



Law Council  
OF AUSTRALIA

12 July 2013

Mr Anthony Coles  
Assistant Secretary  
Criminal Law and Enforcement Branch  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

Dear Mr Coles

### **CRIMES ACT REVIEW – WORKING WITH CHILDREN PROVISIONS**

I am writing in relation to the provisions of the *Crimes Act 1914* (Cth) (the Crimes Act), passed in 2010, that allow information about pardoned, quashed and spent Commonwealth convictions to be disclosed and taken into account by prescribed Commonwealth, State and Territory screening agencies in determining whether a person is suitable to work with children (the Provisions).

Section 85ZZGG of the Crimes Act requires the Minister for Justice to initiate two reviews of the Provisions, the first of which was completed in September 2011 (the First Review). The second review is due to commence no later than 30 June 2013, and must be completed within three months (the Second Review).

As you are aware, the Law Council raised its concerns about the Provisions in its submission to the Senate Legal and Constitutional Affairs Committee in November 2009. It also wrote to the Department on 12 August 2011 ahead of the First Review. Copies of both the Law Council's submission and letter are **attached**.

This letter summarises the Law Council's position on the Provisions, its concerns in relation to the First Review report and the information which should be addressed as part of the Second Review.

#### Law Council position on the Provisions

While the Law Council is generally supportive of endeavours to minimise the risk of harm to children by carefully screening the suitability of those tasked with their care, supervision and instruction, it remains concerned that the Provisions may interfere with the presumption of innocence, as well as a person's right to rehabilitation, privacy and

employment, without any demonstrated justification. When the Provisions were first considered, the Law Council responded in the following manner:

1. The Law Council opposed the Provisions on the basis that there should be no exception to the principle that if a person has been pardoned or their conviction has been quashed, they are entitled to the full benefit of that decision. Any exception would mean that a person's guilt cannot be expunged even if the process of securing the conviction was flawed.
2. The Law Council objected to the fact that the amendments applied to convictions for any offence and not just convictions relating to children.
3. The Law Council also opposed the extension of the then-existing provision for disclosure of spent convictions relating to offences clearly relevant to working with children, beyond these offences to any spent convictions.
4. The Law Council also raised a number of other issues with the amendments. These included the lack of a definition in relation to "working with children"; and concerns that this phrase was overly broad, compared to previous provisions which focused more appropriately on jobs or activities involving the "care, instruction or supervision" of children.

In response to the Law Council's concerns, the Government emphasised that important safeguards would apply. Under these safeguards (in section 85ZZGE), it would only be possible for a person or body to be prescribed as a screening agency to whom criminal history information could be disclosed if the Minister was satisfied that the person or body:

- complied with applicable Commonwealth law, State law or Territory law relating to privacy, human rights and records management; and
- complied with the principles of natural justice; and
- had risk assessment frameworks and appropriately skilled staff to assess risks to children's safety.

However, the Law Council questioned how such safeguards would offer adequate protection, given that the legislation, by its very nature, appeared to declare that it would sometimes be legitimate (and therefore compliant with applicable privacy and human rights principles) to take into account, including to a person's disadvantage, a charge in relation to which that person had already been exonerated.

The Senate Committee on Legal and Constitutional Affairs (the Senate Committee), while supporting the Provisions, noted that similar concerns were held by a number of organisations including the Office of the Information Privacy Commissioner. On the basis of such concerns, the Senate Committee recommended that a Second Review would be required in addition to the First Review originally proposed.

The concerns were also acknowledged by the then-Minister for Home Affairs, the Hon Brendan O'Connor MP. In his second reading speech, the Minister acknowledged that child-related employment screening was a difficult and challenging process, observing 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.*

## First Review

The Law Council wrote to the Government on 12 August 2011 ahead of the First Review being conducted. While noting that the available information would be limited due to the short timeframes involved, the Law Council considered that the First Review nevertheless provided an opportunity for some early, preliminary scrutiny of the safeguards identified by the Government, and their effectiveness in allaying concerns about the amended Crimes Act provisions. The Law Council also made some detailed suggestions about the kinds of de-identified information which would most usefully be collected in the First Review.

However, the Law Council was disappointed with the First Review report, when it was issued, in a number of important respects. These are set out below.

### **Review parameters**

The First Review report identified two review objectives:

- (a) establishing whether the availability of Commonwealth pardoned, quashed and spent convictions had helped to achieve the objective of protecting children by improving screening agencies' decision-making when assessing people's suitability for working with children; and
- (b) ensuring that information disclosed under the Provisions was used and treated appropriately, by establishing whether the s.85ZZGE safeguards continued to be complied with by screening agencies, as well as whether any complaints or other issues had arisen as a result of the Provisions.

The Law Council was disappointed that neither of these objectives really addressed the inherent risks and strong concerns which were highlighted in relation to the Provisions when they were considered by Parliament. These concerned the potential for the Provisions to infringe unfairly, and without justification, on the presumption of innocence and a person's rights to rehabilitation, privacy, and employment.

The First Review report did not effectively address these risks. Instead, it was primarily concerned with the utility of the Provisions from the screening agencies' perspective. On the basis of agencies' general views that the information provided was valuable (which was not supported by specific examples or detail), the Department concluded that the Provisions were operating to achieve their aim of helping to protect children. There was little weight given to the risks identified by Parliament or the Minister.

Furthermore, while the Minister and the Department had highlighted the need for stringent safeguards, the Law Council was disappointed that the First Review report's discussion of these safeguards was perfunctory. It simply reported that screening agencies had indicated that they met the safeguards requirements, while attaching material which had been provided by those agencies. There was no indication of any analysis having been undertaken by the Department.

## Statistical and qualitative information

The Law Council was also disappointed that the First Review report did not provide comprehensive, detailed data or information about the operation of the Provisions. Screening agencies generally provided little information, and one agency provided nothing other than an expression of support for the Provisions. Nor did the Australian Federal Police (AFP) provide key information such as whether disclosures were made regarding pardoned, quashed or spent convictions, or such as the nature of the relevant offences. In addition, no detail was included concerning the nature of the industry or employment for which disclosures were made.

The Law Council considers that such information from both the screening agencies and the AFP is critical in determining:

- whether individuals are prohibited from employment on the basis of pardoned or quashed Commonwealth convictions;
- whether individuals are prohibited from employment on the basis of spent convictions for Commonwealth offences which are irrelevant to working with children;
- whether the phrase "working with children" is being applied in practice to an inappropriately broad range of employment; and
- whether screening agencies are accessing information about an individual's Commonwealth criminal history which is otherwise irrelevant.

The report noted that "there is currently no requirement to collect data and the data provided generally did not cover the full range of information sought by the review". The Law Council considers that screening agencies and the AFP should be required to provide such information.

Meanwhile, the information which was included in the report, while limited, did provide some basis for concern and further investigation by the Department. For example:

- the list of examples of the types of Commonwealth pardoned, quashed and spent convictions disclosed to the Commission for Children and Young People and Child Guardian (Qld) included negligent driving, theft and fraud offences. Similarly, the Queensland College of Teachers noted that the types of offences disclosed included public nuisance, stealing, fraud and traffic offences. While it understands that risk assessment processes may mean that this information would not adversely affect an applicant's eligibility, Law Council queries why such information would be considered relevant in the first place to screening applicants who wish to work with children.
- Further information about the nature of the complaints made by individuals to the screening agencies and the AFP was necessary. It was insufficient to state that these complaints were generally based on a misunderstanding of the Provisions. The Department could have sought further information about these complaints, including whether they related to: the disclosure of information regarding pardoned or quashed convictions, or spent convictions for offences which were irrelevant to working with children; or to whether a job could be categorised as "working with children".

reasons, and to be given the opportunity to respond before the decision was made.

### Second Review

Bearing in mind its previous remarks, the Law Council considers that the Second Review must provide a more detailed picture, as well as a more rigorous analysis, of the operation of the Provisions to date.

The Law Council welcomes the fact that since the First Review, the former Attorney-General, the Hon Nicola Roxon MP, has written to State and Territory Attorneys-General in 2012 to request that measures be taken to record statistical information about the Commonwealth criminal history information which is received by screening agencies, as well as the outcomes of decisions which take this information into account.

It further welcomes the Department's initiatives in writing recently to screening agencies to seek further information about the operation of the Provisions.

However, beyond these actions, the Law Council considers that the Department should take steps to ensure that the Second Review includes the following de-identified material:

- (i) Statistical information regarding the number of instances in which information about pardoned, quashed and spent Commonwealth convictions has been disclosed to and taken into account by prescribed screening agencies in determining whether a person is suitable to work with children;
- (ii) information about the circumstances of the assessments set out in (i), including:
  - the kind of positions and sectors in which relevant individuals work, or sought to work;
  - whether the relevant convictions were pardoned, quashed or spent,
  - the nature of the offences involved; and
  - the outcome of the assessments;
- (iii) whether the assessments set out in (i) and (ii) were subject to review proceedings, and if so, the outcome of those proceedings;
- (iv) the policies or protocols each prescribed screening agency has in place for assessing the relevance of a pardoned, quashed or spent conviction;
- (v) the training provided to screening staff on how to assess the relevance of a pardoned, quashed or spent conviction. This would include the extent to which such training covers information on:
  - the circumstances in which convictions are pardoned or quashed;
  - the principles which underpin pardoned and quashed convictions: that is, that if a person has been pardoned (on the basis of a wrongful conviction) or their conviction has been quashed or set aside by a higher court on review, they are entitled to the full benefit of that decision;

The Law Council was disappointed that the Department did not undertake this kind of analysis.

It notes that the lack of detailed information which is highlighted above was acknowledged in the First Review report itself, with the Department recommending that:

- (a) complete information about the number of Commonwealth convictions disclosed to screening agencies under Subdivision A be collected and retained, as well as information about whether those convictions were pardoned, quashed or spent and the types of offences to which they relate, and
- (b) information be collected and retained about the outcomes of assessments involving Commonwealth criminal history information, in particular instances in which a person is issued with a negative assessment on the basis of that information.

However, as discussed further below, the Law Council would prefer to see additional information collected as part of the Second Review, with the Department taking a more proactive role in ensuring that it is made available.

### **Safeguards**

As noted above, the First Review report simply attached the information provided by screening agencies about their compliance with s.85ZZGE safeguards, without any further analysis. However, the Law Council considers that the Department could have analysed this information to assess whether agencies were complying with the safeguards in the Provisions. For example:

- while several screening agencies noted that they were bound to comply with legislation relating to privacy, human rights, records management and natural justice, there was little or no indication of monitoring or audit mechanisms operating to ensure their practical compliance. See for example the Western Australian Department of Child Protection's response;
- some agencies failed to demonstrate how staff were trained to ensure that the principles of privacy, human rights, records management and natural justice were respected. See for example the Northern Territory Screening Authority's response;
- More particularly, it was not generally apparent how agencies' risk assessment or training processes highlighted or explained individuals' rights to the presumption of innocence, rehabilitation, privacy and employment. This was necessary to ensure that an appropriate balance was struck between these rights, and the need to protect children;
- In responding to the requirement to comply with the principles of natural justice, some agencies did not discuss how such principles are applied at the point at which the decision was taken. For example, the New South Wales screening agencies' response referred only to the ability to seek merits or judicial review. It did not refer to the individual's right to be informed that an adverse decision was likely to be taken, to be provided with the relevant

- the circumstances in which convictions become spent;
  - the principles underlying the spent convictions regime: that is, the encouragement and reward of the rehabilitation of offenders; and the reduction of risk that a person will reoffend;
- (vi) any complaints about the disclosure and use of information under the Provisions, including the nature of these complaints, and any breach of privacy requirements.

If screening agencies (and where relevant, the AFP) do not provide this information, the Law Council considers that the Second Review report should note this absence of information, and that it affects the Department's ability to comment on whether the Provisions (including the safeguards) are operating appropriately.

### Conclusion

Procedural safeguards and review processes are often incorporated into controversial legislation as a means of addressing concerns regarding its impact on human rights and the rule of law. The Law Council maintains a keen interest in how such safeguards and reviews operate in practice. It is essential that proactive, rigorous steps are taken to ensure that these mechanisms operate effectively, or their overall value must be questioned.

In the current context, the Law Council continues to hold reservations about the extent to which the safeguards offer appropriate protections to the individuals concerned, in light of the seriousness of its concerns about the Provisions. The Law Council looks forward to the release of the Second Review report.

Yours sincerely



**MARTYN HAGAN**

12 August 2011

Ms Sarah Chidgey  
Assistant Secretary  
Criminal Law and Enforcement Branch  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

Dear Ms Chidgey

### **CRIMES ACT REVIEW – WORKING WITH CHILDREN PROVISIONS**

I am writing in response to the review by the Attorney-General's Department (the Department) of the operation of the provisions of the *Crimes Act 1914* (Cth) that allow information about pardoned, quashed and spent Commonwealth convictions to be disclosed to and taken into account by prescribed Commonwealth, State and Territory screening agencies in determining whether a person is suitable to work with children (the Crimes Act provisions).

On 29 June 2011, the Minister for Home Affairs and Minister for Justice, the Hon Brendan O'Connor MP (the Minister), wrote to the Law Council inviting it to participate in this review, which is required under the Crimes Act provisions to be completed by 30 September 2011.

#### Law Council position on the Crimes Act provisions

As you will be aware, the Law Council expressed considerable reservations about this legislation when it was reviewed by the Senate Legal and Constitutional Affairs Committee (the Committee) in November 2009. A copy of its submission to the Committee is attached. It also wrote to the Minister seeking further information about how the legislation would be implemented on 1 April 2010, receiving a response on 8 June 2010.

The Law Council maintains its previously expressed position on the Crimes Act provisions. These can be briefly summarised as follows:

1. The Law Council opposed the amendments on the basis that there should be no exception to the principle that if a person has been pardoned or their conviction has been quashed, they are entitled to the full benefit of that decision. Any exception would mean that a person's guilt cannot be expunged even if the process of securing the conviction was flawed. The Law Council also objected to the fact that the amendments applied to convictions for any offence and not just convictions relating to children.

2. The Law Council also opposed the extension of the then existing provision for disclosure of spent convictions relating to offences clearly relevant to working with children beyond these offences to any spent convictions.
3. The Law Council also raised a number of other issues with the amendments such as the lack of a definition in relation to “working with children”.

In response to the Law Council’s concerns, the Government emphasised that important safeguards would apply. Under these safeguards, it would only be possible for a person or body to be prescribed as a screening agency to whom criminal history information could be disclosed if the Minister was satisfied that the person or body:

- complied with applicable Commonwealth law, State law or Territory law relating to privacy, human rights and records management; and
- complied with the principles of natural justice; and
- had risk assessment frameworks and appropriately skilled staff to assess risks to children’s safety.

However, the Law Council questioned how such safeguards would offer adequate protection, given that the legislation, by its very nature, appeared to declare that it would sometimes be legitimate (and therefore compliant with applicable privacy and human rights principles) to take into account, including to a person’s disadvantage, a charge in relation to which that person had already been exonerated.

#### Existing review - Law Council comments

The Law Council notes that the relevant Crimes Act provisions came into effect on 26 March 2010. Given that they commenced so recently, the available information on their operation and impact is very limited.

Nonetheless, the Law Council hopes that the review will provide an opportunity for some early, preliminary scrutiny of how the safeguards identified by the Government are operating in practice, and their effectiveness in allaying concerns about the amended Crimes Act provisions. For example, the Law Council expects that the review will gather and publish useful, de-identified information about the following matters:

- (i) Statistical information regarding the number of instances in which information about pardoned, quashed and spent Commonwealth convictions has been disclosed to and taken into account by prescribed screening agencies in determining whether a person is suitable to work with children;
- (ii) information about the circumstances of the assessments set out in (ii), including:
  - the kind of positions and sectors in which relevant individuals work, or sought to work;
  - whether the relevant convictions were pardoned, quashed or spent;
  - the nature of the offences involved; and
  - the outcome of the assessments;
- (iii) whether the assessments set out in (ii) and (iii) were subject to review proceedings, and if so, the outcome of those proceedings;

- (iv) the policies or protocols each prescribed screening agency has in place for assessing the relevance of a pardoned, quashed or spent conviction;
- (v) the training provided to screening staff on how to assess the relevance of a pardoned, quashed or spent conviction. This would include the extent to which such training covers information on:
  - the circumstances in which convictions are pardoned or quashed;
  - the principles which underpin pardoned and quashed convictions: that is, that if a person has been pardoned (on the basis of a wrongful conviction) or their conviction has been quashed or set aside by a higher court on review, they are entitled to the full benefit of that decision;
  - the circumstances in which convictions become spent;
  - the principles underlying the spent convictions regime: that is, the encouragement and reward of the rehabilitation of offenders and the reduction of risk that a person will reoffend; and
- (vi) any complaints about the disclosure and use of information under the amendments, including any breach of privacy requirements.

Through its Constituent Bodies, the Law Council has received some general anecdotal information about the recent conduct of criminal history checks at the state and territory level, but it has been difficult to ascertain the extent to which this information is directly relevant to the operation of the Commonwealth Crimes Act provisions, as amended in 2009. For example:

- The Law Society of the Northern Territory (LS NT) has advised of its concerns about the Northern Territory Government's recent introduction of Working with Children checks.
  - In particular, it is concerned that the privacy safeguards contained in the Northern Territory's regime may be insufficient, given the unique difficulties of preserving privacy in very small communities and the nature of the information concerned.
  - The LS NT also advises that while the system is in its infancy, it is aware that some individuals are seeking reviews of decisions following negative assessments. It intends to monitor this situation.
- The Law Council is also aware that discrimination on the basis of criminal record continues to be a key ground of complaint received under the Australian Human Rights Commission Act 1986. In 2009-2010, 67 complaints, or just over 30 per cent of the complaints received under that Act, related to discrimination on the basis of criminal record. It is not clear to date whether any of these complaints relate to pardoned, quashed or spent convictions. The Law Council will continue to liaise with the Australian Human Rights Commission regarding the nature of these complaints as they emerge.

For external observers, gathering detailed case information about provisions of the kind currently under review is a significant challenge because individuals are very reluctant to publicise instances in which they have undergone negative assessments, due to the potential community stigma which could flow from further disclosure. This is no less the case in circumstances where a negative assessment rests on a conviction which has

been pardoned, quashed or spent, or relates to an offence which bears no relevance to the inherent requirements of working with children.

For that reason, the Law Council will monitor with interest the outcomes of the current review and in particular hopes that it results in the publication of important factual data about the operation of the amended provisions which is otherwise difficult to obtain publicly. In the Law Council's view, without this information, the current review (and the further legislatively mandated review which is scheduled to occur in 2013) cannot adequately assess whether and how the legislation is meeting its objectives.

The Law Council is grateful for the opportunity to participate in this review, and would be pleased to discuss any of the above issues further should this assist.

Yours sincerely

A handwritten signature in black ink, appearing to read 'W Grant', written in a cursive style.

Bill Grant  
Secretary-General

*Attachment: Copy of submission, November 2009.*