NSW Government for reform of NSW laws, but HPLS will also seek, in coalition with interstate colleagues, appropriate Federal reforms. The overall objective will be to prevent discrimination against homeless people and to promote their full social and economic inclusion. Working in co-operation with government towards a comprehensive spent convictions regime is a logical extension of this work.

PIAC's response to the draft Bill

General

PIAC appreciates the opportunity to make a submission on the Draft Model Spent Convictions Bill 2008 (SA) (the Draft Model Bill). PIAC supports the development of a Bill to be a model for a uniform national spent convictions regime.

What convictions should be capable of being spent?

PIAC agrees in principle that the length of sentence imposed should be the determining factor in whether a conviction is capable of becoming spent or not. The Draft Model Bill proposes a cut-off point for offences that have attracted a custodial sentence of up to 12 months (for an adult) or 24 months (in the case of a juvenile). The proposals would catch a wider range of matters than is presently the case under the NSW regime, which is limited to offences for which sentences of less than six months have been imposed.[3] The Draft Model Bill would, however, cut back the range of matters presently capable of becoming spent under Commonwealth and Queensland legislation[4], each of which extends the spent conviction scheme to offences for which custodial sentences of up to 30 months have been imposed.

Suspended sentences

PIAC believes the Draft Model Bill provides a valuable opportunity to address a significant anomaly. The Draft Model Bill does not distinguish between matters in which a term of imprisonment is served, and those in which a suspended sentence has been imposed. Suspended sentences are presently dealt with under section 12 of *Crimes (Sentencing Procedure) Act 1999* (NSW) and section 20 of the *Crimes Act 1900* (NSW). Suspended sentences occupy the lowest tier of custodial sentences in the sentencing hierarchy—the least onerous of all sentences with the potential to result in imprisonment—less than periodic detention, less than a home

3 *Criminal Records Act 1991* (NSW) s 7(1)(b).

4 *Crimes Act 1914* (Cth) and *Spent Convictions Act 1992* (WA).

detention order (neither of which are dealt with in the draft Bill). A suspended sentence can be a powerful tool to encourage compliance with a rehabilitation regime and, through the real risk of a gaol term, sends a strong signal to the offender and the community that the offence has been treated seriously.[5]

Under current NSW legislation, someone who has a received a suspended sentence of over 12 months (up to a maximum of two years) is a considerably worse position as far as the spent conviction scheme is concerned than someone who was sentenced to and served a 12-month period of imprisonment. This logical inconsistency could be overcome by raising the level of offence able to become spent to include all those in which a custodial sentence (whether suspended or not) of up to 30 months was imposed, as is presently the case under Queensland and Commonwealth law. As an alternative, the Draft Model Bill could deal separately with the question of suspended sentences, by providing that—in addition to any other basis—a conviction can become spent where a suspended custodial sentence of up to two years is imposed.

No conviction recorded: section 10

PIAC is concerned that the Draft Model Bill might not apply the spent convictions regime to offences in which no conviction is recorded under paragraphs 10(1)(a) and (1)(b) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and subsection 19(b) of the *Crimes Act 1900* (NSW). The definition of conviction under sub-clause 3(1) of the Draft Model Bill includes circumstances where a charge has been proved but no conviction is recorded. Typically, this might involve the imposition of a good behaviour bond.

While the *Criminal Records Act 1991* (NSW) includes section 10(1)(a) and 10(1)(b) determinations as convictions for the purposes of the spent convictions regime, it provides that a finding that an offence has been proved without proceeding to conviction either becomes spent immediately, or upon the completion of any period of good behaviour under a bond. Similar observations might be made about existing provisions in other jurisdictions. The ACT regime provides, for example, that a finding of guilt lapses immediately where the matter is disposed of without proceeding to conviction, or upon expiry of any good behaviour order.[6] No similar provision is contained in the Draft Model Bill.

PIAC questions whether, in these circumstances, the words 'where on conviction of the defendant' in the wording of eligible juvenile offence in sub-clause 3(1) have any work to do. They are internally inconsistent with the definition of conviction earlier in the same section, and PIAC is concerned that there is a risk that such determinations will only become spent at the end of the ten-year (adult) or five-year (juvenile) qualifying period.

In PIAC's view, the question might more appropriately be dealt by mirroring the present NSW or ACT legislation, or by amending the definition of conviction in subsection 3(1).

Waiting period

The ten-year waiting period proposed in the Draft Model Bill, so far as it concerns adult offences, generally mirrors existing legislation across jurisdictions. Where it differs is by doubling the waiting period for a person convicted in Queensland of a non-indictable offence, and increasing the qualifying period by two years and three years respectively for persons convicted as juveniles in NSW and Western Australia. Subject to any

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5 In *R v Laws* (2000) 116 A Crim R 70, Wood CJ CL explained that the purpose of suspension was:

> to convey the seriousness of the offence and the consequences of re-offending to the offender, while also providing him or her with an opportunity to avoid the consequences by displaying good behaviour and by not repeating the relevant breach of the law or any similar breach of the law.

See also Howie J in *R v Zamagias* [2002] NSWCCA 17 at [23] - [32].

6 *Spent Convictions Act 2000* (ACT) s 12(2).

question of retrospectivity, PIAC believes that, on balance, this aspect of the Draft Model Bill represents a reasonable compromise.

PIAC agrees that minor offences, attracting fines in the range identified in the Draft Model Bill, should be disregarded for the purposes of the qualifying period. It needs to be made clear in the next draft, however, whether or not a finding that an offence has been proven without proceeding to conviction should also be regarded as falling within this category.

Definition of a minor offence

PIAC notes that it is unclear whether the definition of minor offence encompasses section 10 and similar determinations. It may be that the words 'discharged without penalty' is intended to catch such a situation, at least where a bond is not imposed. Otherwise, PIAC agrees that the range of offences represented by the kinds of maximum penalties set out in the consultation paper are appropriate for consideration as spent convictions. The proposals dealing with interstate and overseas convictions are also supported.

Sex offences

PIAC believes the Draft Model Bill should provide that sex offences that would otherwise qualify as capable of being spent by reference to sentence imposed and time without re-offending, should be capable of being certified as spent by application to and order of the court. While recognising the need to ensure the protection of the public, and children in particular, PIAC observes that there is a range of individuals who are convicted of sex offences who do not fall into the category of recidivist offenders. This category includes, for example, minors who have been convicted of having sex with other minors

Corporations

PIAC agrees that bodies corporate that have attracted criminal convictions should not receive the benefit of a spent conviction regime.

In very practical terms, there are cogent reasons for supporting such a regime as it applies to natural persons, in fostering rehabilitation and minimising the risk of a cycle of discrimination, with the attendant risk of recidivism. Unlike natural persons, corporations are incapable of experiencing guilt, anger, embarrassment, fear, hurt or apathy. They do not feel shame, anxiety or depression when required to disclose a past criminal conviction. They are not at risk of being exposed to discrimination in employment if a past conviction is disclosed, nor of being sacked if it is not.

Knowledge that a criminal conviction will stay on the record may provide a powerful economic incentive for directors and officers, executives and senior managers to ensure that corporations comply with the law. It is important that any past wrongdoing continues to remain a part of the corporate memory, particularly (as is often the case) where those with direct knowledge or involvement have left the corporation.

Retrospectivity

The Draft Model Bill appears to incorporate an element of retrospectivity, in providing that it applies to convictions that occurred before its commencement, such that the waiting period that applies to those convictions will be treated as if the Draft Model Bill had been in force as from the day the offence had been committed.[7]

[7] Model Spent Convictions Bill 2008 (SA), cl 6(4), 7(5)(b).

The effect appears to be anomalous, at least so far as it relates to matters that would be treated as spent under existing legislation, but which are either not within the definition of an eligible offence under the Draft Model Bill, or in relation to which a different and longer waiting period would now apply. PIAC believes that this issue warrants further attention.

Unlawful disclosure and exceptions

PIAC generally agrees with the list of exceptions set out under clause 12 of the Draft Model Bill. It notes, however, that sections 85ZW to 85ZZG of the *Crimes Act 1913* (Cth) prohibit a breach of a right of non-disclosure arising under spent convictions legislation, and provide for investigations and making of declarations enforceable in the Federal Court by the Privacy Commissioner. There would appear to be some tension between those provisions and clause 14 of the Draft Model Bill.

PIAC also notes that it appears to be an offence under clause 13 for any business, including mainstream media, to allow access to archives—including electronic archives of past publications—that refer to convictions that have since become spent. If the real mischief with which the section is intended to deal is the collation and dissemination, for fee or reward, of individual criminal histories, PIAC agrees with the objective sought to be achieved. PIAC has concerns, however, that the exception relating to reports and authorised publications may not be broad enough to cover the retention and continued availability of what were originally fair protected reports of court proceedings. PIAC questions whether, given that such reports (where published electronically) are invariably cached on overseas-based, third-party web servers such as Google, the current provision is likely to be of any practical utility. PIAC is concerned that sub-clause 14(6) may not necessarily cover third-party internet-based Court reports and transcripts, nor abstracts or extracts of Court reports. PIAC believes that sub-clause 14(6) might benefit from further attention.

PIAC also notes that the Draft Model Bill does not address the question of whether a conviction for an offence that is later repealed (whether otherwise coming within the definition of an eligible offence, or not) should be treated as lapsed, as from the date of repeal.[8] PIAC believes this issue might also benefit from attention in the next iteration of the Draft Model Bill.

Conclusion

PIAC supports the objectives of the Draft Model Bill, and would welcome the opportunity to be involved in further comment and policy development in relation to it.

8 See, for example, *Criminal Records (Spent Convictions) Act 1992* (NT) s 8.