Submission

THIS SUBMISSION WAS PREPARED BY THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC) INC, IN CONSULTATION WITH MEMBER CENTRES

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Draft Model Spent Convictions Bill: Consultation Paper

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About the Federation of Community Legal Centres (Vic) Inc

The Federation is the peak body for fifty two community legal centres across Victoria. The Federation leads and supports community legal centres to pursue social equity and to challenge injustice.

The Federation:

- provides information and referrals to people seeking legal assistance
- initiates and resources law reform to develop a fairer legal system that better responds to the needs of the disadvantaged
- works to build a stronger and more effective community legal sector
- provides services and support to community legal centres
- represents community legal centres with stakeholders

The Federation assists its diverse membership to collaborate for justice. Workers and volunteers throughout Victoria come together through working groups and other networks to exchange ideas and develop strategies to improve the effectiveness of their work.

About community legal centres

Community legal centres are independent community organisations which provide free legal services to the public. Community legal centres provide free legal advice, information and representation to more than 100,000 Victorians each year.

Generalist community legal centres provide services on a range of legal issues to people in their local geographic area. There are generalist community legal centres in metropolitan Melbourne and in rural and regional Victoria.

Specialist community legal centres focus on groups of people with special needs or particular areas of law (eg mental health, disability, consumer law, environment etc).

Community legal centres receive funds and resources from a variety of sources including state, federal and local government, philanthropic foundations, pro bono contributions and donations. Centres also harness the energy and expertise of hundreds of volunteers across Victoria.

Community legal centres provide effective and creative solutions to legal problems based on their experience within their community. It is our community relationship that distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change.

Community legal centres integrate assistance for individual clients with community legal education, community development and law reform projects that are based on client need and that are preventative in outcome.

Community legal centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for our clients and the justice system in Australia.

Summary and introduction

The Federation commends the initiative of the Standing Committee of Attorney's General (SCAG) in seeking uniform Australian spent convictions laws and welcomes the opportunity to make submissions on the Draft Model Spent Convictions Bill ('the Bill').

The Federation strongly supports SCAG's commitment to assist offenders to rehabilitate and reintegrate into the community by limiting the stigma of old criminal convictions. The stories of community legal centre (CLC) clients demonstrate the significant difficulties people currently face in employment, education, housing and other areas because of their criminal records.

The Federation supports the concept of developing national uniform legislation regulating the release and use of criminal record information. CLCs have observed through their casework and community development, significant discrepancies across jurisdictions leading to inequitable outcomes for some of our clients. We have also observed significant misunderstanding of the operation of criminal record laws. National consistency of criminal record laws should promote increased equity and understanding. The critical issue however, is ensuring that the correct model is adopted.

In this regard, we welcome some aspects of the Bill which introduce limited protections for people with old criminal records. However, the Bill is disappointing in other areas; in particular the provision that offences where a prison sentence of 12 months or greater is imposed cannot become spent, and the exemptions to the Bill.

More broadly, the Bill disappointingly covers only one aspect of criminal record regulation; the issue of when a "conviction" becomes spent. The Bill does not otherwise regulate the initial release of criminal record information nor does it provide effective protection for Victorians against discrimination on the grounds of irrelevant criminal record.

For many years, Victorian CLCs have been advocating for the following reforms:

- A spent convictions system (covering the initial release of criminal record information) that is governed by legislation, not merely the administrative policy of Victoria Police;
- Stopping the release non-convictions on criminal record checks;
- Laws that provide effective remedies against irrelevant criminal record discrimination; and
- Prohibitions on trading in criminal record information, and on obtaining of criminal record information from such a business, without an individual's consent.

We recommend that Victoria initiate broader reforms addressing these broad aspects of criminal record information use and release. We note in particular the recommendation of the Equal Opportunity Review Final Report (June 2008) that Victoria's equal opportunity legislation be amended to include protection against discrimination on the grounds of an irrelevant criminal record.

Ideally, there would be consistent legislation across Australia regulating these issues. We recognise however the practical difficulties involved in achieve this. We understand that the issue of spent convictions has been on the agenda of the Standing Committee of Attorneys-General (SCAG) since at least 2000.

Accordingly, if agreement on these broader reforms is not possible in a reasonable timeframe, we recommend that Victoria introduce its own legislation, covering not only spent convictions, but the related issues of the release of criminal record information and protection from discrimination on the grounds of an irrelevant criminal record. Our submission addresses these issues in addition to commenting on the Bill.

Background and need for reform

Criminal records affect a significant proportion of our population

Criminal records affect a significant proportion of our population. Fitzroy Legal Service's submission refers to data showing that around 94,000 people were sentenced in Victorian Courts 2007/2008. Of these, over 80,000 were sentenced in Magistrates Courts, and over 11,000 were children sentenced as juveniles.[1] At a national level, 586,202 criminal matters were finalised in Australian Courts in the period 2005-2006.[2]

UK research in 2001 found that around a third of adult men and a tenth of adult women had been found guilty of types of offences which would be disclosed in a criminal record check if committed in Victoria.[3]

Criminal records generate strong negative prejudices

Criminal records generate strong negative prejudices. Having a criminal record can be a significant barrier to obtaining meaningful employment in a wide range of fields. It is a significant barrier to rehabilitation for former offenders.

> "… I am particularly mindful that rehabilitation is seldom a real possibility if offenders are unemployed and unable to obtain gainful employment"
> Senior Member Megay: *Swain v Department of Infrastructure – Director of Public Transport* May 2008 VCAT [33]

A 2002 UK Home Office study recognised that a criminal record "can seriously diminish employment opportunities" and that "employment can reduce re-offending by between a third and a half"[4].

Often, a criminal record generates greater punishment than the direct penalty imposed by the court. The failure to provide proper protection for people with criminal records in essence creates double punishment for those people.

The prejudice generated by criminal record information also has disproportionate impact on Indigenous Australians who are statistically around 12 times more likely to be imprisoned than non Indigenous Australians.

Case study : Prejudicial nature of criminal record information

Dimitri had a history of drink driving and had even spent a short time in jail because of it. He had never been charged or found guilty of dishonesty offences. He secured employment as a cleaner in a large suburban shopping complex. After working for three weeks his employers learned of his criminal history and terminated the employment. He was told his services were no longer required because of his prison record. Dimitri was devastated, having competently run his own cleaning business in the past.

Comment

The Bill would provide Dmitri with limited protection from having to disclose his record, but only after the 10 year crime free qualifying period was completed. If Dmitri was seeking to work in an occupation exempted under the Bill, it would provide him with no protection. This case study highlight the need for protection from discrimination on the ground of irrelevant criminal record.

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[1] Sentencing Advisory Council Annual Report 2007-2008 p 36

[2] ABS, Criminal Courts, Australia, 2005-06, ABS Catalogue No 4513.0 (2007) 3 cited in Naylor et al, *In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record*, Melbourne University Law Revue, Volume 32, p 192.

[3] "Criminal careers of those born between 1953 and 1978", Home Office Statistical Bulletin 4/2001

[4] "Breaking the Circle; Report on the Review of the Rehabilitation of Offenders Act" Home Office July 2002.

A criminal record is an unreliable indicator of future behaviour

It is generally accepted that a criminal record is often an unreliable indicator of future behaviour.

The Australian Law Reform Commission in 1987 stated that "an old conviction, followed by a substantial period of good behaviour, has little if any value as an indicator of how the former offender will behave in the future"[5]. Similarly the Standing Committee of Attorneys General 2004 Spent Convictions Discussion Paper recognised that "the prejudice that a past offender may experience as a result of an old conviction will generally outweigh its value as an indicator of future behaviour".

The Sentencing Advisory Council has stated that "research has shown that most serious crimes against the person are committed by offenders who have not previously been convicted of a violent offence, and who will not go on to be convicted for further violent offences".[6]

UK research suggests that most people who are found guilty of an offence, only offend once, and the offences are more likely to have been committed when the person was young.[7]

The use of criminal record checks as a risk management tool is significantly increasing

Despite the unreliability of criminal records as an indicator of future behaviour, the use of criminal record checks as a risk management tool is increasing significantly.

Statistics released by Victoria Police to Fitzroy Legal Service in 2004 showed that the number of checks being conducted in Victoria rose over 6000% from 3,456 in 1992/93 to 221,236 in 2003/04. In 2006, it was reported that Victoria Police were conducting 300,000 checks a year.

UK research indicates around 2/3 of employers in that jurisdiction request information about a person's criminal history regardless of the position they are applying for.[8]

Many community protections are already in place

Specific regulatory schemes adapted to particular occupational requirements already exist in a range of professions in Victoria. These schemes involve criminal record screening processes, typically to satisfy a "fit and proper person" test or similar requirements. In addition, the Working with Children Check scheme operates as an umbrella criminal record screening process for jobs and voluntary positions involving work with children.

These regulatory schemes cover employment in broad range of professions from security guards to teachers and taxi drivers.

We do not have any in principle opposition to appropriate regulatory schemes for particular occupations. However, the proliferation of these schemes, and the widespread practice of employers requiring criminal record checks in addition to certification through these schemes, needs to be taken into account in assessing the Bill and our broader reform proposals.

Economic and social costs of criminal record discrimination

Victorian CLCs regularly assist clients who have been unfairly excluded from employment or volunteering on the basis of criminal record information.

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[5] Australian Law Reform Commission "Spent Convictions" 1987, (ALRC 37)

[6] Kelb, K, "Recidivism of Sex Offenders", Sentencing Advisory Council, 2007, p 1.

[7] Above n 3.

[8] Metcalf, Anderson & Rolfe, Department for Work and Pensions, UK, *Barriers to Employment for Offenders and Ex-Offenders – Part One: Barriers to Employment for Offenders and Ex-Offenders*, Research Report 155 (2001) 74 cited in Naylor, Paterson & Pittard, *In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record*, Melbourne University Law Revue, 32, p 172

Criminal record discrimination generates widespread economic and social costs including;

- unemployment and under-employment and consequent costs to the economy and the social security system;
- increased costs to the health care system through detrimental health consequences that flow from discrimination; and
- increased social and economic costs through the marginalisation of former offenders leading to increased reoffending.[9]

> Quote from welfare provider – Fitzroy Legal Service Criminal Records Project
> *"[The effects] go across the board. If a person can't get employment because of an employer's preconceived ideas, it immediately limits all of their other opportunities in the community. When people aren't given these opportunities, reoffending behaviour often seems to be the only option they've got. Being excluded from employment has a big impact on their self esteem and confidence. This barrier is very hard to adapt to and there aren't a lot of options for them unless they can access significant advocacy services. Often people can't use skills and trades they've developed in institutions because employers don't want them because of their criminal records."*

Lack of effective protection against criminal record discrimination

Victorian law does not prohibit discrimination on the grounds of an irrelevant criminal record. Victorians can complain to the Australian Human Rights Commission, but the Commission cannot provide any effective remedies against unfair criminal record discrimination. The Commission only has power to investigate complaints and make recommendations. It is legal for employers to ignore those recommendations.

Unfair dismissal law provides limited protection if an employee can show that a termination on the grounds of an irrelevant criminal record was, in broad terms, unfair. Employees must meet the eligibility criteria in the *Workplace Relations Act* 1996 (Cth) to bring an unfair dismissal application.

In June 2008, the Equal Opportunity Review Final Report recommended that Victoria's equal opportunity legislation be amended to include protection against discrimination on the grounds of an irrelevant criminal record.

> *Case study: Lack of effective protection against criminal record discrimination*
> Matthew failed to pay a restaurant bill and was charged with obtaining goods by deception. Matthew sought a no-conviction order because he was concerned about the impact of a conviction on his employment prospects. Matthew was found guilty and received a fine without conviction.
>
> Unfortunately for Matthew the offence mistakenly appeared as a conviction on a police check undertaken by his employer within 3 months of the commencement of his employment. Matthew pointed out this error to his employer, but he was still dismissed. Victoria Police admitted their mistake but the employer refused to withdraw the termination arguing that it was lawful because it fell within the three month probationary period.

Principles to guide criminal record reform

Taking into account this overview, we believe that reform in this area needs be guided by the following principles:

- Criminal record information generates strong negative prejudices;
- Criminal record information is often unreliable as a predictor of future behaviour;
- There has been an enormous increase in the use and availability of criminal record information;

[9] A criminal record "can seriously diminish employment opportunities" and "employment can reduce re-offending by between a third and a half"; Breaking the Circle. Report on the Review of the Rehabilitation of Offenders Act" Home Office July 2002.

- The public interest in managing the community risk of reoffending needs to be appropriately balanced against the public interest in promoting rehabilitation of former offenders and the interests of former offenders in being protected from criminal record discrimination;
- A person accessing criminal record information for the purpose of making a decision (employment, housing, insurance etc) should only be able to take the information into account where it is relevant to the decision. If the criminal record is relevant, any action taken on those grounds needs to be proportionate to the relevance of the record.

Comments on the Bill

Release of criminal record information

Given the strong prejudice generated by criminal records and the difficulties involved in proving discrimination, placing appropriate limits on the release of criminal record information is an effective means of limiting irrelevant criminal record discrimination.

The Bill however, does not address the threshold issue of what information will be released on a criminal record check. Criminal record check certificates in Victoria are currently issued by Victoria Police after applications by organisations and individuals. The consent of the relevant individual is required. The scope of the information released is governed by Victoria Police's Criminal Record Information Release Policy.

It is not clear how the Bill would interact with the release of criminal record information by Victoria Police. The Bill prohibits the disclosure of a spent conviction in some circumstances (section 12), but it is not clear whether this prohibition would apply to Victoria Police.

We believe that the Victorian Government should enact legislation clearly outlining what information will be released on a criminal record check. It is inappropriate for the release of criminal record information to be governed only by Victoria Police's administrative policy. The legislation should clarify the interaction between the release of criminal record information and spent convictions protections.

In this regard, we note that while the Bill mirrors some aspects of Victoria Police's policy (eg: 10 year qualifying period), it differs in other significant aspects (eg: exemptions and the relevant threshold sentence of imprisonment for eligible offences). We comment on these issues below.

Definition of conviction

The broad definition of "conviction" in the Bill is concerning. This definition encompasses any finding of guilt by a court. In essence, the Bill defines convictions to include "non-convictions" under Victorian sentencing law.

The submission of Loddon Campaspe CLC provides a useful overview of the legislative intention behind providing courts with discretion as to whether or not to impose a conviction. The definition of "conviction" in the Bill undermines this policy intention.

In exercising its discretion under the *Sentencing Act* 1991 (Vic) whether or not to record a conviction, a court must consider prescribed matters including the impact on the individual's 'economic or social well-being or on his or her employment practices'. The court is able to balance individual and community interests taking into account the relevant considerations. Sentencing legislation and its application suggests that the absence of a recorded conviction will afford some protection to the reputation of affected community members.

Like the Bill, Victoria Police's Criminal Record Information Release Policy also undermines Victorian sentencing law, as it allows the release of both convictions and non-convictions.

This issue leads to a deep confusion amongst former offenders, who are told by the court that no conviction will be imposed because of the negative impact it would have on their rehabilitation prospects, only to see the offence disclosed later on a police record check. Fitzroy Legal Service conducted research in 2004 which confirmed the confusion around this issue. A majority of participants surveyed believed that they would not have a criminal record if the court imposed no conviction.

This confusion prejudices employees. Former offenders, who are asked in a job interview whether they have ever committed an offence, often honestly answer "no" because the court imposed no conviction. They are later shown a criminal record check which lists their offence and are then liable to be dismissed for dishonesty without any recourse.

For many years Victorian CLCs have been advocating for non-convictions not to be released on a criminal record check. This approach has been adopted in jurisdictions including New South Wales, Queensland and the Northern Territory.

We submit that only convictions should be released on a criminal record check.

Minor offence exemption

The Bill provides that the qualifying period for an offence to become spent, is not affected by a "minor offence". In broad terms, a "minor offence" is defined as an offence where no penalty greater than a $500 fine is imposed.

The intention behind this provision is commendable and improves on the operation of the Victoria Police policy in this regard. Minor offences should not affect the crime free period required to spend an offence. However, we believe the definition of minor offence should be expanded to include offences where no conviction was imposed, and potentially to other categories of offences, such as traffic offences, where no sentence of imprisonment was imposed.

This approach would also avoid the arbitrary nature of the $500 amount. It would also ensure a more appropriate and flexible approach in determining which offences will reactivate the qualifying period.

If the definition is not expanded, the cut off amount for the fine should be expanded to capture a wider range of offences that the public would generally regard as minor.

The intention behind the minor offence exemption lends weight to our recommendations that minor offences such as offences where no conviction was imposed, should not be released on any criminal record check in the first place.

What period of good behaviour is required

The Bill provides for 10 year adult and 5 year juvenile good behaviour qualifying periods. These periods are consistent with Victoria Police's current policy and other jurisdictions across Australia. If a fixed period is chosen, we submit that the relevant period needs to be chosen after taking into account available criminological research on the connection between reoffending rates and the expiry of crime free periods.

Using a fixed qualifying period is necessarily somewhat arbitrary. Some offences, particularly minor offences, will cease being relevant after a much shorter time. This highlights the need for the Victorian Government to introduce protection against discrimination on the grounds of an irrelevant criminal record. This would provide protection for former offenders from discrimination by reference to the relevance of the offence to the circumstances for which the criminal record information is sought. The Bill provides its limited protection based simply on how much time has expired since the guilty finding.

The Victorian Government could consider an alternative to the fixed qualifying period model under which the sentencing court would determine the crime free period that must elapse before an offence can become spent. The advantage of this approach is that the court could take into account the relevant risk and rehabilitation factors in determining the most appropriate period.

Offences capable of becoming spent

The Bill provides that an offence is only eligible to become spent if the sentence imposed is 12 months or less. In 2006, the average imprisonment term imposed in Victoria was 13.8 months.[10] This provision would accordingly render most sentenced prisoners ineligible from having their offences spent. The 12 month sentence provision is also a significant reduction from the 30 month sentence term currently used by Victoria Police in its criminal record policy. We submit that the 30 month sentence term is more appropriate.

Further, we submit that the Bill should expressly provide that the sentence term should not take into account any part of a sentence which is suspended. If a court determines that there are mitigating factors justifying the suspension of a sentence, the suspended sentence should not affect the eligibility of whether or not an offence can become spent.

Sexual offences

We appreciate that the issue of sexual offences can generate heightened levels of community concern. We do not however, believe that sexual offences should be treated differently from other offences (including offences such as murder, armed robbery) under the Bill.

In this regard, we note the existing protections afforded by the Working With Children Check and also note that section 14 of the Bill contains broad exemptions which would prevent sexual offences from becoming spent in connection with employment in various sensitive areas such as working with children and vulnerable people. Overall, we believe that the safeguards built into the Bill in addition to the broader safeguards that exist beyond the Bill are sufficient to protect the community from risk in relation to sexual offences. The specific exemption of all sexual offences from the Bill is not justified.

Overseas offences

We refer to the submission of Loddon Campaspe Community Legal Centre in this regard. We support its recommendation that a person be able to apply to a court for an overseas offence to become spent immediately, or after a prescribed period of time. In the absence of any application, an overseas offence should be able to become spent in the same way as a local offence.

Exemption – licensing and regulatory schemes

We are concerned by the breadth of the exception in section 14(6)(e). This section provides that sections 11-13 of the Bill (the disclosure protections) do not apply in relation to persons seeking, in broad terms, registration under any regulatory or licensing scheme in relation to an occupation or position that has a statutory requirement of good character or a fit and proper person test. There is a wide range of professions or occupations which would fall within this exemption (eg: taxi drivers, real estate agents etc).

An initial issue is the poor drafting of the exemption. As presently drafted, it seems to apply to the relevant *person*, and not the *transaction* for which the criminal record information might be reviewed. Accordingly, it seems to remove the protections of the Bill for those persons in any situation (eg: regulatory approval, seeking employment, seeking housing or insurance etc). If the exemption is retained, at a minimum it should be redrafted to apply only to the process of assessing the person against the relevant statutory character test.

[10] Sentencing Advisory Council, Annual Report 2006-2007 p 21

We submit further, that the exemption should be narrowed in scope, by reference to the principles of relevance and proportionality.

The current drafting of the Bill already contains significant protections; the Bill requires a 10 year crime free qualifying period before convictions can become spent and provides that offences carrying a sentence over 12 months cannot become spent. Accordingly, there needs to be a strong policy justification behind exempting regulatory or licensing schemes from the Bill. Drawing on the principles of proportionality and relevance, this justification would only be made out in particularly sensitive employment areas (such as police, corrections, teachers and other occupations working with children) and would only be made out in relation to those offences that are relevant to those sensitive occupations.

Adopting this approach would be consistent with the Victoria Police Criminal Record Information Release Policy, which provides for the release of serious violent or sex offences (ie; not all offences) beyond 10 years where the criminal record check relates to working with children or vulnerable people. It would also be consistent with the Working with Children Check scheme which focuses on those categories offences (eg: violence and sex offences) which are most relevant to working with children.

This modified approach could be achieved by specifying the particular occupations or professions which are exempted from the scheme and specifying the categories of offences which are exempted from the regulatory approval process for those occupations or professions.

Case study: Employment in exempt occupation
Dave was convicted of a theft related offence in the early 1980s, when he was sixteen years old. He'd taken his dad's car for a joy ride. Some seventeen years later Dave sought employment within the Correctional Services system, was successful and underwent a four-month training course. In the last week of that training his training was terminated on the basis of this conviction and was told that he could not work for Correctional Services unless he had a clear criminal record.

Comment
The Bill exempts occupations such as correctional services from the non-disclosure protections. Accordingly the Bill provides Dave with no protection. The case study highlights the need for protection from discrimination on the ground of irrelevant criminal record.

The issue of regulatory schemes is also relevant in the context of workers being put through multiple criminal record screening processes. Clients of Victorian CLCs report widespread practices of employers conducting criminal record checks in particular industries where criminal record screening has already been undertaken by licensing or regulatory bodies including the Working with Children Check scheme.

Given that the regulatory approval in these schemes broadly endorses that any criminal records do not prevent the worker from performing the inherent requirements of the occupation, any additional criminal record checks facilitate discrimination on the grounds of irrelevant criminal record. These additional checks are unnecessarily, create additional administrative expense and lead to the unjustified exclusion of otherwise qualified workers.

The Victorian Government should introduce additional protections to prevent employers and others from obtaining criminal record checks in those occupations where licensing or regulatory approval for the relevant workers includes a criminal record screening process.

Unlawful disclosures of criminal record information

We support the introduction of offences in connection with unlawfully disclosing (section 12 and 13), and improperly obtaining spent convictions (section 15). We further support the submission of Loddon Campaspe Community Legal Centre which argues for these offences to be expanded to cover:

- Trading in criminal record information without the identified individual's consent; and
- Obtaining criminal record information from a business trading in this information, without the consent of the individual identified.

Effect of a conviction becoming spent

We support the provisions which restrict disclosure of a spent conviction (but refer to our comments above about the ambiguity around the interaction of section 12 which prohibits disclosure by a public authority, and the operation of Victoria Police's Criminal Record Release Policy.)

The intention behind section 11(d) is unclear. The section appears to provide some protection against discrimination on the grounds of a spent conviction in connection with refusing or revoking an "appointment, post, status or privilege". The section however does not expressly cover employment, housing or insurance situations, nor does it prescribe any remedy or penalty for discrimination on these grounds.

Other jurisdictions such as Western Australia expressly prohibit discrimination on the grounds of a spent conviction and provide remedies if discrimination occurs (see section 24 *Spent Convictions Act* 1998 (WA)). At a minimum, the Bill should be amended to expressly provide this protection.

Protection against discrimination on the grounds of *spent conviction* however is not sufficient. As stated above, a criminal record may become irrelevant to a particular job or situation before it becomes spent. It is preferable to introduce a broader protection against discrimination on the grounds of an irrelevant criminal record.