



10 February 2009

By email: CLJS@justice.vic.gov.au

Criminal Law Justice Statement
Department of Justice
GPO Box 4356
MELBOURNE VIC 3001

Dear Sir/Madam

Crime Amendment (Identity Crime) Bill 2008 Exposure Draft

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Victorian Government's exposure draft – Crime Amendment (Identity Crime) Bill 2008 (the **Bill**).

We support the Bill's proposals to provide for new and clear criminal offences related to identity crime. This submission will focus on the reforms in the Bill to amend the *Sentencing Act 1991* and the *Magistrates' Court Act 1989* to allow victims of identity fraud to restore their reputation and credit history by obtaining a certificate from the court. Although Consumer Action supports the Bill's attempts to protect and assist victims of identity fraud, we are concerned about the actual process of obtaining this certificate and the lack of requirements on financial institutions to acknowledge it. Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Court certificates for victims of identity crime

Consumer Action acknowledges that the main objective of the certificate provisions in the Bill is to help victims of identity crime to restore their credit rating in their dealings with creditors and financial institutions. Identity crime can cause serious damage to an individual victim's reputation and credit history and any attempts to rectify this should be lauded. However, although well intentioned, we do not believe that the proposals in this Bill will assist those that are victims of identity fraud. Instead the process may in fact be more burdensome and potentially detrimental to victims of identity theft.

It is our understanding that the Bill proposes that the Court be able to issue a certificate, upon application by a victim of identity crime, that contains the name of the victim, and any other

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information deemed relevant by the Court which will assist a victim to address any potential damage caused to their reputation. We also acknowledge the Bill's intention for Victorian courts to issue certificates to victims determined on the basis of a balance of probabilities that their identity has been misused, irrespective of whether there is a prosecution for an identity crime offence, unlike the process under current laws in South Australia and Queensland, which have their own identity crime legislation.

Our concerns with the Bill's proposals are as follows;

1. Process of obtaining a certificate from the Court.
2. Non-binding nature of the certificates.

1. Process of obtaining a court certificate

There are problems with the process of a victim of identity crime applying for a certificate through the Magistrates' Court. While the Bill takes a more sensible approach to the reality of being an identity crime victim by allowing victims to access the proposed certificate process without first waiting for a prosecution of an offender to take place, the process remains court based. A court procedure rather than assisting victims can potentially be an intimidating experience. This coupled with the court fees and costs for making a court application can in fact act more as a hindrance and deterrent to victims applying for a certificate rather than assisting them. We believe that a more appropriate alternative would be at the tribunal level such as the Victims of Crime Assistance Tribunal or the Victorian Civil & Administrative Tribunal. This would be a less intimidating, less formal and a lower cost procedure.

Furthermore, the process as outlined in the Bill is cumbersome, particularly if the applicant for the certificate is unsuccessful in their application or unhappy with the terms of the certificate. The Bill allows for the applicant to appeal to a higher court, but such a process can potentially be time consuming and again costly. This can obviously be a burden for a consumer who urgently needs to deal with wrongful transactions and/or re-instate their credit history. The Bill also needs to ensure that such a consumer can apply for a certificate and appeal an unfavourable decision in a timely manner. We note that the Bill does not make clear if any other party, for example a financial institution, is able to oppose an application for a certificate or otherwise participate in a hearing. If this is the case, it clearly adds to the potential costs and length of time of the application process.

Finally, the Bill also requires the Court to reject an application if the identity crime was not reported to the police within a 'reasonable' time. This again seems to add an unnecessary step for the victim, particularly with smaller frauds. Many people may simply not think to file a police report over one or two disputed financial transactions. Whereas at present the victim can approach a financial institution and/or credit reporting agency about disputed transactions or defaults without necessarily going through a police process first, now they are required to report the crime to the police before appearing before a court to obtain a certificate.

2. Non-binding nature of the certificates

The fact that financial institutions and credit reporting agencies are not compelled to deal with the certificate in a particular way, for example by removing defaults from a victim's credit file if the victim can provide a court-issued certificate, is a major flaw in the Bill. The certificate is not binding and its purpose is only to highlight to a credit reporting agency that a person was a

victim of identity crime. We believe many institutions will continue to undertake their own investigations even after being provided with this certificate, as alluded to by the Government's discussion paper. Hence consumers can potentially go through the red tape of a time consuming court process with its extra costs to obtain a certificate that may or may not be ignored by financial institutions and credit reporting agencies.

A further concern is that institutions may require any victim of identity crime to obtain a court-issued certificate before looking into disputed transactions. By demanding their clients obtain this certificate, the process of dealing with concerns or complaints about identity crime is delayed. Such delays will in fact make matters worse for Victorians who are struggling with the stress of being victims of identity crimes, rather than better as intended by the Bill.

A further potential problem with this procedure is that, by allowing institutions to insist that consumers obtain a certificate before they will investigate claims of identity crime, the Bill may inadvertently allow for the shift of some of the costs of investigating identity crime claims from private institutions to the publicly-funded court system, even though it is those private institutions that are best placed to implement measures to prevent identity crime, and thus it is more logical to impose cost incentives on them rather than the taxpayer to do so.

Consumer Action recommends that the Victorian Government consult further with the financial industry as to what court process would make them satisfied they could rely on these certificates and thus enable the Government to provide in the Bill for certificates to be binding on institutions including credit reporting agencies. Otherwise, we believe that the Bill's certificate process, rather than being beneficial to identity crime victims, is potentially not merely neutral but detrimental to those consumers.

Conclusion

Consumer Action welcomes any attempt to provide victims of identity crime with a better opportunity to restore their reputation and credit history. However, the new system proposed in the Bill could place further burdens on already stressed consumers with cumbersome court processes to obtain a certificate which is not binding on financial institutions. More consultation is needed with the financial industry to enable the Government to provide for certificates that are binding and assist consumers, otherwise victims of identity crime may well be better off with no new certificate processes implemented in Victoria.

Should you have any questions, please contact Sean Carroll on 03 9670 5088.

Yours sincerely

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