Date Introduced: 10 May 1989
House: House of Representatives
Presented by: Hon. Lionel Bowen, M.P., Attorney-General

Digest of Bill

Purpose

The Bill will clarify the effects, at Commonwealth and Territory laws, of pardons; create a number of specific offences relating to computerised data held by, or on behalf of, the Commonwealth; establish a system of spent convictions which will, after the appropriate period has expired, allow a person to deny the offence and to stop members of the public using such information; and bring the proceeds of crimes provisions of the Customs Act 1901 into line with those in the main Act dealing with that matter.

Background

The subject of computer-related crime has attracted much interest in recent times. In general, misuse of computers may involve use of a computer to effect fraud; unauthorised access to, and use of computer time or services; copying of information; erasure or falsification of data or programs; and denial of access to authorised users. Computer-related crime is not fundamentally different from other sorts of criminal activity. Rather, the computer is only a new device for committing established crimes. The documented incidence of computer crime is not high. However, this may mean only that statistics are incomplete, that there is a low rate of detection, or possibly that corporations which have been the subject of computer-related crime have been reluctant to disclose it.

The use of a computer to effect fraud is similar to traditional crimes; only the means of doing the crime is different. Thus, in Kennison v. Daire (1986) 64 A.L.R. 17, the High Court held that a person who obtained a payment from an off-line Automatic Teller Machine after they had closed their account with the bank was correctly convicted of stealing. Computer hacking involves the unauthorised use of computer time or services. Criminal law is unclear as to whether hacking is criminal activity. Generally, hacking involves a trespass and, or a breach of privacy. In Australian law, if a person views or copies information which is stored on another’s computer, no theft has been committed. This is because information is not property which can be the subject of a theft. Only in the limited circumstances specified in section 78 of the Crimes Act 1914 (the Principal Act) is it criminal to obtain or record information, and
that provision relates to espionage and official secrets. The erasure or falsification of data or programs is an area where the existing law is readily applicable. Section 29 of the Principal Act provides that any person who destroys or damages any property, whether real or personal, belonging to the Commonwealth will be guilty of an offence. In addition, by section 63 of the Principal Act, falsification of data is likely to amount to forgery. An incident involving the denial of access to authorised users occurred at the Australian Bureau of Statistics. A former employee of the Bureau wrote a programme which emptied the Bureau's computer system of information stored on master tapes in Canberra. This was done from Perth. The employee was charged with wilfully obstructing a Commonwealth officer under section 76 of the Principal Act. The employee pleaded guilty, and was fined $200.2

In February 1987, the Attorney-General established a committee to review Commonwealth criminal law. Their Interim Report - Computer Crime was tabled in November 1988. The recommendations of the Review Committee included: that offences should be created for obtaining, without authority, access to data in a Commonwealth computer or data stored in a computer on behalf of the Commonwealth; destroying, erasing or altering data stored in a Commonwealth computer; and obtaining access by means of Telecom or another communications system to a Commonwealth computer. However, the Review Committee recommended that no offence of using a Commonwealth computer without authority or of omitting to record or store data be created.

The issue of 'spent convictions' (old convictions) has been the subject of a report by the Australian Law Reform Commission (the Commission). The report of the Commission was concerned with problems faced by former offenders arising out of their criminal records. The Commission's general conclusions were that difficulties could be reduced by minimising the negative consequences that attach to spent convictions through requiring laws which impose a disability on a person with a conviction to be read as excluding any reference to that conviction; making it unlawful to discriminate unreasonably against a person because of their criminal record; and establish controls on the collection, storage and dissemination of criminal record information by the police and other record keepers. The Commission proposed specific exemptions for the Australian Federal Police and Commonwealth agencies when exercising powers in relation to national security and criminal intelligence, and that the courts should be authorised expressly to continue to use spent convictions in sentencing.3

**Main Provisions**

Clause 6 will amend section 4B of the *Crimes Act 1914* to insert a formula for calculating the maximum fine where an offence also carries a term of imprisonment. The maximum fine will be calculated by dividing the maximum term of imprisonment for the offence by six and multiplying that amount by $3000. Where the maximum penalty is life imprisonment, the maximum fine will be $200 000 unless a contrary intention appears.
Clause 9 will insert a new Part VIA into this Act. The proposed part deals with offences relating to computers. Proposed section 76B will make it an offence for an unauthorised person to intentionally gain access to data stored in a Commonwealth computer or data stored on behalf of the Commonwealth. The maximum penalty will be imprisonment for six months. As well, there will be additional offences of obtaining data with the intent to defraud, or to access data that the person ought reasonably to know relates to the matters listed in the proposed section, including national security, law enforcement and personal details. The maximum penalty for a breach of the latter types of offences will be two years imprisonment.

It will be an offence, with a maximum penalty of 10 years imprisonment, to intentionally damage data held by, or on behalf of the Commonwealth (proposed section 76C).

Proposed section 76D will make it an offence to use Commonwealth facilities to access data without authority. There will also be additional offences relating to security material in the same manner as proposed section 76B. The penalties will be the same as in that proposed section (proposed section 76D).

Proposed section 76E will make it an offence, with a maximum penalty of 10 years imprisonment, to use a facility, other than a Commonwealth facility, to damage Commonwealth data.

Proposed part VIIIC, which deals with pardons and quashed convictions, will be inserted into this Act by clause 10. Proposed section 85ZR deals with pardons for people wrongly convicted. Under Commonwealth and Territory law, where a person has been granted a pardon on the grounds that they were wrongly convicted, the person is to be taken not to have committed that offence. A similar effect will occur in respect of Commonwealth and Territory law where the person is pardoned under a State or foreign law and the effect of the pardon in that jurisdiction is that the offence be taken not to have been committed. If the above applies, a person who knows of the pardon is not to disclose that the person was charged with that offence (proposed section 85ZS).

Similarly, where a conviction is quashed or set aside, the person convicted is not to be required to disclose that they have been charged with, or convicted of the offence (proposed section 85ZT). Similarly, people are not to disclose that the person was so charged or convicted (proposed section 85ZU).

Proposed Division 3 deals with spent convictions. (A conviction will be taken to be spent if the person is pardoned other than on the grounds of wrongful conviction or if the person was sentenced to 30 months imprisonment or less and the waiting period has expired – i.e. five years for offences committed by minors and 10 years for others – proposed section 85ZM.) If an offence is spent, then under Commonwealth and Territory law the person will not be required to disclose that they have been charged with or convicted of the offence. If the conviction was under State or foreign law, the person will not be required to inform any Commonwealth authority (proposed section 85ZW). In such circumstances, the person may deny that they were charged with, or convicted of, the offence and people are not to disclose the fact that they were so charged and convicted (proposed section 85ZW).

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If the person is convicted of another offence before the waiting period has expired by a court exercising federal or Territory jurisdiction, the court may order that Division 3 does not apply or that the person cannot take advantage of that proposed Division until the waiting period for the subsequent offence has expired. This will apply where the person is convicted summarily. Where it is an indictable offence, the same procedure must be adopted (proposed section 85ZX). Similarly, the same sanctions must be applied where the person is convicted of an offence against a State or foreign law (proposed section 85ZY).

The Privacy Commissioner will be able to investigate complaints of breaches of proposed Divisions 2 and 3 (Proposed section 85ZZ). The Commissioner will be able to investigate complaints and to make a number of recommendations, including that the person be re-employed or be paid compensation (proposed section 85ZZD). The Commissioner or the complainant may apply to the Federal Court for an order to enforce a determination made by the Commissioner (proposed section 85ZZF).

Proposed Division 6 lists a number of exceptions to proposed Division 3. They include decisions relating to sentencing; to a law enforcement agency if determining whether to prosecute an employee or former employee; to bodies that employ people to supervise minors; or to Commonwealth agencies when determining whether to employ someone for a designated position. Further, law enforcement agencies may communicate such information with other such bodies or use such information for the investigation or prevention of crime. Such bodies may also record the information (proposed section 85ZZJ). The information may also be used for a fair and accurate report of the circumstances surrounding the granting of a pardon (proposed section 85ZZK).

Part 5 of the Bill will amend the Customs Act 1901 as it relates to the making of orders relating to the proceeds of crime. The amendments will largely bring the provisions into line with those under the Proceeds of Crime Act 1987. The main changes will: extend the Act to property under the person’s effective control (as defined in proposed section 243AB); clarify the determination of the benefit gained (clause 21); allow the courts to determine who is in control of a company to prevent assets being hidden in companies (clause 22); clarify the power to restrain property (i.e. an order may be made directly on the property and extend the order to the specified property of a third party) (clause 23); and increase the penalty for breaching a restraining order (clause 26).

The Director of Public Prosecutions Act 1983 will be amended to confer the additional function of allowing the DPP to institute prosecutions for offences in respect of which a person has not been examined or committed (clause 31).

The National Crime Authority Act 1984 will be amended by clause 37 to make it clear that a person operating under an NCA request for information will not be liable for any action, suit or proceedings.
Clause 42 will insert a new Schedule into this Act. The proposed Schedule will list a number of bodies that are currently exempt from the need to provide information and which, by this amendment, will cease to be exempt.

References

For further information, if required, contact the Law and Government Group.

22 May 1989

Bills Digest Service
Legislative Research Service

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

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