Model Spent Convictions Bill - Draft consultation paper

Background

The Standing Committee of Attorneys-General is working on a project to design a national model Bill for a spent-convictions scheme. A spent-convictions scheme provides for certain criminal convictions to be disregarded, for most purposes, after a sufficient period of good behaviour.

All Australian jurisdictions except Victoria and South Australia already have such schemes, and New Zealand has one, but the legislation varies from one jurisdiction to the next. As yet, no jurisdiction has given a commitment to adopt the model Bill. Ministers will consider that question in light of comment received on this paper.

The existing laws are:

Australian Capital Territory	*Spent Convictions Act 2000*
Commonwealth	*Crimes Act 1914 Part VIIC*
New South Wales	*Criminal Records Act 1991*
Northern Territory	*Criminal Records (Spent Convictions) Act*
Queensland	*Criminal Law (Rehabilitation of Offenders) Act 1986*
Tasmania	*Annulled Convictions Act 2003*
Western Australia	*Spent Convictions Act 1988*
New Zealand	*Criminal Records (Clean Slate) Act 2004*

Questions that typically arise when designing such schemes include:

- what types of convictions should be allowed to become spent?
- how long should the required period of good behaviour be?
- in what circumstances should a conviction that has otherwise become spent be able to be considered?
- what should be the consequence if a conviction that has become spent is disclosed without the person's consent?

This paper invites comment on a draft Bill that could form the national model for a spent convictions scheme. Key features of the draft Bill are explained below. You should not assume that the Bill will necessarily pass into law in this form in any Australian jurisdiction. Final decisions about what the Bill should say and about its adoption as the national model will be taken only after the consultation process is complete.

The Bill has been drafted as if it were a South Australian Bill (for example, 'court' refers to the District Court of South Australia) but each jurisdiction enacting the model would substitute the applicable local references.

To assist in providing comment on the proposals this paper also includes a brief comparison of the model Bill with the current Tasmanian *Annulled Convictions Act 2003*.

Copies of this paper and the draft Model Bill can be found on the Department of Justice website www.justice.tas.gov.au.

Summary of the Bill

Which offences could become spent?

Some offences are too serious to become spent. Under this draft Bill, whether an offence would become spent would depend on the **sentence** imposed in the particular case. The Bill proposes that it would not be possible to spend a conviction in a case where the person, if tried as an adult, was sentenced to more than 12 months' jail or, if tried as a juvenile, was sentenced to more than 24 months' detention.

In the case of an adult offender, if the sentence did not include imprisonment, or if it included imprisonment for no more than 12 months, then the offence would be eligible to become spent. In the case of a juvenile offender (unless dealt with as an adult), this could become spent if the juvenile was not sentenced to detention or imprisonment, or if he or she was, then if the term of the detention or imprisonment was no more than 24 months.

No distinction is made in the Bill based on the category of offence. It does not matter whether it is one of violence, dishonesty, contempt or in some other category. What matters is how seriously the court viewed this particular offence in its circumstances, as demonstrated by the sentence imposed. Thus, for example, the offence of causing death by dangerous driving could become spent in less grievous cases and not spent in others, depending on the penalty imposed by the court.

It follows that, under this Bill, the great majority of all convictions, perhaps around 80% to 90%, could become spent, if the offender is not convicted of further offending during the qualifying period.

Tasmania does not currently draw any distinction between the types of offences but uses the length of imprisonment as the measure of severity.

For Tasmania this would mean two significant changes to the current legislation – increasing the threshold for "spending" or in Tasmania's case "annulling" convictions from the current 6 months imprisonment to 12 months for adults and drawing a difference between the treatment of adult offences and those of juveniles if the two year imprisonment threshold is used for juveniles.

It is noted that when the Tasmanian *Annulled Convictions Bill* was debated there was discussion on the possibility of using 12 months rather than 6 months as the threshold. The above statistics are generally correct for Tasmania with only around 15% of adult offenders receiving sentences of over 12 months. Only three or four percent of juveniles receive sentences in excess of two years.

What about sexual offences?

The public is especially concerned about sex offenders. One view is that these offences should never be permitted to become spent, no matter how long the subsequent period of good behaviour and no matter what the details of the offence. That is currently the law in New South Wales, Tasmania, the Northern Territory and the A.C.T.

On the other hand, in Queensland, sex offences are not treated any differently from other offences and they become spent in the same way once the qualifying period of good behaviour has been completed.

An intermediate position is that taken in Western Australia, where a sex offence cannot become spent by elapse of time but will only become spent if a court so orders. A court, in sentencing, can fix a qualifying period for the offence to become spent, or the offender can later apply for an order. The matter is left to the court's discretion. The court must consider such matters as whether the person is likely to re-offend and whether the person was previously of good character.

The consultation draft Bill has been written to accommodate either result. If one combination of clauses is chosen, the model would provide that a sex offence could never in any circumstances become spent. If the alternative combination of clauses is chosen, the model would permit sex offences to become spent in limited circumstances. The latter version would mean that, after the elapse of the qualifying period of good behaviour, the offender would be eligible to apply for a court order for the conviction to become spent. The application would need to be notified to the Attorney-General and the Commissioner of Police, in case they wish to make submissions to the court. On the application, the court is directed to weigh up matters such as how serious the offence was, how long ago the person was convicted and whether the person appears to have rehabilitated. Clause 9 of the Bill sets out the matters to be considered. If the court says no, then the person cannot reapply for another two years.

Your views are invited on whether sex offences should ever be permitted to become spent and, if so, whether the process of application to a court is the right one.

Tasmania includes most sexual offences in the Act as offences which, regardless of the level of penalty imposed, cannot be spent or annulled. The Tasmanian Act does not currently provide for any spending or annulment of such convictions by the Courts.

What period of good behaviour is required?

The conviction of an adult, or of a juvenile who is tried as an adult, could become spent after **ten years** during which the person is not convicted of any further offences. The conviction of a juvenile who is dealt with as a juvenile would become spent after **five years** during which he or she incurs no further convictions. The reasoning is that if the person has not been further convicted during this period, it is likely that he or she has been rehabilitated and that the conviction is no longer relevant as a guide to that person's general character.

If the person is further convicted during the qualifying period, then the Bill proposes that the first conviction cannot become spent until the qualifying period for the second conviction is completed. That is, the second conviction has the effect of extending the qualifying time by a further ten or five years. Once a qualifying period is completed and the conviction becomes spent, however, if the person is later convicted of another offence, the first conviction does not revive.

Tasmania currently uses qualifying periods of ten years for adults and five years for juveniles.

The exception is where the later conviction is for an offence that occurred during the qualifying period. In that case, even though the qualifying period had ended, it is revived and does not expire until the qualifying period for the later conviction expires. This is because the later conviction

demonstrates that the person had not, in fact, been of good behaviour during the qualifying period and thus that the first conviction should never have become spent.

Tasmania also has a similar provision providing that a second relevant offence (see below re minor offences) during the qualifying period will delay the spending of the initial conviction.

What about a minor offence?

It is proposed that the qualifying period should not be broken if the person commits a further offence that results in no penalty, or in a fine of no more than $500. For example, a conviction for a minor littering or parking offence would not affect the qualifying period for an earlier conviction.

Tasmania provides that offences that are punished only by fines do not affect the period of "good behaviour". This proposal provides that fines over $500 will also delay the qualifying period.

What about interstate offences?

The Bill proposes that if a conviction has become spent in the state or territory where it was incurred, it is treated as spent in other Australian jurisdictions. This is to be done by each jurisdiction proclaiming the similar laws of other jurisdictions to be 'corresponding laws' for the purposes of this legislation. Otherwise, a person would find that an offence that was not disclosable in applications for employment in one state would be disclosable in others.

Tasmania's laws already provide that convictions can be spent regardless of where they occur.

Does that mean that a person can apply in one jurisdiction to spend a sex offence conviction that was incurred in another?

No. An application to the court for an order that a sex offence conviction is spent can only be made in the jurisdiction where the conviction was incurred.

Tasmania does not currently have a process for courts to order the spending/annulment of any convictions.

Overseas offences

The draft Bill proposes that an overseas offence should be treated in the same way as a local offence, that is, if it is eligible to become spent, then it would become spent at the time it would have become spent if the conviction had occurred here. The question has been raised of an overseas offence that does not correspond to any offence known to local law, for example, it might be an offence in some countries to express criticism of the government. It can be argued that a person should not have to wait the qualifying period for these offences to become spent. One possibility is that these convictions should become spent immediately, but this creates a difficulty in that it will not always be clear whether an overseas offence corresponds to an offence in Australian law. Another possibility is that these convictions could become spent on application to a court. A third is that they should be treated no differently from other offences. Comment is invited on what would be a fair way of dealing with them.

Tasmania's laws already provide that convictions can be spent regardless of where they occur.

Exceptions - when should a spent conviction still be relevant?

The Bill proposes that even if a conviction has become spent, there will still be some situations in which its disclosure is relevant. That is, there will be cases where the individual's interest in putting the offence behind him or her is outweighed by the public interest in community safety. These are the exclusions set out in clause 14. Broadly speaking, they are:

- investigation and prosecution of offences - it is considered that a person's full record should be available for use in criminal investigation processes, for the protection of the public
- national security - it is proposed that Commonwealth agencies that handle secret information should be able to require full disclosure of the records of persons who are to be entrusted with that information
- courts and tribunals - a spent conviction may sometimes be relevant in a court case. It is proposed that the court should be able to receive evidence about a spent conviction but should take appropriate steps to prevent publication of that evidence.
- parole authorities - a spent conviction is relevant in making decisions about whether to release an offender on parole
- special occupations - although the Bill seeks to prevent the consideration of spent convictions in selecting staff for most jobs, there are some jobs where extra protection of the public is justified and the spent conviction should be disclosed. That includes where the person seeks to become a judge, magistrate, justice of the peace, lawyer, doctor or other health professional, teacher, social worker, child-care worker, aged-care worker or personal carer. It also extends to jobs for which the law applies a character test, for example, licensed occupations such as being a security guard or operating a supported residential facility.

It is also acknowledged that one cannot change history. In some cases, contemporaneous public records will have been made about the conviction. For example, road deaths are often reported in the media and so are the trials of the drivers charged with causing those deaths. These reports may be stored in libraries or archives and it will not be an offence for those libraries or archives to retain those records and make them available to the public in the ordinary way.

Occasionally, a criminal case will also attract academic attention and be reported in law reports or learned journals or discussed in the teaching programmes of law schools. Again, the draft Bill does not attempt to restrict that activity.

The draft Bill also permits other exceptions to be created by regulation. For example, it is planned that there would be regulations that replicate the current Commonwealth exceptions relating to persons needing clearance to work in certain aviation or maritime jobs.

Tasmania has a range of categories of employment or profession or licences where access to the full criminal history needs to be available – police and prison officers, child care workers, firearm licence holders but the current Tasmanian list does not cover all of the ones in the Model.

Consequences

The Bill proposes that, once a conviction is spent, the person should not have to disclose it for most purposes. He or she can treat a question about any 'convictions' as referring only to convictions that are not spent. For many practical purposes, therefore, the conviction no longer exists.

Accordingly, the Bill proposes that it should generally be unlawful for a person who has access to official records of conviction and who knows, or should know, that a conviction is spent, to disclose information about it. Some jurisdictions may choose to deal with this by prosecuting the person who made the disclosure. Others might treat it as a privacy or equal-opportunity complaint or, where the disclosure is made by a government employee, a complaint to the Ombudsman.

The Tasmanian legislation currently allows a person to decline to reveal their conviction if it has been spent and makes it an offence to reveal information about a person's spent convictions. Tasmania also makes it unlawful to discriminate against a person on the basis of annulled convictions.

The Bill also proposes to make it an offence if a business that trades in criminal-record information discloses a conviction that it knows, or should know, is spent.

This would be a new offence in Tasmania

Further, anyone who fraudulently or dishonestly obtains information about a spent conviction from public records (such as by forging the person's signature on a request for a police clearance) commits an offence.

This is already an offence in Tasmania.

If a conviction is spent, how does that affect the rights of victims?

The right of victims are not affected. Subject to legal time limits on their claims, victims are still entitled to pursue claims for compensation even though the conviction has become spent. It is still possible to prove the fact of the conviction in the compensation proceedings, where that is a pre-requisite to compensation. One of the exceptions to the disclosure of spent convictions is in court proceedings and decision-making.

Likewise, court processes to enforce a penalty, disqualifications that go along with the penalty (such as a disqualification from driving) and the accumulation of demerit points for traffic offences, are not affected.

Invitation to comment

Comment on any aspect of the draft Bill is invited no later than 6p.m. EST Friday 23 January 2009 and can be sent to:

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Or

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