

Privacy and Confidentiality

A/Prof Moira Paterson

Privacy and Confidentiality

- Privacy legislation
 - Privacy Act 1988 (Cth)
 - Information Privacy Act 2000 (vic)
- Spent convictions
- Common law
- Law reform proposals

Privacy Act

- Private sector organisations are bound by National Privacy Principles (replaced by Australian Privacy Principles to commence 2014)
- Do not apply to employee records or to small business operators
- Criminal records cannot be collected without consent
- Collection of personal information triggers operation of other principles (security, non-disclosure, deletion etc)

Spent convictions laws

- Victoria does not have a law; only an administrative regime that affects police disclosures
- Spent convictions laws apply to older (>10 years or >5 years for juveniles) and less serious convictions
- Legal regimes allow individuals not to disclose spent convictions and forbid taking them into account in decision-making

Common law

- Depending on the circumstances disclosure of criminal records information may create an actionable breach of confidence.
- The law does not yet recognise a right to sue for breach of privacy but is moving in that direction.
 - *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199,
 - *Giller v Procopets* [2008] VSCA 236

Law reform proposals

- ALRC recommendations for removal of employee records and small business exemptions from Privacy Act
- Proposal for a uniform Australia-wide spent convictions regime
 - SCAG discussion paper, *Uniform Spent Convictions - A Proposed Model*
- Proposal by ALRC and others for a statutory cause of action for privacy invasion.
 - Issues Paper, *A Commonwealth Statutory Cause of Action for Invasion of Privacy* (2011)

Conclusion

Possible risks can generally be minimised by –

- conducting criminal records checks only where appropriate and minimising the retention of any information collected once employment decision-making has been completed
- complying with the best practice as outlined by the Australian Human Rights Commission