Model Spent Convictions Bill 2008

Standing Committee of Attorneys General

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Introduction

The Law Council of Australia is grateful for the opportunity to provide comments on the Model Spent Convictions Bill ('the Model Bill') and to respond to the Discussion Paper prepared by the Standing Committee of Attorneys-General ('SCAG').

The Law Council supports efforts to provide certainty and uniformity in the approach taken to spent convictions across Australian jurisdictions.

Spent conviction regimes gives a person a chance to live down a minor criminal conviction and to remove any unfair barrier such a criminal record poses to his or her prospects of resuming a normal place in society.

Given this rationale, it is critical that such schemes apply equally and consistently across Australia.

Currently, inconsistency of laws is leading to people either mistakenly disclosing a spent conviction because they are not familiar with the relevant law in the particular jurisdiction, or failing to disclose convictions because they believe the conviction to be spent. These types of misunderstandings can result in complaints of discrimination and can significantly affect the ability of past offenders to engage in the community in a normal way.

For these reasons, the Law Council generally supports the objects of the Model Bill.

However, the Law Council is concerned that in certain areas the Model Bill appears to adopt a more restrictive approach to that currently employed in a number of Australian jurisdictions. The Law Council's concerns relate to the following factors:

- the adoption of penalty thresholds for convictions eligible to become spent that are more restrictive than those currently in force in some Australian jurisdictions;
- the distinction made between sexual offences and other offences when determining what convictions are eligible to become spent;
- the adoption of qualifying periods of good behaviour for convictions incurred while a juvenile that are longer than those currently in force in some Australian jurisdictions;
- the potential for a broad range of exemptions to the unlawful disclosure provisions to be added by regulation;
- the need to consider additional mechanisms to protect against and deter unlawful disclosure of spent convictions; and
- the need to consider strengthening existing anti-discrimination laws to protect against discrimination on the grounds of a person's criminal records, including a spent conviction.

The Law Council wishes to acknowledge the contributions of the New South Wales Bar Association, the New South Wales Law Society, the Law Institute of Victoria, the Queensland Law Society and the Northern Territory Law Society in the preparation of this submission.

Overview of Current Position within the Australian Jurisdictions

Spent conviction regimes vary considerably across Australian jurisdictions.

In general, two models have been employed:

- automatic 'spending' of eligible convictions following the expiry of a prescribed qualifying period; and
- an application procedure for eligible convictions to become spent.

The automatic model is currently employed in varying forms in the Australian Capital Territory (ACT), New South Wales (NSW), the Northern Territory (NT), and Tasmania. Under this model, an eligible conviction will be determined primarily by the penalty imposed for the offence. If the penalty is under the statutory threshold, the conviction will become spent following the expiry of a certain period of good behaviour, or qualifying period, which varies depending on whether the offender was an adult or juvenile at the time of the offence. Under this model, convictions for certain offences may be excluded, such as sexual offences, and can never become spent. Queensland and the Commonwealth also adopt the automatic model, however in those jurisdictions no distinction is made as to the nature of the offending given rise to the conviction.

The application model is currently employed in Western Australia (WA). In WA, a distinction is made between 'serious' and 'lesser' convictions. A lesser conviction becomes spent following an application to the Commissioner of Police, and the issue of a certificate by the Commissioner that the conviction is spent. Serious convictions can become spent on application to the District Court after the required qualifying period has elapsed. The Court will consider a broad range of matters, including the circumstances of the offence and the offender's rehabilitation, before determining whether the particular conviction should become spent.

The merits of these two models will be discussed in further detail in the course of this submission.

Victoria and South Australia do not have spent conviction laws. However, Victoria does have the "Victorian Spent Conviction Scheme", which is a scheme based on police policy.

Issues Raised in Discussion Paper

Which offences could become spent?

Penalty Thresholds

Under the Model Bill, a conviction will be eligible to become spent if, in the case of an adult, a penalty of less than one year imprisonment was imposed or, in the case of a juvenile, a penalty of less than two years imprisonment was imposed.[1]

These penalty thresholds potentially make *more* convictions eligible to become spent under the Model Bill when compared to the regimes currently in operation in the ACT, the NT, Tasmania and NSW. In those jurisdictions a conviction will be eligible to become spent if the person was sentenced to imprisonment for less than 6 months, provided the offence to which the conviction relates is not a sexual offence, a corporate offence or an offence prescribed by regulation.[2]

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[1] See Model Bill ss3, 4.

[2] *Spent Convictions Act 2000* (ACT) s11; *Criminal Records (Spent Convictions) Act* (NT) s5; *Criminal Records Act 1991* (NSW) s7; In Tasmania only 'minor convictions' are eligible to be spent. 'Minor convictions' are defined as any conviction other than a

However, the penalty thresholds adopted in the Model Bill are lower than those currently in operation in Queensland and under the *Crimes Act 1914* (Cth). Currently, under subsection 85ZM(2) of the *Crimes Act 1914* (Cth) a conviction is eligible to be spent if the person was sentenced to less than 30 months imprisonment. This is also the position in Queensland.[3] This means that, if enacted, the Model Bill would have the effect of *restricting* the number of convictions eligible to become spent in those jurisdictions.

This raises the concern, which has been strongly voiced by the Queensland Law Society, that the Model Bill would have the effect decreasing the number of offenders able to access the spent conviction regime and would disadvantage certain persons who are currently eligible to have their conviction spent.

The restrictive impact of these penalty thresholds may also be exacerbated by the general trend across all Australian jurisdictions towards increasing rather than decreasing penalties for criminal offences.[4]

There appears to be no discernable reason for the adoption of the penalty thresholds in the Model Bill. No research or data has been put forward by the proponents of the Model Bill, for example, to suggest that the thresholds adopted reflect the type of offending for which rehabilitation is most likely, or that the thresholds currently operating in Queensland and the Commonwealth have proven to be problematic.

In the absence of such evidence, the Law Council would urge SCAG to reconsider the penalty thresholds adopted in the Model Bill in light of the restrictive impact they may have on the number of offenders able to access the spent conviction regime.

The Queensland Law Society has also submitted that if the ambit of the Queensland scheme is reduced by adopting the Model Bill, consideration ought to be given to a national scheme of judicially supervised application to declare convictions for offences attracting a higher penalty spent where, for instance, an application can demonstrate that they have been rehabilitated and the existence of the conviction is no longer warranted. A similar approach currently exists in Western Australia in respect of serious convictions.

Meaning of "Conviction"

Under the Model Bill, the term 'conviction' is defined to mean a conviction, whether summary or on indictment, for an offence and includes a formal finding of guilt made by a court, or a finding by a court that a charge has been proved.

This means that non-recorded convictions will be included in the scheme, and will only be eligible to become spent following the completion of the qualification period for the conviction, in accordance with section 8 of the Model Bill.

The definition of 'conviction' adopted in the Model Bill is similar in scope to that employed in the Commonwealth, the NT, Tasmania and the ACT. However, it departs from the definition of 'conviction' in place in Queensland, where the term is limited to a *recorded* conviction by or before any court.[5]

In NSW, although 'conviction' is defined in a manner similar in scope to that contained in the Model Bill, the *Criminal Records Act 1991* (NSW) provides a specific procedure for spending non-recorded convictions. Section 8 of the NSW Act provides

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conviction for which a sentence of imprisonment of more than 6 months is imposed; or a conviction for a sexual offence; or a prescribed conviction, see *Annulled Convictions Act 2003* (Tas) s3;

3 *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s3(2).

4 For further information on Australian Crime Statistics see Australian Institute of Criminology, *Australian Crime: Facts and Figures 2007* (December 2007) available at www.aic.gov.au.

5 See *Criminal Law Rehabilitation of Offenders) Act 1986* (Qld) s3.

(2) A finding that an offence has been proved, or that a person is guilty of an offence, without proceeding to a conviction is spent immediately after the finding is made.

(3) An order of the Children's Court dismissing a charge and administering a caution is spent immediately after the caution is administered.

(4) A finding that an offence has been proved, or that a person is guilty of an offence, and:

> *(a) the discharging of, or the making of an order releasing, the offender conditionally on entering into a good behaviour bond for a specified period, on participating in an intervention program or on other conditions determined by the court, or*
>
> *(b) the releasing of the offender on probation on such conditions as the court may determine, for such period of time as it thinks fit,*

is spent on satisfactory completion of the period or satisfactory compliance with the program (including any intervention plan arising out of the program) or conditions, as the case may require.

The effect of this provision is that a non-recorded conviction can become spent immediately, or upon the satisfaction completion of bond or period of probation.

In contrast, the Model Bill contains only one procedure for convictions being spent - the completion of the qualification period for the conviction - regardless of whether they are recorded or not.

The Law Council is concerned that the approach adopted in the Model Bill may result in dispositions of a court where it specifically wished to avoid recording a conviction being treated as a conviction and subject to lawful disclosure until they have become spent within the terms of the Model Bill.

This has the potential to undermine the rehabilitative motives for not recording a conviction in respect of an offence and could interfere with diversionary programs.

As submitted by the NSW Bar Association, in cases where an offence was found proved but no conviction recorded, the conviction should become spent immediately. The person should not be required to declare such offences and no records should be maintained with respect to such offences once any period of an associated bond has been complied with and expires.

In order to ensure that non-recorded convictions are not subject to the same requirements as recorded convictions, an additional procedure could be included in the Model Bill to allow for the immediate spending of non-recorded convictions, similar to that contained in section 8 of the *Criminal Records Act 1991* (NSW).

Alternatively, Law Council recommends that the definition of the term 'conviction' in the Model Bill be amended to ensure only recorded criminal convictions from a recognised court of law should come within the scope of the spent conviction regime.

What offences are ineligible to become spent?

Many jurisdictions currently distinguish between certain categories of offences when determining which convictions are eligible to become spent.

For example, in NSW, Tasmania, the NT and the ACT[6] convictions in respect of sexual offences can *never* be spent, regardless of the details of the offence, the gravity of the penalty imposed or the period of crime free behaviour. In contrast, in Queensland, no distinction is made in respect of sexual offences when determining what convictions are eligible to become spent.

6 *Spent Convictions Act 2000* (ACT) s11.

As noted above, in WA a distinction is made between 'serious' and 'lesser' convictions. Lesser convictions will be eligible to be spent on application to the Police Commissioner, if the penalty is for imprisonment for less than one year or a fine of less than $15,000.[7] In respect to serious convictions, where the prison sentence was for more than one year or a fine of $15,000 or more, a person may apply to the District Court to have the conviction declared spent after the required qualifying period has elapsed. The judge will decide whether to make a serious conviction spent by taking into account a range of factors including the length and kind of sentence imposed, the circumstances in which the offence was committed, the person's circumstances at the time of the offence and at the time of the application, and any public interest to be served by not making an order.[8]

Sexual Offences

While the Model Bill generally does not distinguish between types of criminal offences, it does make provision for sexual offences to be excluded from the spent conviction regime.

The Model Bill contemplates two alternative mechanisms for dealing with convictions in respect of sexual offences. One is to state that sexual offences can *never* be spent. The other adopts an approach similar to that adopted in WA in respect to serious convictions.

Section 9 of the Model Bill provides a separate procedure for dealing with 'prescribed eligible offences', namely eligible adult offences or eligible juvenile offences that are sexual offences and are defined as such by regulation.

Section 9 provides that a conviction for a prescribed eligible offence will be spent if, on application to the Court by the convicted person, the Court makes an order that the conviction will be spent. When exercising its discretion to make such an order, the Court is required to have regard to

- the nature, circumstances and seriousness of the offence;
- the length and kind of sentence imposed in respect of a conviction;
- the length of time since the conviction;
- all the circumstances of the applicant;
- whether the conviction prevents or may prevent the applicant from engaging in a particular profession, trade or business or in particular employment;
- whether there is any public interest to be served in not making an order.

The Discussion Paper seeks views on whether sexual offence should ever be permitted to become spent, and if so, whether the process of application outlined in section 9 should be adopted.

The Law Council submits that sexual offences should not be treated differently from any other category of offences and should become spent following the expiry of the prescribed qualifying period of good behaviour, as is the current practice in Queensland.[9]

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7 Certain minor offences are excluded from the WA Act, see *Spent Convictions Act 1988* (WA) s4.

8 *Spent Convictions Act 1988* (WA) s6.

9 This position has received the support of the Queensland Law Society, the NSW Bar Association and the Criminal Law Committee of the Law Society of NSW. In a previous submission the Law Institute of Victoria ('LIV') also supported a consistent approach being applied regardless of the nature of the offence, however it noted that legislation had already been passed in Victoria requiring the registration of certain persons convicted of sexual offences. It formed that view that if the government has legislated to deem these offences serious enough to require offenders to be registered and monitored for a period of time after their sentences then the public would expect that these offences could not, at the same time, become spent.

A central object of the spent conviction regime is to allow offenders convicted of minor offences, who have subsequently functioned in the community for a considerable period without committing another offence, the opportunity to engage in society without the stigma of a criminal conviction.

Given that no evidence was presented in the Discussion Paper to suggest that the rehabilitation period required for minor sexual offences is longer than that required for other minor offences, or that the approach adopted in Queensland has given rise to concern or criticism, the Law Council sees no reason why the spent conviction regime should not be applied consistently to all categories of offences.

In taking this position the Law Council acknowledges the public's particular concerns regarding sexual offenders and sexual predators, and the need to protect vulnerable members of the community from the risk of sexual crime. However, the Law Council is of the view that a high level of community protection is already provided by the combination of the following factors:

- Every spent conviction regime currently in operation is directed towards convictions for which relatively minor penalties have been imposed. Under the Model Bill, this is capped at penalties of less than one year imprisonment for adult offenders. This means that access to the spent conviction regime is only ever available to offenders whose crimes have been considered by the court to be of a nature warranting – at the most stringent - a penalty of only a short period of custody. Given the seriousness the community and the courts attach to sexual offences, it is likely that only very minor offences would attract a penalty of less that one year imprisonment. This could include offences for which the rehabilitation motive of the spent conviction regime is particularly relevant, such as young people who engage in consensual sexual relations with peers who happen to be just below the age of consent.

- The qualifying period that must expire before a conviction can be spent is considerable (ten years for adults and five for juveniles). This demonstrates to the community that the offender is able to function in the community without reoffending.

- Specific exclusions apply in respect of the provisions preventing disclosure of spent convictions for situations where offenders will be tasked with or responsible for providing care, instruction or supervision of vulnerable groups or individuals, including children and the mentally disabled. This means, for example, that if a person has a conviction for a sexual offence that has been spent, disclosure of that conviction will not be unlawful (and in fact can be required) if the person is seeking to engage in employment in child care centre or a school. The existing exclusions in this respect are already broad in scope, and can be added to by regulation.

In addition, the Law Council is of the view that the application process proposed in section 9 of the Model Bill runs counter to the rationale underpinning the spent convictions regime.

A central premise of the spent conviction regime is that following the expiry of a certain period, past convictions for minor matters will not be disclosed to anyone, or be required to be disclosed to anyone, unless a specific exclusion applies.

To set up a procedure whereby a person must apply to the court to have the conviction spent undermines this rationale by requiring the offender to initiate a process wherein the details of his or her past offending will again be the subject of judicial and potentially public scrutiny.[10]

As noted by the NSW Bar Association and the Queensland Law Society, the practical effect of a convicted person having to be rejudged by a different court over an old offence offends the principle of double jeopardy and is likely to result in very few genuinely rehabilitated people applying to have an old conviction declared to be 'spent' due to the stress involved, the risk of publicity and the expense.

[10] The Law Council notes that Schedule 1 of the Model Bill provides that section 9 hearings should be held in private unless otherwise ordered by the court.

If the Law Council's position in relation to section 9 is not adopted, the Council would prefer the inclusion of section 9 in the Model Bill rather than the alternative suggested in the Discussion Paper. The Law Council would strongly oppose an approach wherein a sexual offence can never be permitted to become spent.

Corporate Offences

As noted above, outside of the provisions relating to sexual offences, the Model Bill does not distinguish between different categories of offences. Eligibility for convictions becoming spent is determined solely on the basis of the penalty imposed.

In the NT, NSW and ACT convictions imposed against bodies corporate or a corporation are excluded from the spent conviction regime. This means that in those jurisdictions, convictions against corporate or bodies corporate can *never* become spent.

The rationale behind excluding offences against corporations is that they are not affected by the disclosure of convictions in the same way that individuals are. However, because corporations could still be affected negatively by past criminal convictions, the Law Council maintains the view that no distinction should be made between different categories of offences.

What period of good behaviour is required?

Under the Model Bill, the period of good behaviour required before a conviction for an eligible offence can be spent (known as the 'qualifying period') is ten consecutive years for convictions acquired when the person was an adult and five years for convictions acquired when the person was a juvenile, beginning from the day of the conviction.

This is consistent with the periods currently in force under the *Crimes Act 1914* (Cth) and in the NT, Tasmania, WA and the ACT. In Queensland, the qualifying period is ten years for indictable offences, and five years for summary offences. For persons convicted as juveniles, the qualifying period is five years regardless of the offence. In NSW the qualifying period is ten years for adults, and three years for juvenile offences.

The Law Council does not oppose the adoption of the ten year qualifying period in respect of adult offenders in the Model Bill as this is consistent with each of the regimes currently in operation around Australia.

However the Law Council queries whether a comparative analysis or any other relevant research has been undertaken in support of the adoption of the five year qualifying period in respect to juvenile offenders.

As pointed out by the NSW Law Society Criminal Law Committee, the qualifying period imposed by the Model Bill in respect of juveniles is considerably longer than that currently in operation in NSW (five compared to three years). The Law Council would be concerned if the longer qualifying period was adopted solely on the basis that it conforms with the period adopted in the majority of jurisdictions, without an assessment of whether this constitutes best practice.

For the Law Council, the rehabilitative motive behind the spent regime is particularly strong in respect of persons who have been convicted of a minor offence in their youth. If there has been no indication that the approach adopted in NSW has caused concern, the Law Council would urge that further consideration be given to including a shorter qualifying period for juveniles in the Model Bill.

The Law Council also notes that subsection 7(1) of the Model Bill provides that the juvenile qualifying period of five years will not apply where the person 'was dealt with as an adult'. This phrase is not defined in the Act and may give rise to significant ambiguity and confusion among offenders as to when a conviction is spent.

The Law Council is of the view that the meaning of this phrase, which has the potential to result in a doubling of the qualifying period required to be served before a conviction can be spent, should be clearly defined in the Model Bill.

What happens when the person is convicted during the qualifying period?

The Model Bill provides that if a person is convicted of an offence during the qualifying period for his or her past conviction, the qualifying period is broken and the first conviction cannot become spent.

As an exception to this general position, the Model Bill provides that the qualifying period will not be broken if

- the second offence is against the laws of another country;
- the second offence is a minor offence; or
- the second conviction is quashed; or
- the person is granted a pardon for the second offence.

A 'minor offence' is defined in the Model Bill as an offence that results in no penalty, or in a fine of no more than $500. It can also include an offence attracting a fine of more than $500, if such an offence is prescribed by the regulations for the purposes of this definition.

In most jurisdictions, the qualifying period required before a conviction can be spent will not be broken if the second conviction relates to a traffic offence.[11]

Various definitions of 'traffic offence' apply across jurisdictions and in some jurisdictions a second traffic offence conviction *will* break the qualifying period if the initial conviction related to a driving offence.

For example, in Tasmania, a conviction for a traffic offence and any resulting imprisonment is to be disregarded in the qualifying period. However, a subsequent traffic conviction will be relevant if the first conviction relates to certain traffic offences, such as causing death by dangerous driving, dangerous driving causing grievous bodily harm, driving under the influence and reckless driving.[12]

In Queensland, the qualifying period will not be broken if the person is convicted of a 'simple offence', unless the court is satisfied that, having regard to the public interest, previous convictions recorded against the person should be revived.[13]

In NSW, the crime free period for orders of the Children's Court will only be broken if the person has been subject to a control order, convicted of an offence punishable by imprisonment, has not been unlawfully at large or has not been in prison because of a conviction for an offence.[14]

The Law Council generally supports the approach taken in the Model Bill to exclude convictions for minor offences from interrupting the required qualifying period. This approach recognises that certain minor offending is unlikely to be a strong indicator that the offender's rehabilitation has ceased or been interrupted.

The Law Council also generally supports the use of the term 'minor offence' as this has the potential to capture minor offending beyond traffic offences, and offers greater flexibility than many of the existing regimes by including the power to add offences to the definition by regulation.

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[11] *Spent Convictions Act 2000* (ACT) s14(2); *Criminal Records (Spent Convictions) Act* (NT) s6(3); *Criminal Records Act 1991* (NSW) 11(2); *Annulled Convictions Act 2003* (Tas) s 7(2).

[12] See *Annulled Convictions Act 2003* (Tas) s7.

[13] See *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s11(2).

[14] See *Criminal Records Act 1991* (NSW) s10.

However, the Law Council is concerned by the low penalty threshold attached to the definition of 'minor offence', which excludes any offence that attracts a penalty of greater than a $500 fine. In this way, the Model Bill may have the effect of being more restrictive than many of the other regimes, given the fact that many traffic offences regularly attract penalties of greater than $500.

For example in Western Australia, driving under the influence of alcohol can attract *minimum* fines of $400 . Similar penalty provisions apply around Australia. In NSW, maximum fines can reach $2,200 for court convicted speeding charges, even for exceeding the speed limit by less than 15 km per hour.

The Law Council acknowledges that under the Model Bill it may be possible for each jurisdiction to add by way of regulation their existing definition of 'traffic offence' so that all of these offences will fall within the definition of 'minor offence'. However, in the interests of uniformity it may be beneficial to consider the range of penalties currently attributed to the traffic offences excluded from the qualifying period in State and Territory jurisdictions and use this range to determine a more inclusive definition of 'minor offence' in the Model Bill.

What about interstate offences?

Section 6 of the Model Bill provides that the Bill applies to convictions for offence against the laws of the originating State and convictions for offences against any other law. It further provides that in the case of convictions for offences against the laws of a recognised jurisdiction, the 'mutual recognition principles applies'.

The 'mutual recognition principle' is explained in subsection 3(4) of the Model Bill. It means that a conviction for an offence against a law of a recognised jurisdiction that is spent under the corresponding law of that jurisdiction will be taken to be spent for the purpose of the Model Bill. Similarly, a conviction that is not spent under the corresponding law of that jurisdiction will be taken not to be spent for the purpose of the Model Bill.

A 'corresponding law' is defined to mean a law of another State or of the Commonwealth that is declared by the regulations to be a corresponding law for the purposes of the Model Bill.

This means that, provided each jurisdiction adopts the Model Bill and proclaims the similar laws of other jurisdictions to be 'corresponding laws' for the purposes of the legislation, if a conviction has become spent in the State or Territory where it was incurred, it is treated as being spent in other Australian jurisdictions.

This approach is consistent with that currently in operation around Australia wherein interstate spent convictions are recognised as spent across State or Territory borders.[15]

The Law Council strongly supports this approach. It is a necessary component of a functioning uniform spent conviction regime, and essential to providing the certainty and clarity of spent convictions laws around Australia.

Overseas offences

Section 6 of the Model Bill proposes that, for the purposes of the spent conviction regime, an overseas offence should be treated in the same way as a local offence, provided the overseas offence corresponds to an existing Australian offence.

The Discussion Paper raises the question of how the Model Bill should deal with a conviction for an overseas offence that does not correspond to any offence known to law in Australia.

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[15] For example see *Criminal Records Act 1991* (NSW) s6(1); *Spent Convictions Act 1988* (WA) s8(1); *Annulled Convictions Act 2003* (Tas) s4(1).

The Law Council is of the view that persons convicted of an overseas offence, which may be eligible to become spent in the originating jurisdiction, should not be required to wait the qualifying period for their conviction to be spent in Australia, particularly given the significant restrictions this may place upon their ability to obtain gainful employment in Australia.

However, the Law Council also recognises that spending such convictions immediately might be problematic given the likelihood of discrepancies arising as to whether an overseas offence corresponds to an offence under Australian law.

For this reason, the Law Council supports a process whereby a person convicted of an offence overseas, which does not correspond to any known offence in Australia, can apply to an Australian Court to have their conviction spent.

The Law Council considers the case of overseas offences to be a justifiable exception to the general principle that the spent conviction scheme should operate without the need for applications to a court. Such a departure from this principle is necessary because some countries may criminalise behaviour that is allowed in Australia, for example criticising of the government, and such convictions should not be subject to a qualifying period before becoming spent. In other cases, overseas convictions may relate to offences which should be recognised in Australia, such as offences relating to torture, and which should properly be subject to the qualifying period. A court application process would enable the court to decide the issue on a case by case basis.

Exceptions - when should a spent conviction still be relevant?

The Model Bill provides a number of exceptions or exclusions to the provisions which prohibit disclosure of spent convictions.

These exclusions can be summarised as encompassing the following situations:

- investigation and prosecution of offences;
- national security;
- courts and tribunals;
- parole authorities;
- official records, archives and libraries; and
- special occupations, such as the care, supervision or instruction of children, aged persons, or persons with a disability, illness or impairment.

The Model Bill also permits other exclusions to be created by regulation.

These exclusions, including the power to add exclusions by regulation, are broadly similar to those included in the regimes currently operating around Australia.[16]

[16] For example, these exclusions appear to be broadly consistent with those listed in Part VII, Division 6 of the *Crimes Act 1914* (Cth), which include the ability to create further exclusions by regulation. In Queensland, the exceptions are focused on judicial and police activities, such as reports or commentary on judicial proceedings and the use of such information in police practice, see *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s7. In the ACT, exemptions include the appointment of a range of professions, including professions relating to the care, supervision or instruction of children, the elderly or the disabled. Exemptions also apply in respect of gambling and firearm licences, see *Spent Convictions Act 2000* (ACT) s19.Exclusions in the NT relate to the appointment of persons to certain professions, generally concerned with law enforcement, law enforcement activities, the suitability of a person becoming a juror, to or in relation to proceedings before a court, and certain licensing applications, see *Criminal Records (Spent Convictions) Act* (NT) s15. In NSW, the spent conviction provisions do not apply to appointments to legal offices (Judges, Magistrates, JPs), or for employment as police officers, prison officers, teachers, teacher's aides or providers of child care services. Legal proceedings are also exempt. In WA exclusions apply in respect of parole board proceedings, the appointment to certain professions such as the police or prison

Despite this consistency, the Law Council has a number of concerns with the potential breadth of the exclusion provisions in the Model Bill.

First, the Law Council is concerned that the Model Bill does not contain any provisions that limit the operation of the exclusion provisions to matters that are *relevant* to the particular category of exemption. This means that disclosure of a spent conviction will not be unlawful if it occurs in the context of a certain exempt situation, regardless of the relevance of the particular conviction to that situation. To use an example provided by the Queensland Law Society, under the Model Bill an individual applying for a position as a personal carer would be required to disclose a conviction for possession of marijuana obtained 15 years earlier, despite its likely irrelevance to the person's ability to undertake the position.

The Law Council submits that a spent conviction should only be required to be disclosed when a causal link can be established between the specific conviction and the exempt situation.

The requirement for a casual link to be established between the exemption and the conviction is partially recognised under the existing Commonwealth regime, wherein exclusions added by regulation are required to specify the body that is exempt, (for example a public authority), the purpose of the exemption (for example determining eligibility for employment), and the relevant offence (for example offences involving violence).

Secondly, the Law Council is concerned by the exemption to the unlawful disclosure provisions contained in subsection 14(11) of the Model Bill. This subsection provides that the unlawful disclosure provisions do not apply if a disclosure does not contain any information that would tend to be identify the convicted person. In particular, the Law Council is concerned that the term 'tend to be identify the convicted person' is not defined in the Model Bill.

Subsection 14(11) of the Model Bill provides that the offence provisions do not apply if a disclosure does not contain any information that would 'tend to identify a person'. Given that this provision has the potential to significantly extend the scope of the exemptions to the unlawful disclosure provision, the Law Council is of the view that it should either be removed or be clearly defined.

As noted by the Queensland Law Society, the disclosure of different information may have the effect of identifying the individual to different classes of society, for example information which may not identify an individual to the general public may nonetheless identify the individual to their friends, family or employer. Any definition attributed to the term 'tend to identify a person' should take into account the various circumstances in which a person could be identified, and not just be limited to information that identifies a person by name

Thirdly the Law Council is concerned by the broad power contained in the Model Bill to extend the categories of exclusions by regulation.

Like the Model Bill, all jurisdictions have a broad power to expand the exclusion provisions by way of regulation.[17] However, generally the use of this regulation power is subject to some limitation, such as the requirement that the regulations be necessary or convenient for carrying out the purpose of the Act.[18]

To date, the use of the regulations power to increase the range of exclusions has been relatively limited. Only three jurisdictions have introduced regulations providing further exclusions: 26 new exclusions have been created under Part VIIC of the *Crimes Act 1914* (Cth); six in NSW and one in the NT.

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officers, casino and security appointments and licences, appointments relating to the care, supervision or instruction of children. Similar exclusions apply in Tasmania.

[17] *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s13(1); *Criminal Records Act 1991* (NSW) s25, *Spent Convictions Act 1988* (WA) ss16, 33, *Annulled Convictions Act 2003* (Tas) s16, *Crimes Act 1914* (Cth) s85ZZH; *Spent Convictions Act 2000* (ACT) s23; *Criminal Records (Spent Convictions) Act* (NT) s19.

[18] See for example, section 25 of the *Criminal Records Act 1991* (NSW).

In most instances, the use of the regulations was closely related to existing grounds of exclusion and did not have the effect of greatly expanding the range of exclusions.[19]

At the Commonwealth level, the new exemptions that have been added by regulation include:[20]

- Commonwealth authorities for the purpose of assessing the suitability of a person to be engaged, in work that is likely to involve access to national security information classified as secret or top secret (all offences)

- the Defence Force for the purpose of assessing the suitability of a person for appointment to a position involving the care, instruction or supervision of minors; (sexual offences, or any violent offence where the victim was a minor)

- Prison administrations in New South Wales, Victoria, Queensland, South Australia, Tasmania, Western Australia and the Northern Territory for the purpose of assessing the suitability of a person to have responsibility for matters relating to law enforcement (offences involving violence).

While the majority of the exemptions added by regulation relate closely to the types of exemptions already listed in section 85ZZH of the *Crimes Act,* in some instances the exclusions added by regulation appear to broaden the scope of exemptions into areas or occupations not originally contemplated under the Act. For example, public libraries, university libraries, public archives offices and the Australian War Memorial are exempt from the unlawful disclosure provisions in respect of all offences for the purpose of making available material for research reference or study.[21]

Thus, although the power to expand the scope of the exclusion provisions appears to have been exercised relatively conservatively to date, there remains the risk that such a power could be used to considerably expand the scope of exclusions and thus undermine the objects of the Act.

For this reason, the Law Council recommends that further consideration be given to incorporating some form of limit or control in the Model Bill in respect to the power to add exclusions by regulation. This could take the form of one or a combination of the following mechanisms:

- Require all exemptions to specify a prescribed person or body, for a prescribed purpose, in relation to a conviction for a prescribed offence.

This would bring the Model Bill into line with the current approach adopted under the *Crimes Act 1914* (Cth). Such a requirement would ensure that all exclusions are drafted with a degree of specificity, and that there is a casual link between the exempt situation and the particular conviction disclosed.

- Clearly state in the Model Bill the objects of the Bill.

This would act to limit the power to add exclusions by regulation, by ensuring that new exemptions do not detract from the key rehabilitative purpose of the spent conviction regime.

- Provide independent oversight for the making of new exemptions by regulation.

Currently, under the Commonwealth scheme, the Privacy Commissioner is responsible for receiving and examining any requests for exclusion from the application of the spent convictions provisions and advising the Attorney-General whether exclusion should be granted.

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[19] For example, in NSW the regulations were used in 2004 to create the following new exclusions: applicants for employment in Office of DPP; applicants for employment with the Independent Commission Against Corruption (ICAC) or ICAC Inspector; applicants for employment with Police Integrity Commission; applicants for employment with New South Wales Crime Commission; applicants for appointment as Crown Prosecutors and applicants for admission as legal practitioners. See *Criminal Records Regulation 2004* (NSW), Regulations 5-11.

[20] A full listing of the exclusions added by regulation can be found at http://www.privacy.gov.au/publications/cscel.pdf.

[21] See Statutory Rule 1990 No 227 (Cth).

A similar role could be established for the Privacy Commissioner or another independent statutory body in respect of the Model Bill. The Queensland Law Society has submitted that, given Australia's international treaty obligations to prohibit discrimination on the grounds of past criminal history, the Australian Human Rights Commission could be an appropriate body to undertake this function. The Law Institute of Victoria ('LIV') has suggested that an existing national body such as Crim Trac could be tasked with managing and administering new exemptions. Such an oversight role may also act to promote national consistency and ensure that exclusions do not operate to detract from the purpose and objects of the spent conviction regime.

Consequences

Under the Model Bill, once a conviction is spent, the person cannot be required to disclose the conviction for any purpose other than those situations excluded by law. He or she is entitled to treat a question about any 'convictions' as referring only to convictions that are not spent.

Section 12 of the Model Bill makes it an offence for a person with access to records of convictions kept by or on behalf of a public authority to disclose information about a spent conviction. To be guilty of the offence the person must have known or ought reasonably to have known at the time of the disclosure that the information was about a spent conviction. The penalty for this offence is a fine of $10,000. It is a defence to this offence to prove that the disclosure was made with the consent of the person whose conviction is spent.

The Model Bill also makes it an offence for a person carrying on a business involving the provision of information about convictions to disclose a conviction that he or she knows, or ought reasonably to know at the time of disclosure, is spent.

The consequences of a conviction becoming spent vary across Australian jurisdictions.

In some jurisdictions it is an offence to disclose information about a spent conviction. For example in Queensland it is an offence to disclose a spent conviction, if the person knows the conviction has been spent.[22] The penalty for this offence is 100 penalty units, or a $7500 fine.[23]

In NSW is an offence for a person who has access to records of convictions, to disclose information relating to a spent conviction without lawful authority.[24] The maximum penalty for this offence is 100 penalty units ($5500) or 6 months in prison or both.[25] It is also an offence for a person to fraudulently or dishonestly obtain spent conviction information. Similar offences and penalties exist in the NT and the ACT.[26]

In Tasmania it is also an offence to *threaten* to disclose another person's annulled conviction.[27] The maximum penalty for this offence is 50 penalty units or a fine of $6000.[28]

In Western Australia there is no specific offence making it unlawful to disclose information regarding a spent conviction. However, Part 3 Division 3 of the *Spent Convictions Act 1988* (WA) makes it unlawful to discriminate against a person on the grounds of a spent conviction in respect to job applications and employment. Section 28 of the Act also makes it an offence to obtain, without lawful reason, information about a spent conviction, or the charge to which the conviction relates, from an official criminal record. The penalty for this offence is $1,000.

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[22] See *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld) s6. NB The Queensland Act provides that a prosecution for contravention of the act shall be upon the complaint of a person authorised in writing in that behalf by the Minister and no other person.

[23] *Penalties and Sentencing Act 1992* (Qld) s5.

[24] *Criminal Records Act 1991* (NSW) s13.

[25] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

[26] See *Spent Convictions Act 2000* (ACT) s17; *Criminal Records (Spent Convictions) Act* (NT) s12.

[27] *Annulled Convictions Act 2003* (Tas) s11(1).

[28] *Penalty Units And Other Penalties Act 1987* (Tas) s4.

At the Commonwealth level it is an offence to disclose a conviction that is spent without consent, provided the person knew or could reasonably have been expected to know that the conviction was spent.[29] The Commonwealth provisions also provide for a complaints mechanism enforced and administered by the Privacy Commissioner.[30] An individual may lodge a written complaint with the Privacy Commissioner about an act or practice of another person or of a Commonwealth authority or State authority that may be in a breach of Division 2 or 3 of Part VIIC of the *Crimes Act*. After investigating the complaint, the Privacy Commissioner may: dismiss the complaint, make declarations that the respondent should employ, re-employ or promote the complainant, and/or determine that the complainant is entitled to compensation for loss or damage or award costs. Enforcement of these orders can be made by application to the Federal Court either by the Privacy Commissioner or the complainant.

The Law Council supports the adoption of measures in the Model Bill to protect against and deter the unlawful use or disclosure of a spent conviction. The disclosure of a spent conviction has the potential to have a significant impact on an individual's life, including loss of licences, employment and an impact on the individual's rehabilitation. Accordingly, it is essential that the Model Bill provides an effective deterrent against unlawful disclosure of a spent conviction.

For this reason, the Law Council supports the inclusion of specific offences for unlawful disclosure or dealing with spent conviction information, such as those contained in sections 12, 13 and 15 of the Model Bill.

However, given the object of the spent conviction regime is to enable persons to move on from past convictions, the Law Council is of the view that further consideration ought to be given to additional mechanisms to protect against unlawful use or disclosure of information relating to spent convictions.

These mechanisms could include:

- Providing a custodial penalty in relation to the unlawful disclosure offence in section 12 of the Model Bill.

  Although the monetary penalty of $10,000 exceeds that prescribed for corresponding offences in most jurisdictions, a number of jurisdictions also make provision for short custodial penalties to be imposed. The Law Societies of Queensland and the Northern Territory have suggested that his may heighten the deterrent effect of the offence provision.

- Incorporating a complaint-based mechanism into the Model Bill, such as that currently in operation in the Commonwealth and administered by the Privacy Commissioner.

  A complaint-based approach would have the advantage of empowering the person whose spent conviction has been disclosed to initiate a complaint and/or remedial action, rather than having to rely on the matter being pursued by the Crown. Further, a complaint based mechanism could ensure a higher degree of confidentiality than a prosecution based process, protecting against further public disclosure of the spent conviction that has been alleged to have been unlawfully disclosed.

- Providing measures to prevent breaches of the legislation as a result of information published on the internet.

  There are now many websites that publish information about prosecutions, penalties imposed and details of offences. The publication of this information has a shelf life well beyond the proposed ten year qualification period and may result in a breach of the unlawful disclosure provisions if it remains in public circulation once the offence has become spent.

[29] See *Crimes Act 1914* (Cth) s85ZW.
[30] See *Crimes Act 1914* (Cth) s85ZZ.

In order to combat the risk of unlawful disclosure of spent convictions on the internet, the LIV has suggested a ban on publishing information about minor offences which could be spent after the qualifying period, or at least a ban on identifying the defendant so that the person's rights under the spent convictions regimes can be protected across the board.

Intersection with Anti-Discrimination Laws

When considering the range of mechanisms available to protect against unlawful disclosure of spent conviction information, further consideration ought to be given to strengthening the anti-discrimination protections currently available to protect against unlawful discrimination on the basis of a person's spent conviction or criminal record.

In some jurisdictions, the spent conviction legislation specifically prohibits discrimination on the grounds of a person's spent conviction. For example, Part 3 Division 3 of the *Spent Convictions Act 1988* (WA) makes it unlawful to discriminate against a person on the grounds of a spent conviction in respect to job applicants and employees. This extends to discrimination by commission agents, organisations of workers and employers, authorities that confer qualifications and employment agencies.

However, in most jurisdictions, the only protection from discrimination on the basis of a person's criminal record or his or her spent conviction is the limited protection provided under anti-discrimination laws.

Commonwealth Level

At the Commonwealth level, the *Human Rights and Equal Opportunity Act 1986* (Cth) (the HREOC Act) empowers the Australian Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission) with the power to conduct an inquiry into a complaint of discrimination on the grounds of criminal record, for which there is an exception for discrimination in respect to particular prescribed requirements of the job.[31]

However, although the Commission may find that certain conduct is discriminatory, if the complaint is unable to be conciliated, the Commission's actions are limited to preparing a report with recommendations to the Attorney-General, for tabling in federal Parliament. The Commission does not have the authority to implement its recommendations or make respondents to a complaint comply with them.[32]

The HREOC Act provisions operate to enable an employer to refuse to employ someone if their criminal record is genuinely relevant to the essential requirements of the job. However, if a person's criminal record doesn't impact on the inherent requirements of the job, and that person is the best candidate for the job in every other way, the laws protect a person from being denied equal opportunity because of their criminal record.

Under the HREOC Act there is no definition of what constitutes 'criminal record', but it has been interpreted broadly to include not only what actually exists on a police record, but also the circumstances of the conviction, charges which were not proven, investigations, findings of guilt without conviction and convictions which were later quashed or pardoned.[33] . It also includes imputed criminal record. For example, if a person is denied a job because the employer thinks that they have a criminal record, even if this is not the case, a person may make a complaint to the Commission.

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[31] The Commission's powers and functions in relation to discrimination in employment on the ground of criminal record are contained in Part II – Division 4 (sections 30, 31 and 32) of the HREOC Act and the *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth) reg 4. The Commission's jurisdiction to handle these complaints is underpinned by the International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* (ILO111), which Australia has ratified, and which is scheduled to the HREOC Act.

[32] See for example, *Mr Mark Hall v NSW Thoroughbred Racing Board*, HREOC Report No. 19 (Hall's Case) and *Ms Renai Christensen v Adelaide Casino Pty Ltd*, HREOC Report No. 20 (Christensen's Case), 2002.

[33] Hall's Case, p20.

The HREOC Act does not define what is meant by 'inherent requirements' of the job, however the Courts have found that an inherent requirement is something that is 'essential' to the position rather than incidental, peripheral or accidental[34] and should be determined by reference to the specific job to be done and the surrounding context of the position, including the nature of the business and the manner in which the business is conducted.[35]

Following a period of growing complaints to the Commission from people alleging discrimination in employment on the basis of criminal record, [36] HREOC produced guidelines to assist with information and guidance on spent conviction laws, privacy laws, industrial laws and police record policies.[37] The Guidelines include the following principles:

> *2. Employers should only ask job applicants and employees to disclose specific criminal record information if they have identified that certain criminal convictions or offences are relevant to the inherent requirements of the job.*
>
> ...
>
> *5. Criminal record checks should only be conducted with the written consent of the job applicant or current employee.*
>
> ...
>
> *7. The relevance of a job applicant's or employee's criminal record should be assessed on a case-by-case basis against the inherent requirements of the work he or she would be required to do and the circumstances in which it has to be carried out. A criminal record should not generally be an absolute bar to employment of a person.*
>
> *8. If an employer takes a criminal record into account in making an employment decision, in most cases the employer should give the job applicant or employee a chance to provide further information about their criminal record including, if they wish, details of the conviction or offence, the circumstances surrounding the offence, character references or other information, before determining the appropriate outcome in each case.*

Despite HREOCs efforts to prevent discrimination on the grounds of criminal record, the protections available at the Commonwealth level remain relatively weak.

For this reason, if specific provision is not made in the Model Bill to prohibit discrimination on the grounds of a person's spent conviction, the Law Council recommends that further consideration be given to strengthening the Australian Human Rights Commission's powers in relation to complaints its receives alleging discrimination on the grounds of a person's criminal record.

State Level

Among the States and Territories, only the ACT, Tasmania, the NT and WA have laws which prohibit discrimination on the grounds of criminal record or spent conviction.

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[34] See for example *X v The Commonwealth* [1999] HCA 63 (2 December 1999) (X's Case), *Qantas Airways v Christie* (1998) 193 CLR 280 (Christie's Case) or Hall's Case p32, 34.

[35] See X's Case ibid at 208, Also,. See also Christie's Case, ibid and Hall's Cas.Case, above n 30..

[36] As a result, in August 2004 the Human Rights Commissioner on behalf of the Commission commenced a research project to examine more closely the extent and nature of this discrimination, to clarify the rights and responsibilities of employers and employees, and to consider measures which may be taken to protect people from this form of discrimination. In December 2004 the Commissioner issued a Discussion Paper on Discrimination in Employment on the basis of Criminal Record, calling for submissions. These submissions, together with a series of consultations on the issue of criminal record discrimination, highlighted further the need for practical guidance for employers and employees in this area. The Guidelines are a result of this research and consultation process. The Guidelines are not legally binding.

[37] HREOC, Guidelines for the prevention of discrimination in employment on the basis of criminal record, November 2005 (minor revisions September 2007) available at http://www.hreoc.gov.au/HUMAN_RIGHTS/criminalrecord/on_the_record/index.html

Under subsection 7(1)(o) of the *Discrimination Act* (ACT) it is unlawful to discriminate against a person on the grounds of a spent conviction within the meaning of the *Spent Convictions Act 2000* (ACT).

Exceptions exist to this general principle. For example, discrimination is not unlawful in respect of positions involving the residential care of children or applications to adopt children.[38] In addition, it is not unlawful under the ACT Act to discriminate against a person on the ground of the profession, trade, occupation or calling of the person in relation to any transaction if profession, trade, occupation or calling is relevant to that transaction and the discrimination is reasonable in those circumstances.[39]

In the ACT, complaints of unlawful discrimination can be made to the Human Rights Commission. Upon receiving a complaint, the Commissioner will then decide whether to refer a complaint for investigation or consideration by a Conciliation Officer, or refer the matter for conciliation or may close the complaint.

If attempts to conciliate the complaint are unsuccessful, the matter can be brought before the Human Rights Tribunal. If the tribunal is satisfied that the respondent has engaged in unlawful conduct, the tribunal can order that the respondent not repeat or continue the unlawful conduct; that the respondent redress any loss or damage suffered by a person because of the unlawful conduct; or that the respondent provide compensation for any loss or damage suffered by the person because of the unlawful conduct.

Under the NT's *Anti-Discrimination Act 1992*, it is unlawful to discriminate against a person on the grounds of 'irrelevant criminal record', which is defined to include a spent conviction.[40]

A criminal record will be 'irrelevant' where the circumstances relating to the offence for which the person was found guilty are not directly relevant to the situation in which the discrimination arises. For example, a conviction for possession of cannabis might be irrelevant to employment as an accountant, while a conviction for fraud is likely to be relevant.

A general exemption to discriminate in respect of employment is contained in section 35 of the Act which provides that a person may discriminate against another person if the discrimination is based on a genuine occupational qualification which the applicant is required to fill. This is similar to the 'inherent requirements of the job' exemption under the Commonwealth anti-discrimination laws. Further exemptions to unlawful discrimination on the grounds of an 'irrelevant criminal record' exist where the employment sought principally involves the care, instruction or supervision of vulnerable persons, including children.[41]

The Tasmanian *Anti-Discrimination Act 1998* contains similar provisions to those in the NT. A person must not discriminate against another person on the basis of 'irrelevant criminal record' and there is a specific exemption for discrimination in relation to the education, training or care of children.[42]

In both the NT and Tasmania a variety of legal remedies are available if a finding of discrimination is made. The court can order an employer not to repeat or continue the prohibited conduct, to pay compensation or to take specific action, including re-employing a person.[43]

In the NT case of *Wall v Police*[44] the Anti-Discrimination Commission considered the way in the provisions of the Northern Territory anti-discrimination laws interact with the NT's spent conviction regime, in particular the prescribed exclusions to the provisions relating to unlawful disclosure.

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[38] See *Discrimination Act* (ACT) s25-25A.
[39] *Discrimination Act* (ACT) s57N.
[40] See *Anti-Discrimination Act 1992* (NT) s 4. It is also unlawful to ask another person to supply information on which unlawful discrimination could be based, see s26.
[41] *Anti-Discrimination Act 1998* (Tas) s37.
[42] *Anti-Discrimination Act 1998* (Tas) s50.
[43] *Anti-Discrimination Act 1992* (NT), section 88; *Anti-Discrimination Act 1998* (Tas), section 89.
[44] *Wall v Police* (14 March 2005), unreported, Anti-Discrimination Commission of the Northern Territory, hearing No 1 of 2005.

In *Wall*, the complainant alleged that his criminal record was a spent criminal record and therefore an 'irrelevant criminal record' within the meaning of the *Anti-Discrimination Act 2004* (NT) ('the ADA'). He claimed that the rejection of his application to become a police officer by the respondent was on account of his irrelevant criminal record, and that amounted to unlawful discrimination under the ADA. It was argued that while the respondent was exempt from the unlawful disclosure provisions of the *Criminal Records (Spent Convictions) Act 2004* (NT) ('the SCA'), that exemption did not make lawful discrimination which is otherwise prohibited under the ADA.

The respondent denied that discrimination had taken place and submitted that the complainant's criminal record was not an irrelevant criminal record under the ADA. In the alternative the respondent argued that if the complainant was discriminated against, such discrimination was exempted under the ADA because it was based on a genuine occupational qualification.

The Commission reviewed the relevant provisions. It noted that section 15 of the SCA excludes the provisions relating to unlawful disclosure of spent convictions in respect of applications for appointment to or employment as a member of the police force. This means that the respondent was entitled to view the complainant's spent conviction, or have this information disclosed to it.

However, the Commission agreed with the complainant's submission that this was as far as the exemption went. It rejected the argument advanced by the respondent that the exclusion provisions in SCA operate to make the full criminal record, including all spent convictions, of an applicant to the police force 'relevant' for the purposes of the ADA.

The Commission concluded that while it was clear that Parliament intended spent records and convictions to be taken into account in the case of sensitive occupations, this did not extend to an intention to allow prospective employers to discriminate by refusing an application for employment.

In respect to the respondent's alternative argument, the Commission found that the respondent did not sufficiently identify the particular occupational qualifications of the job that the spent conviction would be relevant to and thus failed to meet the requirements of the exemption.

This decision demonstrates that the disclosure exemption provisions in the spent conviction laws will not operate to authorise discrimination on the basis of a person's spent conviction, provided the anti-discrimination laws in the particular jurisdiction are robust enough to outlaw discrimination on these grounds.

The Law Council urges the other States and Territories to adopt specific provisions within their anti-discrimination laws to make it unlawful to discriminate against a person on the basis of his or her criminal record, or at the very least, on the basis of his or her spent conviction. Although the exemptions applicable to such discrimination are likely to be broad, outlawing discrimination on this ground would provide an additional layer of protection to that currently offered by the Model Bill. It would also ensure that the disclosure exemption provisions with the spent conviction laws cannot be used to facilitate or justify unlawful discrimination.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.