

SUBMISSION IN RELATION TO THE DISCUSSION PAPER ON 'IDENTITY CRIME' 12 JUNE 2007

Executive Summary

The proposed Model Identity Crime laws will create vague and over-inclusive provisions that will punish innocent behaviour, or be enforced selectively and inconsistently. The laws are unlikely to be effective in solving the problems of identity crime and are motivated by over-reaction to perceived public sentiment at a stage where the problem is ill-defined. The complexity of identity crime warrants investigation by the Australian Law Reform Commission. Identity crime is a complicated and serious issue that must be tackled with a well-considered and comprehensive solution that makes clear for law enforcers and people generally what conduct is criminalised.

Proposed laws ignore specific aspects of identity crimes

1. The Discussion Paper attempts to deal with what it describes as a very broad range of conduct that constitutes identity crime. The model crimes are intended to deal with aspects of identity crimes not previously anticipated, including new uses (eg non-financial reasons such as smuggling) and types of information (eg electronic records).
2. The proposed law attempts to deal with the broad range of behaviour by creating a single major offence of "identity crime." This blanket provision ignores the specific aspects of individual crimes in sweeping many types of behaviour into one overbroad category.
3. The law of extended criminal liability, covering conspiracy, attempt, complicity, innocent agency and incitement, currently accommodate the offences targeted by the proposed legislation.¹ Any additional sanctions should be narrowly drafted to cover only reprehensible activity not addressed by current provisions.

¹ See Part 2.4 of *Criminal Code 1995* (Cth).

Proposed laws may criminalise innocent behaviour

4. The Discussion Paper acknowledges the risk of inadvertently criminalising innocent behaviour absent the intent to commit another offence.
5. The standard that “no harm is caused to others” becomes meaningless when the critical element of identity crime is intent and not the actual commission of an offence. Mere intent, without the commission of a criminal offence, does not cause harm to others. The Criminal Code Act requires action that is “more than merely preparatory” for liability under attempt.² Preparatory offences require proof of specific intent. Generally, a subjective test determines the accused’s mindset. However, circumstantial evidence may prove intent.
6. The Discussion Paper mentioned teenagers using false identification as an offence not intended to be captured. Likewise, other innocent behaviours not yet considered might fall into this gap between letter and intent. For example, performing as a female impersonator, or signing a form as “Kylie Minogue” or “Pope Benedict” in jest, should not be criminalised. NSWCCCL believes that any identity crime provision be narrowly drafted to ensure that the innocent expropriation of someone’s identity is not criminalised.
7. The proposed crimes of on-selling and possessing equipment to create identification information have an even broader scope, requiring only recklessness for liability.
8. There are legitimate reasons for capturing personal information or possessing manufacturing equipment. These two provisions criminalise actions that are not crimes in themselves and do not even require criminal intent. Liability does not require intent or knowledge and only arises from the subsequent actions of another. Liability does not even require knowledge of this subsequent action, only mere recklessness with respect to such effect.
9. For example, this provision may criminalise actions retrospectively. In the example of the shopkeeper collecting drivers license numbers to validate cheques, it is possible for the criminal intent to be formed subsequent to the only actual action. Therefore, this provision may punish only “thoughtcrimes” combined with a legitimate action.
10. Also of concern are the potential chilling effects of the proposed model crimes. Fear of violating such a general provision as the proposed identity crime offence could have the practical effect of proscribing perfectly legitimate behaviour. If requirements of offences are not specific, the shopkeeper may be hesitant to engage in activity such as verifying cheques. Unclear language erodes the predictability of law and prevents Australians from efficiently ordering their behaviour in compliance.
11. The crime involves “capture, use or transfer” of personal identification information. However, the model code does not elaborate what the actions entail. Also, the model offence covers the “broadest possible range of identification information.” The combination of these two provisions yields a principle that is difficult to interpret and therefore to abide by.

² See id.

12. The absence of consent as a defence also is overbroad, especially with regard to the capture of personal identification information. An individual has the right to share his information.

Other jurisdictional approaches

13. The model legislation will likely be ineffective in curbing identity theft crimes. The United States passed the *Identity Theft and Assumption Deterrence Act* in 1998.³ The act criminalises actions similar to those in the Model Identity Crime. It is more expansive than the model legislation as it provides for victim services to more quickly alert credit bureaus of the theft. However, since enactment, the economic impact and incident rates of identity theft have not shown a decrease.⁴ Commentors criticise this law as being reactionary and symbolic rather than providing a practical remedy to the problem.⁵
14. Perhaps more effective legislation would be akin to Directive 95/46/EC of the European Union, which limits the spread of personal identifying information by providing guidelines under which corporations can transfer information. This stops the problem at the source more than legislation with merely symbolic effect.⁶
15. The comparison of identity theft incident rates between the United Kingdom (0.17%) and the United States (3.39%) supports the difference in effect.⁷

Victim certificates are a potential risk to privacy

16. We recognise that identity crime poses a great threat to a victim's dignity and privacy. In a consumer society, aspects of one's identity, such as credit history and reputation, are very valuable to an individual.
17. We fear that records of identity crime victims could have the adverse effect of potentially subjecting this group to future exploitation. As the Discussion Paper notes, certificates are themselves personal identity information. A collection of such information creates additional risk to a particularly vulnerable group, people whose records have already been compromised.
18. Considering that, as the Discussion Paper states, less than 10% of losses resulting from identity crime are borne by individual victims, potential benefits would be outweighed by costs of a certificate scheme as proposed. The fact that

³ See 18 U.S.C. 1028(a).

⁴ See Privacy Clearing House, *Recent Surveys and Studies*, <<http://www.privacyrights.org/ar/idtheftsveys.htm>>, accessed on 8 June 2007.

⁵ See Nicole M. Buba, *Waging War Against Identity Theft: Should the United States Borrow from the European Union's Battalion?*, 23 Suffolk Transnat'l L. Rev. 633, 648 (2000)

⁶ See Directive 1995/46/EC of the European Parliament and of the Council of 24 October 1995 (Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data).

⁷ See Liz Pulliam Weston, *What Europe can teach us about identity theft*, <http://moneycentral.msn.com/content/Banking/FinancialPrivacy/P116528.asp>, accessed 8 June 2007.

- the certificates would provide no remedial or restorative value to victims underscores the net loss.
19. Perhaps something more useful would be a provision that facilitates proactive steps in restoring the victim's pre-crime status. For example, California's provision facilitates notification of credit bureaus, freezes on any affected accounts, and provision of free credit reports to the victim.⁸
 20. Restorative action should not be contingent on prosecution. For example, in NSW a victim of a violent crime can claim compensation whether or not a the offender has been charged.⁹ The blameless victim should not have to wait on proceedings in order to take steps towards restoring his identity.
 21. A comprehensive solution to identity theft should attack the problem from all sides, providing victim compensation and consumer education, in addition to a refined criminal or civil sanction.

Conclusion

The reality of the situation is that "identity crime" takes many forms and cannot be generalized into one offence. Without more structure to ensure intended effect, the proposed laws would infringe on liberty by proscribing innocent behaviour through letter and practical effect. We recommend that this issue be further considered by the ALRC before measures are taken.

⁸ See Cal. Penal Code § 530.5 (creating civil remedy for victims of identity theft).

⁹ See *Victims Support and Rehabilitation Act 1996* (NSW).