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Attention Paul Schmertmann

Via email criminal.law@ag.gov.au

Dear Sir

I refer to an invitation by the Hon Brendan O'Connor MP dated 29 June 2011 to provide my views on the operation of Subdivision A Division 6 of Part VIIC of the *Crimes Act 1914* (Cth). Subdivision A is a newly made amendment (which is currently under review), allowing information about pardoned, quashed and spent Commonwealth convictions to be disclosed for the purposes of Working with Children Check.

Thank you for inviting me to comment on the privacy aspects of the new criminal history information sharing scheme.

I recognise that the appropriate assessment of criminal history information for people seeking to work with children is an important public interest objective aimed at protecting children from sexual, physical and emotional harm.

I broadly agree with the views expressed by the Office of the Privacy Commissioner in its submission to the Senate Legal and Constitutional Affairs Committee in September 2009, when the amendment was originally debated, to the effect that, on the face of it, the information about all previous quashed, pardoned or spent convictions may not be directly relevant in assessing a person's suitability to work with children. If such information is considered necessary it should be made available to a limited number of prescribed persons or bodies. Such persons or bodies should be subject to applicable privacy legislation and should be equipped with clear and consistent guidelines so as to assist them in making the assessment in such a way that children are protected and, at the same time, prospective and current workers are not being prejudiced in the process.

By way of a brief illustration, in NSW Working with Children Checks (WWCC) are conducted under the *Commission for Children and Young People Act 1998* (NSW)

(CCYP Act) by either the Commission or by an approved screening agency. Under section 35 of the CCYP Act the Minister must publish guidelines relating to the procedures and standards for background checking. The Guidelines define criminal records relevant to the WWCC as being, broadly, any sexual offence and offences related to children. They charge approved screening agencies with estimating risks to children that arise from the records and with communicating their findings to the prospective employers without providing further details about the individuals' criminal records. The Guidelines further emphasise privacy obligations of all approved screening agencies, the majority of which are NSW public sector agencies subject to NSW privacy legislation, and provide that a non-government screening agency should also follow the privacy legislation when dealing with records and information relating to WWCC.

I note from section 7A of the *Crimes Regulation 1990* under the Crimes Act that prescribed persons or bodies for the purposes of section 85ZZGB, 85ZZGC or 85ZZGD are prescribed under a State or Territory law and all approved agencies under the CCYP Act are so prescribed. It follows that NSW approved screening agencies/prescribed bodies are following the Guidelines as discussed above when dealing with Commonwealth (or Territory) offences disclosed as allowed by the amendments, for the purposes of the WWCC.

I consider the operation of guidelines similar to the ones discussed above to be essential for the proper administration of the amendments under review. I am hopeful that other jurisdictions would have similar guidelines in order to conduct WWCC, including in respect of information regarding Commonwealth offences, etc, however, I am not aware whether this is the case.

The Inquiry into Spent Convictions for Juvenile Offenders conducted by the NSW Legislative Council Standing Committee on Law and Justice in 2010 may be of some relevance to the current review. The Inquiry recommended including juvenile sexual offences in the spent conviction scheme where the sentence imposed is less than 24 months, and the offender completes a good behaviour period of three years. In making the recommendations the Inquiry discussed instances where, for example, consensual sexual activity of minors or a minor juvenile sexual offence would prohibit a person from working with children and/or, by implication, place a person in a high-risk category under WWCC. This may preclude, for example, a grandparent who had a criminal record of a minor nature as a juvenile and led otherwise a crime free life, from volunteering at school events involving their grandchildren.

My Office receives a large number of inquiries in relation to the operation of the spent convictions scheme generally, some of which are in the nature of a complaint. Some of the inquiries relate to the individual's dissatisfaction with the fact that their conviction, otherwise capable of being spent, will be disclosed to assess their

suitability when working with children. I have not received, however, any formal complaints relating directly to the operation of the amendments currently under review.

I am not in a position to provide the information you are asking of State and Territory screening agencies, however, I am grateful you are raising privacy related issues with them and I am looking forward to your report when it is tabled in federal Parliament.

I once again thank you for seeking my view on the issue and hope my comments have been useful for the purposes of your review.

Yours sincerely

John McAteer
Acting Privacy Commissioner
Information and Privacy Commission