Submission to the Standing Committee of Attorneys-General

Draft Model Spent Convictions Bill

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About VACRO

VACRO is a non-government, non-denominational organisation. It was established in 1872 (as the Discharged Prisoner's Aid Society of Victoria) in the wake of the 1871 Royal Commission into the Penal Establishments and Goals, which urged the establishment of a body to give assistance to discharged prisoners.

In 1975 the name changed to the Victorian Association for the Care and Resettlement of Offenders (VACRO). Our mission is to provide support and information for individuals charged with a criminal offence, offenders, prisoners and their families; as well as leadership, education, training and research on the Justice System for the Community.

VACRO is structured around three service areas, which work closely together to ensure an integrated and constructive approach to our work:

- Justice System Services
- Family and Children Services
- Community

About the PILCH Homeless Persons' Legal Clinic

The PILCH Homeless Persons' Legal Clinic (***HPLC***) is a project of PILCH and was established in 2001 in response to the great unmet need for targeted legal services for people experiencing homelessness. The HPLC has the following aims and objectives:

- to provide free legal services to people who are homeless or at risk of homelessness, in a professional, timely, respectful and accessible manner, that has regard to their human rights and human dignity;
- to use the law to promote, protect and realise the human rights of people experiencing homelessness;
- to use the law to redress unfair and unjust treatment of people experiencing homelessness;
- to reduce the degree and extent to which homeless people are disadvantaged or marginalised by the law; and
- to use the law to construct viable and sustainable pathways out of homelessness.

Free legal services are offered by the HPLC on a weekly basis at 13 outreach locations that are already accessed by homeless people for basic needs (such as soup kitchens and crisis accommodation facilities) and social and family services.[1] Since its establishment in 2001, the HPLC has assisted over 3500 people at risk of, or experiencing, homelessness in Victoria.

[1] Host agencies include Melbourne Citymission, The Big Issue, the Salvation Army, Anglicare, St Peters Eastern Hill, Ozanam House, Flagstaff Crisis Accommodation, Salvation Army Life Centre, Hanover, Vacro,

Acknowledgements

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Koonung Mental Health Centre, Homeground Housing Service, St Luke's Bendigo and Loddon Mallee Housing Service. Legal services are provided at our host agencies by volunteer lawyers from law firms: Allens Arthur Robinson, Arnold Dallas & Mcpherson, Baker & McKenzie, Blake Dawson, Clayton Utz, Mallesons Stephen Jaques, Minter Ellison, DLA Phillips Fox, Corrs Chambers Westgarth, Stella Stuthridge and Associates and the legal department of Goldman Sachs JBWere.

1. Executive Summary

This submission has been jointly produced by Victorian Association for the Care and Resettlement of Offenders (***VACRO***) and the Homeless Persons' Legal Clinic (***HPLC***) in relation to the Draft Model Spent Convictions Bill 2008 (***the Bill***) and associated Consultation Paper, released in November 2008.

The Consultation Paper is a relatively brief document which outlines the function of the Bill and states that comment on 'any aspect of the draft Bill is invited…' and raises specific questions for comment.

Broadly speaking, the Bill provides that where a person has committed an 'eligible offence'[2] and has waited for a 10 year[3] 'qualification period' to expire, the eligible offence may be regarded as 'spent'. A spent conviction may not be disclosed on a criminal record and is not required to be disclosed; however, the Bill provides for numerous exceptions to this basic principle.

As a starting point for our response to the Consultation Paper, we consider the rationale for spent conviction schemes, the broader legislative framework that impacts on the use (and misuse) of criminal record information, and attempt to situate the Bill in this context. In our view, any evaluation of the Bill must also consider how criminal record information is currently being used, how this use affects people with criminal records and how the law regulates this use currently. As such, our submission makes specific recommendations in relation to the Bill but also comments on these broader issues.

VACRO and the HPLC are very well-placed to respond to the Consultation Paper and comment on the Bill. In our experience, misuse of criminal record information (including findings of guilt and investigations) and discrimination against people who have criminal records are widespread problems across Australia, often forming barriers to employment, accommodation, health care and other basic goods and services. Where the goal with offenders must always be rehabilitation and integration back into the community, such information misuse and discrimination is causally linked to a number of serious social problems which hamper these goals. For example, criminal record information is increasingly being used by employers in circumstances where such information may not be relevant to the job description in question. The internet has contributed to an explosion of personal information available online, which is being traded by private entities for financial benefit. This situation often creates difficulties for ex-offenders in being able to access appropriate accommodation, leading to homelessness, poverty and often recidivism.

The current legal framework including anti-discrimination, privacy and spent convictions regimes is insufficient to prevent the misuse of criminal record information and the issues for individuals and society that often flow from this misuse.

[2] For adults, an eligible offence is defined by the Bill as an offence for which a sentence of imprisonment of 12 months or less has been imposed. For children an eligible offence is defined as an offence for which a sentence of imprisonment of 24 months or less has been imposed. S 3, *Spent Convictions Bill 2008*

[3] S 7, adult qualification period, *Spent Convictions Bill 2008*

Our principal submission is that the Bill must be reconfigured to regulate the use of criminal record information more broadly and to ensure that this information can be released only if it is *relevant*. Disclosure should also be limited to offences relevant to a specific employment position or other purpose.

1.1 Recommendations

VACRO and the HPLC make the following recommendations:

Recommendation 1

The Bill should contain an object or purpose giving explicit consideration to the ways in which the rehabilitation and reintegration of offenders is affected by criminal record discrimination.

Recommendation 2

In light of the deficiencies in current anti-discrimination legislation in Victoria and federally, the Bill should be amended to prohibit discrimination on the basis of irrelevant criminal record.

Recommendation 3

The Bill should be reconfigured to provide that criminal record information may be released only where relevant and that in such circumstances the disclosure be limited to offences relevant to the specific employment position.

Recommendation 4

The Bill should be amended to reflect that a specific purpose or object of the legislation is to facilitate rehabilitation and reintegration of offenders into the community.

Recommendation 5:

The Bill should be amended to provide that findings of guilt and criminal investigations may not be disclosed in any circumstances.

Recommendation 6

The qualification period for adults should be reduced from ten to seven years and for juveniles from five to three years.

Recommendation 7

The Bill should be amended to provide that minor offences may not be disclosed on a criminal record.

Recommendation 8

The monetary limit used to define minor offences should be based on a penalty scale similar to the Victorian penalty scale.

Recommendation 9

Subject to any decision to reorganise the 'minor offence' exclusion around categories of offence, (see part 5.3.3), a minor offence should be defined as any convictions accruing a penalty of at least 7 penalty points.

Recommendation 10

The definition of 'minor offences' in the Bill should be amended to include summary offences (with any necessary limitations) and infringement offences.

Recommendation 11

Sex offences should be subsumed within the Bill and the definition of 'eligible offences'

Recommendation 12

If recommendation 11 is not adopted, the Bill should provide that eligible sex offences may be spent on application. Victoria Legal Aid funding should be made available to assist offenders with applications under these provisions.

Recommendation 13

Discrimination provisions in the Bill should be dealt with in a separate section and the Bill should specify that discrimination on the basis of a spent conviction is an offence.

2. Introduction

> *Spent conviction schemes aim to assist offenders to rehabilitate and reintegrate into the community by limiting the stigma of old criminal convictions for less serious offences*[4]

VACRO and the HPLC acknowledge that the Bill*,* and similar spent convictions schemes, play an important role in ensuring the rehabilitation and reintegration of offenders into the community. We note that, until now, this type of scheme has been completely absent from the Victorian legislative landscape.

While our submission deals principally with the Bill, in our view spent convictions should not be separated from the broader issues of criminal record checking and criminal record discrimination, which impact on people seeking to reintegrate into the community, who have already been punished for their offence.

The aims of incarceration include punishment, deterrence, community protection and rehabilitation. Once someone is released from prison the assumption is that they have

[4] Rob Hulls, Herald Sun, 2008

'served their time'. However, when someone exits prison they are not automatically reintegrated into society. They face numerous barriers to resettling into the community, such as relationship breakdown, drug and alcohol issues, mental and physical health difficulties and homelessness. Ex-offenders also face difficulties accessing goods and services including insurance and visiting family and community in prison, which further hamper their reintegration into society.

Above all, ex-offenders face significant barriers in the area of employment. Employment is a key component of reintegration plans which can be used as 'one part of a larger holistic approach to reintegration, which aims to assist offenders returning to the community and to reduce reoffending'[5]. Employment can also 'enhance and facilitate resettlement by offering a way in which a person can gain, for example, self-respect, confidence, and skills'[6]. It is therefore crucial that access to employment opportunities for ex-offenders is as unimpeded as possible.

In this submission, in order to 'set the scene' we also raise some of the key principles intrinsic to the work of VACRO and the HPLC that are consistent with a more balanced approach to spent convictions legislation. These include the principles of throughcare and early intervention.

Finally, this submission considers the legal landscape in which the Bill sits. As a starting point, we consider the underlying human rights principles associated with criminal record checking and the Bill, along with current anti-discrimination and privacy laws.

Our response the Consultation Paper and Bill argues that there is a clear need for legislation which assists offenders to rehabilitate and reintegrate into the community. Ultimately we consider that the Bill fails to achieve these purposes. Only offenders who have committed an eligible offence are entitled to the protection of the Bill. Further, these offenders must wait for the expiry of a 'qualification period' before they are entitled to the protection of the Bill and until this period has expired there is no law governing the use of criminal record information.

We consider that information about a conviction is highly sensitive and private information which should only be disclosed where justified. As a result of the rise in readily accessible personal information on the internet, we submit that the spent convictions regime must be bolstered by a broad and comprehensive prohibition on the use of irrelevant information relating to convictions. In addition to this broader submission, and in the event it is not accepted, we have provided a number of recommendations to expand and strengthen the proposed Bill to ensure that it meets its rehabilitation and reintegration purposes.

2.1 Relevance of Criminal Record Information

We accept that criminal record information may be relevant to certain employment positions and to the provision of some goods and services and is

[5] Peacock, M (2008) *A third space between the prison and the community: post release programs and re-integration*. Current Issues in Criminal Justice Vol 20 (2)
[6] ibid

appropriate and useful information to assist in the protection of children and other vulnerable groups. There nonetheless are several important points to make in relation to the use of criminal record information in our community:

- Between 1993 and 2004, the use of criminal record checks in Victoria increased 6295%, from 3459 to 22236.[7] Requests for information from the Victoria Police increased to 467878 in 2006-07[8]. Statistics indicate that requests to the national criminal record agency 'CrimTrac' have also increased 35% from 1.7 million in 2005-06 to 2.3 million in 2006-07 and that requests of the Australian Federal Police have also increased. [9] These figures support Lam and Harcourt's position that employers are concerned about employee criminal information, regardless of the relevance of that information[10].

- In addition to the rise in 'official' criminal record checks, it has become easier to obtain criminal record information without obtaining consent of the subject of that information. *Crime Net* is an example of a private criminal record checking company which uses public records to create a database of criminal convictions[11]. The American based website notes on its homepage that '*CrimeNet* covers all Australian jurisdictions, is fast and *does not require the permission of the person being checked.*'[12] [emphasis added]

- Across Australia, extensive legislative provisions exist to regulate criminal record checking and disclosure. In Victoria, 47 provisions within Acts and 10 provisions within regulations address this issue. These broadly apply to the legal, educational, correctional, real estate, fundraising and gambling professions (amongst other industries). Appendix 1 sets out further details of these provisions.

- The *Human Rights and Equal Opportunity Commission* has noted that, in Australia, at least 30,000 adult offenders are released from prison every year and therefore significant numbers of people with a criminal record will seek employment in the community[13]

The access to and use of criminal record information has reached a tipping point. A growing percentage of people in the community have a criminal record and the use of 'official' criminal record information has increased exponentially in recent years. Further, employers now rely on the internet as another 'unofficial' source

[7] Fitzroy Legal Service (2005) *Criminal Records in Victoria: Proposals for Reform*
[8] Victoria Police (2007) *Annual Report 2006-07* 8, 27
[9] CrimTrac Agency (2007), *Annual Report 2006-07* 37
[10] Lam, H & Harcourt, M (2003), *The Use of Criminal Record in Employment Decisions: The Rights of Ex-offenders, Employers and the Public*, p.241 & 242
[11] The Crimnet website states it will record convictions of any person sentenced to prison for a term of at least 3 months, convictions relating to sex offences, fraud and violence, convictions of people in positions of public trust. The site also refers to a discretion to include convictions in the public interest. http://www.crimenet.org/about.phtml?sid=0c08e00855290c631d35d80ad3a61476, accessed 20/01/09
[12] http://www.crimenet.org/, accessed 20/01/09
[13] Human Rights and Equal Opportunity Commission (2005) *On the record – Guidelines for the prevention of discrimination in employment on the basis of criminal record.*

of private information, to the detriment of individuals trying to get on with their lives. There is no information to suggest these trends will not continue.

Whereas spent convictions regimes alone may have once been appropriate, in our view, it may now be worth considering additional and broader ways to target the *relevance* of criminal information.

3. Rationale for a Spent Convictions Bill – Practicalities and Principles

3.1 Recidivism and Desistence

The fundamental premise for spent convictions schemes such as that proposed in the Bill is the notion that once a person has served their sentence, they are entitled to the same opportunities in the community as others. This second chance principle is intrinsic to the work of both VACRO and the HPLC, but also to the overarching rehabilitation objective of the criminal justice system.

Current practice pertaining to recorded criminal convictions undermines the principle of rehabilitation by severely curtailing key social components that can facilitate reintegration and rehabilitation, and in particular access to employment. In our view, the current situation in relation to criminal record checking reinforces a sense of stigma and the notion that the individual does not deserve to rejoin the community. The basic argument is that that someone who has committed an offence is untrustworthy and therefore must continually prove in their search for employment, accommodation and goods and services that they have gone 'straight'.

Typically, approaches to recidivism emphasise redemption from an offending lifestyle. It is fundamentally about personal change and the demonstration of consistent trustworthiness and good character to the community. There is very little (if any) literature supporting the proposition that criminal records and criminal record checks are motivational factors for personal change. Furthermore, research suggests that personal change, whilst important, is not the sole factor for desistence from crime[14]. Factors such as employment, safe affordable housing, access to positive and pro-social community connections and networks and exposure to non-judgemental community attitudes are as important, if not more so, to the process of change. Going 'straight' is therefore a process of desistence, rather than a discrete event.[15] The following section outlines some protective factors – such as access to employment and insurance – that assist with this process. Other factors present unnecessary barriers to desistence. Such barriers are more pronounced in some Indigenous communities where they add to concentrated disadvantage and its intergenerational effects. VACRO, in particular, advocates support for

[14] Ross, S., Brown, M., Malone, J & Henry, N (2008) Post Release Support for Women Prisoners: Processes of Psychological and Social Transition. Final Report on the VACRO Women's Mentoring Program.
[15] Sampson, R & Laub, J (2005) A life-course view of the development of crime. The ANNALS of the American Academy of Political and Social Science. Vol 12

desistence through the adoption of through- care and early intervention approaches.

3.2 Employment

As stated above, individuals exiting prison face a multitude of barriers upon release including homelessness, drug and alcohol issues, mental and physical health issues, difficulties with family reunification, weakened support networks and unemployment.

Employment is one of the key pathways to a more stable transition back into the community. It has been shown that employment can reduce re-offending by between 30 and 50 percent.[16]

Ex-offenders seeking employment are often faced with substantial obstacles including lack of qualifications, skills and work experience, low self esteem, lack of confidence and persistence to negotiate the complex array of employment procedures and programs.[17] Criminal record checking often provides an extra and insurmountable barrier to their employment. The following case studies illustrate this situation:

Case Study - Bob

Bob has had a history of sentences related to drug offences and burglary. He is 28 years old and has just been released after a two year sentence. He registered with a job employment agency as part of his Centrelink requirements and secured a job in a factory doing manufacturing work. The job required him to work from 6.30am til 3.30pm, allowing plenty of time to fulfil his parole obligations. In his interview he disclosed to the human resources manager that he had a criminal record. The HR manager told him that this disclosure would remain confidential and Bob was told not to mention his time in prison to his work colleagues.

However, during Bob's first week of work someone recognised him and began telling other work colleagues that Bob had a record. By the end of the first week Bob was let go, according to his employer, because there was no work.

Bob felt that he had no chance of gaining employment with a criminal record.

Case Study - Melissa

Melissa is 55 years of age. She has spent approximately 14 years in prison from the age of twenty. Previous to this she spent some time in juvenile facilities as a state ward. Melissa's offences are varied as are her sentences. In between prison sentences however, Melissa has been able to support herself through work at times. Between her third and last prison sentence there was a gap of twelve years, during which time she did not offend and held down a variety of jobs including industrial cleaning, delivery services and secretarial work. Melissa felt in most

[16] Home Office (2002) Breaking the Circle: A report of the review of the rehabilitation of offenders act. Home Office United Kingdom.

[17] Jordan, J & Horn, M (2007) *Still looking for a break*. Melbourne Citymission.

cases when she started her employment that she should disclose her criminal record. She saw this as part of building trust and honesty between her and her employer. Unfortunately, when she disclosed her criminal record when seeking or just after commencing a job, Melissa found that she was discriminated against because of her record.

An example of this was when she worked delivering milk. At the interview, Melissa was not asked about her criminal record and as a result she did not disclose it. After the first week of work however when she felt comfortable in her position she felt that she should disclose her record which was over 10 years old. After this disclosure Melissa was placed under closer scrutiny by her employer. Melissa felt pressured by this and was subsequently let go. This is just one example amongst many where Melissa lost her employment because of her criminal record.

3.3 Insurance

Another important issue is the common practice amongst insurers of denying insurance across a whole range of areas to those people who have a criminal conviction. For those attempting to reintegrate into the community after exiting prison, denial of car or house and contents insurance can hinder this reintegration and further exclude them from society.

There is a paucity of literature around this practice, however we do know that insurance is an essential resource which can act as a protective factor against the risks of financial hardship and economic marginalisation. The case study below demonstrates that lack of access to insurance is a real concern for those attempting to resettle into the community.

Case Study – Matt

Matt's last conviction was in August 2003. Post release, Matt had got his life back in order - he had a job, a new partner and had just moved into a new house. He and his partner wanted to get home and contents insurance. However, this was a difficult process, as most insurance agencies he contacted asked if either he or his partner had had a criminal conviction within the last five years. Matt was unsure of his rights regarding this issue. He had been out of prison for four years and eleven months, but was unsure whether the period of good behaviour counted from sentencing or the date of incarceration. Matt felt that he didn't want to take the chance of revealing his criminal record and phoned several more insurance companies until he found one that did not ask about criminal convictions. He felt that the insurance companies he contacted asked the question about criminal conviction in an arbitrary way. He also felt that revealing his criminal record over the phone to someone in a call centre breached his privacy and it was not explained how this information would be used or stored.

Although Matt found secure work, he didn't find it by applying for positions. Rather he found work through word-of-mouth via friends or family and in some cases he was employed by people who had been in a similar situation to him.

3.4 Indigenous Communities

Consideration must be given to the impact of recorded convictions policies on vulnerable groups in society, and in particular Indigenous communities. Indigenous men and women are over represented in prisons across Australia, although we note that the rate of incarceration is lower in Victoria (approximately 5.5%) than elsewhere[18]. Even at comparatively lower levels, over-representation is indicative of the disproportionate impact of poverty, disadvantage, social exclusion and discrimination in Indigenous communities. Access to 'protective factors' such as employment and insurance are crucial to breaking the cycle of poverty and yet, as described above, are often inhibited by criminal record checking and discrimination.

Additionally, when individuals with a criminal record wish to visit family or kin in prison, special permission must be granted by the prison. This represents an additional barrier for those visiting prison. These visits can already be extremely difficult for the indigenous community due to the remote location of prisons, expense of visiting and intergenerational trauma. Where appropriate, prison visits can be a crucial mechanism for supporting families to maintain relationships.[19] The disproportionate presence of criminal records in the indigenous community also impacts on the ability of families (and particularly children) to visit prison. A spent conviction scheme could be the basis of changing these policies at a local Corrections Victoria operational level.

3.5 Throughcare and Early Intervention

VACRO, in particular, is committed to the principle of throughcare. A throughcare model emphasises a continuum of care, with a need for coordination and planning of a range of interventions and supports directed to resettlement and integration. It involves multi-disciplinary, collaborative approaches to respond to the range of issues that offenders face throughout the criminal justice system, from the point of arrest, through the court system, through a period of incarceration and importantly into the community post release. In VACRO's experience, the benefits of the through-care model are undermined by current practices around recorded convictions, preventing people from moving on after a period of incarceration.

Early intervention has flow-on social and economic benefits for local communities and for wider society. These may be described as 'whole-of-community' benefits and require an investment to produce functioning, productive safe communities. An early intervention approach must include the removal of barriers to activities such as employment which contribute to maintaining a non-offending lifestyle. It requires that criminal justice system policies and practices acknowledge the effects of a criminal

[18] Department of Justice (2008) *Statistical Profile of the Victorian Prison System, 2002-03 to 2006-07*, Corrections Victoria. Melbourne, 2008.
[19] Tudball, N (2000) *Doing it Hard: A study of the needs of children and families of prisoners in Victoria*. Victorian Association for the Care and Resettlement of Offenders (VACRO)

conviction well beyond the period of the sentence and actively play a role in mitigating these effects.

Recommendation 1: The Bill should contain an object or purpose giving explicit consideration to the ways in which the rehabilitation and reintegration of offenders is affected by criminal record discrimination.

4. The legal landscape

Spent convictions legislation is not the only legal tool which has been used to encourage rehabilitation and reintegration of offenders into the community. The increasing use of criminal record information supports a broad analysis of the variety of ways in which Australian legislation impacts on the use of this information. In our view, it is important to understand whether the possibility of reintegration in the community and rehabilitation has any practical possibility of realisation, in light of all laws affecting disclosure of criminal record information.

4.1 Human rights as a starting point

We submit the Bill should be grounded in a human rights framework. Human rights - specifically the right to non discrimination and the right to privacy - are clearly engaged by the Bill.

We concur with the Human Rights Law Resource Centre submission to the Consultation Paper[20] that the Bill must comply with Australia's obligations under the human rights instruments it has enacted including the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* (***ICCPR***). Further, we note as it is anticipated the Bill will be enacted in Victoria, it must also comply with the *Charter of Human Rights and Responsibilities Act 2006* (***Charter***).

Our submission adopts the rights analysis put forward by the Human Rights Law Resource Centre.[21] We have briefly examined the right to non-discrimination and the right to privacy in the Australian context below.

4.2 Anti-discrimination legislation

Anti-discrimination legislation in Australia deal with criminal record information in very different ways.

At the Federal level, the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) and the *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth) a 'criminal record' is deemed to be an attribute under

[20] P 1, *Submission to the Standing Committee of Attorneys-General*, Human Rights Law Resource Centre, 21 January 2009

[21] *Submission to the Standing Committee of Attorneys-General,* Human Rights Law Resource Centre, 21 January 2009

which any distinction, exclusion or preference which nullifies or impairs 'equality of opportunity or treatment in employment or occupation', will establish discrimination.

Despite this protection, it is important to note that under federal anti discrimination legislation, where an employer discriminates against a person on the basis of an 'inherent requirement' of the position, this conduct will not amount to discrimination[22]. Further, even if discrimination is established, Commonwealth legislation does not make this conduct 'unlawful'. In responding to a finding of discrimination, the Human Rights and Equal Opportunity Commission (***the Commission***), is constrained to either attempting conciliation between the parties or preparing a report with recommendations to be tabled in parliament[23].

At a state level, discrimination on the basis of an irrelevant criminal record is prohibited in Tasmania[24] and the Northern Territory[25]. Both the ACT[26] and Western Australia[27] provide that it is unlawful to discriminate on the basis of spent convictions.

In Victoria, 'criminal record' is not currently a 'protected attribute' under the Victorian *Equal Opportunity Act 1995* (***EO Act***) and therefore it is effectively legal for employers to discriminate on the basis of a person's criminal record, even if this record is irrelevant. A recent review of the EO Act concluded that there should be an amendment to include 'irrelevant criminal record' as a protected attribute[28]. VACRO and the HPLC strongly support this recommendation. It is crucial that this recommendation is adopted and implemented as a matter of urgency.

Notwithstanding this recommendation and any future protection under the EO Act, the Bill in question must be viewed in light of current legislation rather than prospective legislative amendment. Victoria does *not* have legislation which prohibits discrimination on the basis of criminal record and Federal legislation provides insufficient protection where discrimination is established. Accordingly, the Bill must be amended to include protection for individuals against discrimination on the basis of irrelevant criminal record.

Recommendation 2: In light of the deficiencies in current anti-discrimination legislation in Victoria and Federally, the Bill should be amended to prohibit discrimination on the basis of irrelevant criminal record.

[22] S 3(1)(c), *Human Rights and Equal Opportunity Commission Act 1986* (Cth)
[23] The Commission refers to 2 matters in which discrimination on the basis of criminal record was established and where a report was provided to Federal Parliament, the discussion paper noted the recommendations were ignored in both cases as the findings were unenforceable, *Discrimination in Employment on the Basis of Criminal Record*, p 12
[24] *Anti-Discrimination Act 1998* (Tas)
[25] *Anti-Discrimination Act 1992* (Northern Territory)
[26] *Discrimination Act 1991* (ACT)
[27] *Spent Convictions Act 1998* (WA)
[28] P 104, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report*

4.3 Privacy Law

(i) The right to privacy

Aside from the question whether criminal records are governed by privacy law, privacy legislation is useful for its specific acknowledgement of the sensitivity or *privacy* of criminal record information. In addition to the human rights analysis undertaken by the Human Rights Law Resource Centre[29], it is worth considering the way in which the Bill engages the 'privacy right' referred to in the Victorian *Charter of Human Rights and Responsibilities Act 2006* (***the Charter***). The Charter provides in section 13:

A person has the right –

(a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with;[30]

Guidelines on the Charter released by the Victorian Department of Justice state that although privacy is difficult to define, it is 'bound up with conceptions of personal autonomy and human dignity. It encompasses the idea that individuals should have an area of autonomous development, interaction and liberty – a 'private sphere'.[31]

Criminal record information is sensitive personal information which clearly affects personal autonomy and human dignity. While acknowledging the need for certain employers to be aware of employees with convictions that are relevant to their position, it should also be noted that 'job applicants are generally not required to disclose personal information that is not relevant to the job, such as age, marital status, and health history. A criminal record is just another piece of such personal information'[32].

The General Comment on article 17 of the ICCPR, which is reflected in section 13 of the Charter, sets out that (*General Comment*):

- 'aribtary interference' may involve interference which is provided for by law and must be reasonable[33]
- 'public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society'[34]

[29] We adopt the human rights analysis and submissions of the Human Rights Law Resource Centre in their consultation submission.
[30] Section 13 of the Charter is based on article 17(1) of the ICCPR

[31] Department of Justice (2008), *Charter of Human Rights and Responsibilities – Guidelines for Legislation and Policy Officers in Victoria*, Department of Justice p. 83.
[32] Lam, H & Harcourt, M (2003) *The Use of Criminal Record in Employment Decisions: The Rights of Ex-offenders, Employers and the Public.* p 241
[33] Para 4, General Comment 16, *Toonen v Australia* (Communication No 488/1992)

- 'relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted'[35]

- 'The gathering and holding of personal information on computers…and other devices, whether by public authorities or private…bodies, must be regulated by law…States [must] ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it.'[36]

The requirements of 'reasonableness' and information 'in the interests of society' in the General Comment refer to scenarios in which an offender's criminal record is relevant. The risk of ongoing stigmatisation and the damage to reintegration and rehabilitation of offenders are two reasons why it is neither reasonable nor in the interests of society to permit general disclosure of criminal information without being regulated by 'relevance'. The Bill must therefore include reference to the notion of relevance and provide that disclosure is only permissible where it is relevant to an employment position or other purpose.

The Bill clearly engages and promotes the right to privacy insofar as it relates to offenders who have committed an 'eligible offence' and have waited for expiry of the qualifying period. The Bill does not, however, protect the right to privacy for those who fall outside its ambit against the detrimental use of their criminal record information.

(ii) Privacy legislation

As it stands, Australian privacy legislation is not an adequate vehicle to regulate the use or misuse of an individual's criminal record information (particularly when it is sourced from the internet or from print media)[37].

Currently, employers and goods and services providers are free to perform internet and library catalogue searches about an individual and find information about his or her convictions even if they are irrelevant, old or spent. The Office of the Victorian Privacy Commissioner has stated 'readily accessible, searchable online databases – both legitimate (media archives and court judgments) and questionable (eg CrimeNet) – increase the risk that a finding of guilt will forever stigmatise a person and put their rehabilitation and personal safety (including the safety of their family) at risk.'[38] The Federal Office the Privacy Commissioner also supports this position, noting that websites

[34] Para 7, General Comment 16, Office of the United Nations High Commissioner for Human Rights
[35] ibid Para 8
[36] ibid Para 10
[37] Leaving aside the issue of defamation
[38] Office of the Victorian Privacy Commissioner (2006) *Controlled disclosure of criminal record data*. p 4

such as CrimeNet 'change the lifecycles of information and may interfere with the implementation of spent convictions legislation'[39].

The *Information Privacy Act 2000* (Vic) classifies 'criminal records' as 'sensitive information' requiring special protection. This Act provides that such information may only be collected where certain circumstances exist, including consent of the individual in question[40]. Unfortunately, however, this Act covers Victorian government agencies, statutory bodies and local councils but does not extend as far as private companies and organisations.

The Commonwealth *Privacy Act 1988* also classifies criminal information as 'sensitive information' and principles governing collection of such information[41] mirror the Victorian legislation. While it is 'strongly arguable'[42] that businesses such as CrimeNet are governed by the *Privacy Act 1988* on the basis that it benefits from disclosure of personal information, this has yet to be tested.

Australian privacy legislation is important because it goes as far as identifying criminal record information as sensitive, private information. Nonetheless, it provides very little protection against the use or misuse of criminal record information (particularly when sourced from the internet or from print media) and therefore undermines an individual's the rights to non-discrimination and privacy.

The Bill provides an excellent opportunity to provide the broader protection that is currently lacking in Australia's legislative framework in respect of criminal record information. Unfortunately, as it is drafted, there are numerous circumstances in which offences other than 'eligible offences' may be disclosed or where disclosure may occur within the 'qualifying period'. In our view, the Bill must be amended to address these issues.

Recommendation 3: The Bill should be reconfigured to provide that criminal record information may be released only where relevant and that in such circumstances the disclosure be limited to offences relevant to the specific employment position.

4.4 Conclusion

The issue of criminal record information engages a number of human rights, particularly the right to non-discrimination and the right to privacy. Current Federal and State legislation do not provide a satisfactory response to

[39] Karen Curtis (2005) Speech – *Access and Privacy: Getting the Balance Right,* retrieved on 15/01/09 from http://svc004.wic001g.server-web.com/news/speeches/sp12_05.pdf,
[40] The individual has consented, collection is required by law, collection is necessary to prevent or lessen a serious and imminent threat to the life or health of any individual where that individual is unable to give consent, or where consent is required for the establishment, exercise or defence of a legal or equitable claim., Privacy Principle 10, *Information Privacy Act 2000* (Vic)
[41] Principle 10, National Privacy Principles, *Privacy Act 1988* (Cth)
[42] Fitzroy Legal Service (2005) *Criminal Records in Victoria – Reform Proposal* p.28

discrimination on the basis of a criminal record. Furthermore, although Australian privacy legislation treats criminal record information as sensitive and private, at this stage it has been unable to prevent such information (particularly when sourced online) from being misused.

Anti-discrimination, privacy and spent convictions legislation all affect the use of criminal record information in different ways but do not provide a complete framework for disclosure of this information. It is our submission that the Bill be expanded to provide this overarching framework.

5. Comments on the Draft Bill

5.1 Introduction

Consistent with our analysis of the legal landscape, we consider the Bill should be reconfigured to provide broad coverage in relation to the use and misuse of criminal record information and in particular to provide for disclosure *only* where relevant. We acknowledge that to reorganise the Bill in this way would involve considerable changes to the legislation however we feel such an approach would both deal with the specific needs of employers and adequately protect the rights of offenders.

Nevertheless, set out below are a number of recommendations in relation to a specific sections of the Bill as it stands now. In general, our recommendations consider the ways in which coverage and scope of the Bill can be strengthened and, in some cases, expanded. As noted above, these recommendations should be read in light of the deficiencies of current legislative approaches to criminal record discrimination.

5.2 Overview of the Bill

In broad terms, the Bill provides that following the expiration of a waiting period, a person may not be required to disclose certain criminal convictions. In these circumstances, an offence is regarded as 'spent'.

Central to the operation of the Bill is the definition of the types of offences which may become spent (***eligible offences***), the waiting period (***qualification period***) and the way in which spent offences are treated.

An eligible adult offence[43] is defined as an offence for which a sentence of imprisonment is not imposed, or where the sentence of imprisonment is for 12 months or less[44]. As a result of this definition, any offence for which a sentence of imprisonment in excess of 12 months has been imposed can not be spent *under any circumstances*.

[43] Note different provisions apply to juvenile offences, see part 1, s 3, *Spent Convictions Bill 2008*

[44] Part 1, S 3, *Spent Convictions Bill 2008*,

To be an 'eligible offence' capable of being disregarded or spent, a person must wait for the expiration of the qualification period of 10 years[45]. Juveniles must wait 5 years[46]. The Bill is silent on the disclosures of criminal record information before the qualification period has expired.

5.3 Purpose of scheme - wiping the slate clean

Principles of statutory interpretation dictate that when interpreting a provision of an Act, a construction which promotes the purpose or object underlying the Act is preferred to a construction which does not promote the purpose or object.[47] As an overarching theme and to ensure that the Bill is appropriately framed, it is important to consider its purpose.

As currently framed, the Bill does not have a stated purpose although it is prefaced with the following statement:

> *A Bill For: An Act to limit the effect of a person's conviction for certain offences if the person completes a period of crime-free behaviour, and for other purposes*

Spent conviction schemes in Tasmania[48], Northern Territory[49], Queensland[50] and Western Australia[51] currently provide that their purposes is to facilitate of rehabilitation while the New Zealand legislation refers to a 'clean slate scheme'[52]. Legislation in the Australian Capital Territory[53] and New South Wales[54] describes the purpose of their spent convictions legislation in similar terms to the statement in the Bill, that is, to limit the effect of conviction for certain offences following a crime free period.

Of these schemes, Justice Debra Mullins of the Supreme Court of Queensland wrote, 'For all jurisdictions in Australia (apart from Victoria and South Australia) there is legislative recognition of the benefit in fostering rehabilitation of offenders who are convicted of less serious offences by having the slate "wiped clean" for an offender after a prescribed number of years and no further offending…'[55] This reasoning is reflected in the final report of the Equal Opportunity Act (Vic) Review, which recommends that discrimination on the basis of irrelevant criminal record be made unlawful and which stated that 'the

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[45] S 7(1), *Spent Convictions Bill 2008*

[46] S 7(1), *Spent Convictions Bill 2008*

[47] S 15AA, *Acts Interpretation Act 1901* (Cth), s 35(a), *Interpretation of Legislation Act 1984* (Vic)

[48] Long title, Annulled Convictions Act 2003 (TAS)
[49] Long title, Criminal Records (Spent Convictions) Act (NT)
[50] Criminal Law (*Rehabilitation of Offenders)* Act 1986
[51] Long title, Spent Convictions Act 1988 (WA)
[52] Section 3(1), *Criminal Records (Clean Slate) Act 2004*, New Zealand
[53] Spent Convictions Act 2000 (ACT)
[54] S 3(1), Criminal Records Act 1991 (NSW)
[55] Justice Debra Mullins (2004) *Judicial Writing in an Electronic Age*. Supreme Court of Queensland, p 3 & 4

purpose of spent convictions schemes is to ensure that a convicted offender is not burdened with the stigma of a criminal conviction'[56].

We submit that a clear statement of purpose is required so that the Bill may be assessed against this purpose. A stated purpose would also provide guidance in cases of ambiguity. Consistent with spent conviction legislation in other jurisdictions we consider the purpose of the Bill to be rehabilitation and reintegration of offenders in the community.

Recommendation 4: The Bill should be amended to reflect that the specific purpose or object of the legislation is to facilitate rehabilitation and reintegration of offenders into the community.

5.4 Definition of a criminal record

As it is currently framed, the Bill defines a conviction as:

'a conviction, whether summary or on indictment, for an offence and includes a formal finding of guilt made by a court, or a finding by a court that a charge has been proved.'[57]

The Victoria Police 'Information release policy' similarly states that 'Victoria Police releases criminal history information on the basis of findings of guilt' however the policy also states that the police 'may also release details of matters currently under investigation or awaiting court hearing.'[58]

Under the Bill, findings of guilt or convictions will be regarded as a 'convictions' and may *not* be released at the end of a relevant qualifying period. The Bill is silent as to whether criminal investigations may be disclosed before the end of the qualifying period. As such, the Bill sets up a situation in which Victoria Police could lawfully continue to disclose information about current investigations. The Bill must make clear that current investigations must not be disclosed under any circumstances.

We also submit the Bill should specifically prevent 'findings of guilt' from being disclosed at all. In support of this proposition, we note that the *Sentencing Act 1991* (Vic) specifically provides that when deciding whether to record a conviction, a court must have regard to circumstances including (a) the nature of the offence, and (b) the character and past history of the offender and (c) *the impact of the recording of a conviction on the offender's economic or social well-being or on his or her employment prospects* [emphasis added][59] The

[56] Department of Justice (2008) *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report.* p. 102
[57] S 3, *Spent Convictions Bill 2008*

[58] Victoria Police, National Police Certificates – Information Release Policy, undated
[59] S 8(2), *Sentencing Act 1991* (Vic)

Sentencing Act further states that a finding of guilt without the recording of a conviction 'must not be taken to be a conviction for any purpose'[60].

Research conducted by the Fitzroy Legal Service (***FLS***) and Job Watch indicates that many people who have been through the criminal justice system believe findings of guilt without conviction will not appear on their criminal record[61]. Case studies referred to in FLS and Job Watch submissions to the Consultation Paper provide real examples of many individuals who misunderstood the effect of a non-conviction finding. These individuals were concerned about employment in the future, entered a guilty plea in the hope of avoiding a conviction and were shocked to discover the finding of guilt could still be disclosed to and considered by their employer[62]. These examples support our recommendation that the Bill define criminal record as a conviction, whether indictable or summary and that a further section be included which prevents the release of findings of guilt without conviction or of criminal investigations in all circumstances.

Recommendation 5: The Bill should be amended to provide that findings of guilt and criminal investigations may not be disclosed in any circumstances.

5.5 Waiting period

Given that the underlying purpose of spent conviction regimes is to ensure rehabilitation and reintegration of offenders into society, we submit that the qualification period for adults and juveniles should be reduced from ten to seven years and five to three years respectively[63].

In our view, it is important to recognise that people make mistakes and should not carry the stigma of a criminal record longer than is necessary - qualifying periods that are longer than seven years for adults and three years for juveniles may hamper reintegration into the community. For example, it is unsatisfactory that the certain convictions of an adolescent may continue to impact on his or her life and opportunities when he or she is nearly thirty years old. Indeed, the desistance framework described above supports our submission to lower qualifying periods and recognises the complexity and range of offences and offender behaviour as well as the need to emphasise rehabilitation rather than punishment. Recidivism research also supports this and indicates that a person's likelihood of reoffending decreases dramatically over time[64].

Recommendation 6: The qualification period for adults should be reduced from ten to seven years and for juveniles from five to three years for juveniles.

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[60] S 8(2), *Sentencing Act 1991* (Vic)
[61] Fitzroy Legal Service (2005) *Criminal Records in Victoria – Reform Proposal p. 30*
[62] ibid p. 28 & 29
[63] We support the position in New Zealand's spent convictions scheme where adults must have a 'clean slate' for seven years, New Zealand *Criminal Records (Clean Slate) Act 2004*
[64] Ross, S., Holland, S & Pointon, K (2007) *Who returns to prison? Patterns of recidivism among prisoners released from custody in Victoria in 2002-03*. Department of Justice Victoria. Payne, J (2007) *Recidivism in Australia*: *Findings and Future Research*. Research and Series No. 80 Australian Institute of Criminology Canberra.

5.6 Minor offences

The Bill provides that where a person is convicted of another offence, the first offence cannot be spent until the qualification period for the second offence has expired[65]. In effect, the second offence extends the time required to spend the first offence.

The Bill provides an exception to this situation: a second conviction will be disregarded where that conviction is for a 'minor offence.'[66] A 'minor offence' is defined in section 3 of the Bill as an offence where:

- the defendant is charged without penalty;
- the only penalty imposed on the defendant is a fine not exceeding $500; or
- the penalty exceeds $500 and the offence is prescribed by the regulations.

Our analysis of the way in which the Bill deals with 'minor offences' considers whether the $500 amount is an appropriate measure to determine whether an offence is minor; it also considers alternative definitions for 'minor offences'.

We submit the Bill should go further than its current proposed form to prevent minor offences from being disclosed on an individual's criminal record. This submission is supported by the fact that the Bill recognises some offences are 'minor' and should not adversely affect an offender.

Recommendation 7: The Bill should be amended to provide that minor offences may not be disclosed on a criminal record.

(i) Minor offences - the $500 limit

The Bill defines 'minor offences' by reference to a $500 limit. Offences over this amount will not be classified as 'minor' and such offences will therefore extend the qualification period under the Bill.

The Victorian penalty scale is the basis on which fines are calculated in this jurisdiction and therefore regulates the offences which are captured by the $500 limit.

The basis of the penalty scale is the penalty unit rate which rises each year according to the rate of inflation. This process ensures that all penalties increase at the same rate and preserves the relationship between different penalties for different offences. For example, a contravention of an Act may attract one penalty unit, five penalty units or even 240 penalty units. The penalty unit is defined each year and currently one penalty unit is $113.42[67].

[65] S 7(2), *Spent Convictions Bill 2008*
[66] Section 7, Part 2, *Spent Convictions Bill 2008*
[67] In the 2008-09 financial year as disclosed by Department of Treasury and Finance website, http://www.dtf.vic.gov.au/CA25713E0002EF43/pages/economic-and-financial-policy-taxation-and-revenue, accessed 21/01/09

Currently, the proposed $500 limit does not cover offences punishable by 5 penalty units under the Victorian penalty scale. An offence punishable by five penalty units, at the least, should be considered to be a minor offence[68]. For example, a young person between 10-18 years is prohibited from attending a film exhibition in a public place in the knowledge it has a classification of RC, x 18+ or R 18+. The punishment is five penalty units ($567.10). It is ludicrous that this would not constitute a 'minor offence' for the purposes of the Bill. Appendix 2 sets out a more detailed list of minor offences punishable by a fine of more than $500, which we argue should be included in the 'minor offences' definition in the Bill.

This argument is further supported by the fact that automatic indexing of penalties in Victoria may mean that by 2010 the proposed $500 limit will not protect a person convicted of an offence punishable by an amount as low as 4 penalty units (currently just below $500).

The Bill should adopt a standard similar to the Victorian sliding scale method in its minor offence provisions. We are of the view that it should also extend the cut-off for the exception to at least seven penalty units, to take account of the reality of minor offences. If not, the definition of a minor offence will become far too restricted and will undermine this important exception to the operation of the qualification period in the Bill.

Recommendation 8: The monetary limit used to define minor offences should be based on a penalty scale similar to the Victorian penalty scale.

Recommendation 9: Subject to any decision to reorganise the 'minor offence' exclusion around categories of offence, (see part 5.3.3), a minor offence should be defined as any conviction accruing a penalty of at least 7 penalty points.

(ii) Minor offences – a recommended approach

We submit that using categories of offences rather than merely their monetary limit to define a minor offence would also improve protections under the Bill.

By way of example, the Northern Territory Criminal Records (Spent Convictions) Act 1992 applies a broad definition of a minor offence. The good behaviour bond will not lapse unless the person is convicted of a crime punishable by imprisonment. The Queensland Criminal Law (Rehabilitation of Offenders) Act 1986[69] exempts 'simple or regulatory' offences from causing the good behaviour bond to lapse. Simple and regulatory offences are defined as an offence committed other than a crime or misdemeanour. The Tasmanian Annulled Convictions Act

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[68] On the basis that penalties range from 1 penalty unit to 3000 penalty units.

[69] *Section 11*

2003 defines a minor conviction as any conviction other than a conviction for imprisonment of more than 6 months.

Ideally, the definition of a minor offence would capture most summary offences. The Sentencing Act 1991 (Vic) defines a summary offence as an offence punishable by a penalty of 2 years of imprisonment or less or a fine of 240 penalty units or less[70]. A summary offence can be very minor including offences punishable by less than 1 penalty unit but also encompasses more serious offences such as common assault[71] and going equipped to steal[72] which can result in a term of imprisonment. In light of the breadth of summary offences it may be possible to limit the category of offences by reference to the sentence/fine imposed.

The term infringement is defined in the Infringements Act 2006 (Vic). The Infringements Act governs a broad cross section of fines from various government agencies including Vic Roads, the Department of Transport, Parks and Local Councils[73]. The term infringement is also used beyond the Infringements Act to define minor offences punishable by a fine.

We submit that the category 'Infringement Offence' should supplement a monetary limit to the definition of a minor offence. It is an appropriate category to be used in the definition of a minor offence. It covers all on the spot fines, most traffic infringements and other common low-level offences. Minor shop theft, indecent language and other common offences are now also defined as infringements[74]. They are punishable by on the spot fines.

In our view, it is important to have a composite definition incorporating a monetary limit and categories of offence to capture as many minor offences as possible.

Recommendation 10: The definition of 'minor offences' in the Bill should be amended to include summary offences (with any necessary limitations) and infringement offences.

5.7 Sex offences

The Consultation Paper seeks input as to whether sex offences should ever be permitted to be spent and whether the proposed mechanism for spending is appropriate. The Bill provides that a conviction for a sex offence[75] (as defined

[70] *Sections 112 & 109*
[71] *Summary Offences Act Section 23*
[72] *Crimes Act 1958* Section 91
[73] *The infringements Act 2006 Section 7* lists all offences governed by the Infringements Act

[74] Department of Justice FAQ regarding on the spot fines for theft http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Crime/JUSTICE+-+FAQs+-+Shop+Theft
[75] S 3, defined as a 'prescribed eligible offence', *Spent Convictions Bill 2008*

by regulations) may be spent if the Court makes an order that the conviction is spent[76].

We believe that sex offences should be capable of being spent. In our view, spent convictions in relation to sex offences should not be treated differently from other offences. Accordingly, sex offences should be incorporated into the general definition of 'eligible adult offence'. This change would render the application process in section 9 and schedule 1 unnecessary.

Clearly, community expectations and public opinion play a role in decisions about how to treat sex offences. However, in our view, the development of spent convictions scheme should not be wholly influenced by public attitudes surrounding sex offending. There is a range of other standards and principles which must be taken into account. As it stands, the Bill's treatment of sex offences is problematic.

First, it is widely thought that sex offenders are repeat offenders. Research shows that recidivism rates for sex offenders "are far lower than is popularly assumed. [Studies]…suggest that the overall rate of sexual reoffending is 13.4%, which is much lower than for most other types of offending, such as theft and violent crimes"[77].

Secondly, the Bill does not consider the complexities and range of sex offences.

Finally, while the Bill puts forward the option of applying to a court to spend a sex offence conviction, it gives no consideration to the issue of access to justice for ex sex offenders. Accessing justice can prove difficult for those who have tried to "move on" from their previous offences. It is even more difficult for those who do not have the knowledge or 'know how' about how to access court for this process. It is possible that the rehearing of an offence in this court-based spending model may also result in people feelings as though they have been repunished for an offence, and receiving, in effect, an extension of their punishment. If relevant offenders were required to apply to court under the Bill, assistance would need to be provided for ex-offenders to access legal representation and to the courts to ensure a past conviction is spent.

Exclusion of any category of offenders needs to be justified by evidence and practice. In this instance, we consider that sexual offences should not be treated differently from any other offence.

Recommendation 11: Sex offences should be subsumed within the Bill in the definition of 'eligible offences'.

[76] S 9, *Spent Convictions Bill 2008*
[77] Hanson RK, Bussière MT. Predicting relapse: a meta-analysis of sexual offender recidivism studies. *J Consult Clin Psychol* 1998; 66: 348-362 cited in Sullivan, Muellen & Pathe, 2005 MJA 2005; 183 (6): 318-320).

Recommendation 12: If recommendation 11 is not adopted, the Bill should provide that eligible sex offences may be spent on application. Victoria Legal Aid funding should be made available to assist offenders with applications under these provisions

5.8 Spent criminal record discrimination - protection under the Bill

The Bill provides in section 11(d) that the 'spent conviction' is not a proper ground for either hiring or dismissing a person. It is unclear why this particular provision has been included in a section more broadly titled 'Person not required to disclose spent conviction' and we recommend that these anti-discrimination provisions are set out in a separate section. In our view this section should provide that it is an offence to discriminate against someone on the basis of a spent conviction and that certain penalties apply.

Recommendation 13: Discrimination provisions in the Bill should be dealt with in a separate section and the Bill should provide that discrimination on the basis of a spent conviction is an offence.

5.9 Exclusions

The Bill provides exclusions to the spent conviction regime in section 14, division 2.

5.10 Good character exclusion

Section 11 of the Bill details the circumstances in which a person is not required to disclose a spent conviction and subsection 11(c)(ii) provides that when reference is made to a person's character or fitness, this does not require an applicant to provide details of any spent convictions.

However, despite the specific reference in section 11, sections 14(6)(e) & (f) (***exclusion clauses***) of the Bill provide that where a person has obtained or is seeking, registration or enrolment, or a licence or accreditation and the legislation governing that occupation, profession or position requires the person applying to be a 'fit and proper' person or to be a person of 'good character' – such a person is excluded from the protection afforded by section 11, in Division 1 of the Bill.

It appears that for the exclusion clauses to apply there are three levels of requirements:

- Firstly, that the relevant statute be in relation to a 'registration, enrolment, licence or accreditation';
- Secondly, that that registration, enrolment, licence or accreditation be in relation to an 'occupation, profession or position'; and
- Thirdly, that the 'occupation, profession or position' requires the person to be a 'fit and proper' person or of 'good character'.

None of these words are defined. There is ample case law dealing with the meaning of 'fit and proper' and of 'good character' in relation to various pieces of

legislation and this fact in itself highlights that the exclusion clauses are potentially too broad and not adequately defined.

In addition, there are over 70 pieces of legislation in Victoria which require a person to be 'fit and proper' and/or of 'good character':

- **"Fit and proper":** There are approximately 49 Victorian Acts and twelve Victorian Regulations that contain a requirement for a person to be a 'fit and proper' person.
- **"Good character:** There are approximately fourteen Victorian Acts and two Victorian Regulations that contain a requirement for a person to be of 'good character'.

A random sample of 19 of the 61 pieces of legislation referring to 'fit and proper' (those highlighted in bold in Appendix One) found that the majority of them would fall within the categories listed in the exclusions clauses. A random sample of nine of the 9 pieces of legislation referring to 'good character' (those highlighted in bold in Appendix Two) found that the majority of them would fall within the categories listed in the exemption clauses.

Although the 'good character' exclusions in the Bill correctly recognise that some convictions will be *relevant* to some jobs, the provisions are currently too ambiguous and broad and do not relate to the requirements of specific positions or professions. We refer to our recommendation above that the Bill be reconfigured to provide for the release of criminal record information only where relevant to a specific employment position.

6. Conclusion

VACRO and the HPLC welcome the introduction of a uniform spent convictions scheme in Australia. We are particularly pleased this regime will be introduced in Victoria, which until now has had no legislated spent convictions scheme. Nevertheless, it is important that we get this scheme right, given the impact that it has on the lives and opportunities of ex-offenders and the relevance to employers of certain convictions to certain occupations.

The Office of the Victorian Privacy Commissioner has said that 'holistic' legislation dealing with criminal record disclosure is now required and that such legislation should embody a shift from 'selectively forgetting' criminal information to 'precise, relevant remembering'[78]. The current Bill provides that only certain 'eligible offences' may be spent and this amounts to selectively forgetting only certain criminal information and permitting the disclosure of other material that does not come within the ambit of the draft legislation. The Bill fails to address the nature and circumstances in which disclosure may be made prior to expiry of the qualification period and fails to ensure that any disclosure is limited to offences that are relevant.

[78] P 15, Office of the Victorian Privacy Commissioner, (June 2006) *Controlled disclosure of criminal record data.* Office of the Victorian Privacy Commissioner

Our submission demonstrates the need for whole-of-issue legislation that considers all circumstances in which disclosure of criminal record information may occur. We recommend that the Bill be reworked to provide for the release of criminal record information only where relevant and that any disclosure be limited to offences relevant to the specific employment position. Our specific recommendations in relation to the Bill, as drafted, seek to strengthen and expand the coverage of the Bill in order to achieve the purposes of spent convictions legislation, that is, the rehabilitation and reintegration of offenders into the community.

Appendix 1

'fit and proper'

Victorian Acts

Accident Compensation (Further Amendment) Act 1996 - No. 60 of 1996

Accident Compensation Act 1985 - No. 10191 of 1985

Adoption Act 1984 - No. 10150 of 1984

Alcoholics and Drug-dependent Persons Act 1968 - No. 772 of 1968

Building Act 1993 - No. 126 of 1993

Building Amendment Act 2008 - No. 36 of 2008

Children's Legislation Amendment Action 2008 - No. 22 of 2008

Children's Services Act 1996 - No. 53 of 1996

Children, Youth and Families Act 2005 - No. 96 of 2005

Corrections Act 1986 - No. 117 of 1986

Domestic (Feral and Nuisance) Animals Act 1994 - No. 81 of 1994

Drugs, Poisons and Controlled Substances Act 1981 - No. 9719 of 1981

Education and Training Reform Act 2006 - No. 24 of 2006

Environment Protection Act 1970 - No. 8056 of 1970

Estate Agents Act 1980 - No. 9428 of 1980

Firearms (Further Amendment) Act 2005 - No. 78 of 2005

Firearms Act 1996 - No. 66 of 1996

Fisheries act 1995 - No. 92 of 1995

Fuel Prices Regulations Act 1981 - No, 9702 of 1981

Fundraising Appeals Act 1998 - No. 78 of 1998

Gambling Regulation Act 2003 - No. 114 of 2003

Health Professions Registration Act 2005 - No. 97 of 2005

Health Services Act 1988 - No. 49 of 1988

Legal Profession Act 2004 - No. 99 of 2004

Legal Profession Amendment (Education) Act 2007 - No. 46 of 2007

Legal Profession Amendment Act 2007 - No. 12 of 2007

Limbless Soldiers Trust Act 1942 - No. 4885 of 1942

Local Government Act 1989 - No. 11 of 1989

Local Government Amendment (Councillor Conduct and Other Matters) Act 2008 - No. 67 of 2008

Meat Industry Act 1993 - No. 40 of 1993

Mineral Resources (Sustainable Development) Act 1990 - No. 92 of 1990

Mines Act 1958 - No. 6320 of 1958

Motor Car Traders Act 1986 - No. 104 of 1986

Motor Car Traders Amendment Act 2008 - No. 4 of 2008

Non-Emergency Patient Transport Act 2003 - No. 69 of 2003

Police Regulation Act 1958 - No. 6338 of 1958

Prevention of Cruelty to Animals Act 1986 - No. 46 of 1986

Private Security Act 2004 - No. 33 of 2004

Racing Act 1958 - No. 6353 of 1958

Radiation Act 2005 - No. 62 of 2005

Road Safety Act 1986 - No. 127 of 1986

Securities Industry Act 1975 - No. 8788 of 1975

Trade Measurement Act 1995 - No. 59 of 1995

Trade Unions Act 1958 - No. 6397 of 1958

Transport Act 1983 - No. 9921 of 1983

Travel Agents Act 1986 - No. 52 of 1986

Unlawful Assemblies and Processions Act 1958 - No. 6406 of 1958

Utility Meters (Metrological Controls) Act 2002 - No. 48 of 2002

Wildlife Act 1975 - No. 8699 of 1975

Victorian Regulations

Adoption (Intercountry Fees) Regulations 2002 - No. 129 of 2002

Adoption Regulations 2008 - No. 10 of 2008

Children's Services Regulations 1998 - No. 59 of 1998

Country Fire Authority Regulations 2004 - No. 9 of 2004

Drugs, Poisons and Controlled Substances Regulations 2006 - No. 57 of 2006

Environment Protection (Prescribed Waste) (Amendment) Regulations 2000 - No. 92 of 2000

Environment Protection (Prescribed Waste) Regulations 1998 - No. 95 of 1998

Legal Practice (Admission) (Amendment) Rules 2005 - No. 149 of 2005

Legal Practice (Admission) Rules 1999 - No. 144 of 1999

Legal Profession (Admission) Rules 2008 - No. 15 of 2008

Road Safety (Vehicles) Regulations 1999 - No. 29 of 1999

Supreme Court (General) Civil Procedure) Rules 2005 - No. 148 of 2005

Appendix 2

'good character'

Victorian Acts

Architects Act 1991 - No. 13 of 1991

Building Act 1993 - No. 126 of 1993

Camperdown (Public Park Land) Act 1973 - No. 8457 of 1973

Children, Youth and Families Act 2005 - No. 96 of 2005

Crimes Act 1958 - No. 6231 of 1958

Estate Agents Act 1980 - No. 9428 of 1980

Evidence Act 2008 - No. 47 of 2008

Health Professions Registration Act 2005 - No. 97 of 2005

Local Government Act 1989 - No. 11 of 1989

Local Government Amendment (Councillor Conduct and Other Matters) Act 2008 - No. 67 of 2008

Mines Act 1958 - No. 6320 of 1958

Police Regulation Act 1958 - No. 6338 of 1958

Private Agents Act 1966 - No. 7494 of 1966

Securities Industry Act 1975 - No 8788 of 1975

Victorian Regulations

Education and Training Reform Regulations 2007 - No. 61 of 2007

Police Regulations 2003 - No. 6 of 2003

Appendix 3

Act and offence	Penalty
Transport Act - Transport (Infringements) Regulations 1999 Graduated penalties for second and subsequent offences. Graduated penalties would be imposed even if the prior offences under the Transport Act has occurred prior to the commencement of the Spent Convictions Scheme good behaviour bond.	The penalties range from 1.47 penalty units (currently $167) to 9.78 ($1,109)
Fences Act 1968 Must not destroy another person's vermin proof fence	5 Penalty units ($567.10)
Classification (Enforcement) Act 1995 A parent or guardian of a minor must not permit that minor to view a film on exhibit which has a classification of X 18+ A minor must not attend a film exhibition in a public place in the knowledge that it has a classification of X 18+	20 Penalty units ($2,268.40) 5 Penalty units
Liquor Control Reform Act 1998 Failure by owner or mortgagee of licensed premises to notify change of address	5 Penalty units
Electoral Act 2002 Distributing electoral material within 400 metres of the entrance of a voting centre other than a registered how to vote card	60 penalty units or 6 months imprisonment
Electoral Act 2002 Inappropriate conduct near voting centres	5 Penalty units
Gambling Regulation Act 2003 Participating in an unauthorised lottery	5 Penalty units
Environment Protection Act 1970 Owning a noisy vehicle	5 Penalty units