

LIV Submission

Introduction of Spent Conviction Legislation in Victoria

To: The Hon. Martin Pakula, Attorney General

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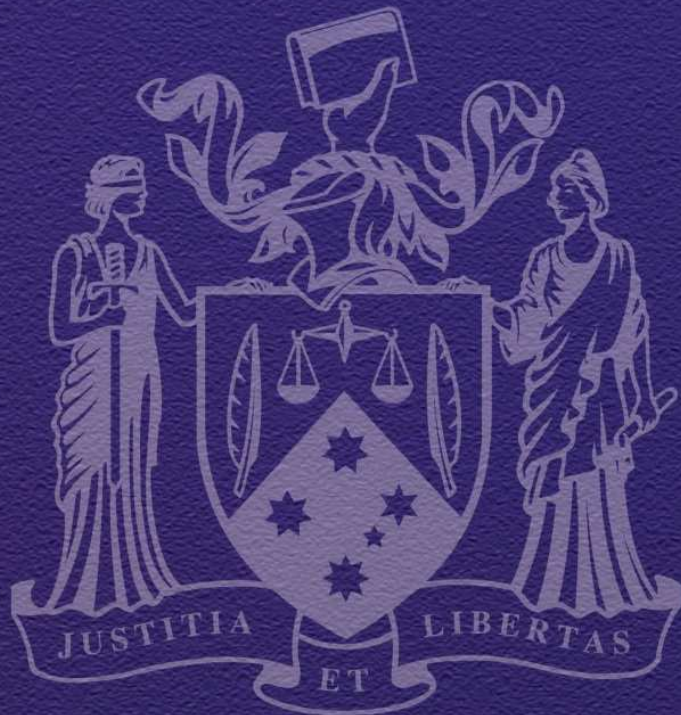


TABLE OF CONTENTS

Introduction.....	1
Spent Convictions Legislation.....	1
SCAG National Uniform Scheme – History.....	3
Comparative Analysis: Commonwealth, States and Territories	4
Recommendation 1:.....	6
Definition of conviction	6
Recommendation 2:.....	7
Recommendation 3:.....	9
Convictions capable of being spent	10
Recommendation 4:.....	11
Waiting period.....	11
Recommendation 5:.....	12
Means by which convictions become spent.....	12
Recommendation 6:.....	13
Commencement of time period.....	13
Recommendation 7:.....	13
Cross jurisdictional offending	13
Recommendation 8:.....	15
Consequence of conviction becoming spent	15
Recommendation 9:.....	16
Consequences of disclosing spent convictions	16
Recommendation 10:.....	17
Recommendation 11:.....	18
Recommendation 12:.....	20
Equal Opportunity Act	20
Recommendation 13:.....	20
Charter of Human Rights.....	21
Conclusion.....	21

Introduction

The Law Institute of Victoria (LIV) is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 19,000 members. This submission has been prepared by members of the LIV Criminal Law Section, which is comprised of over 2,500 lawyers practising in Criminal Law.

Our members have a long history of contributing to, shaping and developing effective legislation in various areas of the criminal justice system, and have undertaken extensive past advocacy relating to the introduction of a spent conviction scheme in Victoria and across all jurisdictions.

The LIV Criminal Law Section initiated a working group made up of representatives from various stakeholders, including Fitzroy Legal Service, Woor Dungin Inc, Human Rights Law Centre and the Federation of Community Legal Centres.

We acknowledge the efforts and contribution made by members of the working group:

- Meghan Fitzgerald, Fitzroy Legal Service
- Dr Bronwyn Naylor, Monash University
- Darryl Annett (LIV Criminal Law Section Executive Committee)
- Ann Valos (LIV Criminal Law Section Executive Committee)
- Bill Doogue (LIV Criminal Law Section General Committee)
- Sue Macgregor (LIV Criminal Law Section General Committee)
- Annamiek Van Loon (LIV Legal Policy Intern)

Members of the working group met for several roundtable discussions between October 2014 and April 2015 to discuss a number of issues outlined in this submission.

We also consulted with Victoria Police Legal Services during the course of this submission process.

Our submission encompasses 13 recommendations supporting the development of legislation allowing for criminal record information to become spent, delivering a balance between community safety and rehabilitation. We have included case studies taken from records of Fitzroy Legal Service and LIV member firms which illustrate some of the issues facing those who have sought employment unsuccessfully due to a conviction (or non-conviction) which might otherwise be spent.

Spent Convictions Legislation

Currently all Australian states and territories as well as the Commonwealth have spent convictions legislation in place. Victoria is the only jurisdiction without a legislative scheme.

A spent convictions scheme limits the disclosure and use of older, less-serious and/or irrelevant convictions and findings of guilt by mandating when a conviction becomes “spent”. A spent conviction no longer appears as part of any lawful disclosure by police of a person's criminal history and a person is not required to disclose convictions that are spent. The purpose of a spent convictions scheme is to ensure that a convicted offender is not overly burdened with the stigma of a criminal record.

It is imperative that Victoria implements spent convictions legislation. Such a move would not only prevent discrimination but clarify an area of considerable public confusion. Additionally, it would remove obstacles which prevent some former offenders from pursuing and gaining employment and participating in society. Spent conviction schemes afford people the chance to move on from a criminal conviction after a suitable period identified by Parliament.

The LIV submits that a lack of formality and legislative structure has led to inconsistent and confusing outcomes. A spent convictions legislative scheme would be a more appropriate way of consolidating when, and under what terms, a conviction is considered spent or when a conviction/non-conviction should be disclosed. Enacting such legislation to reflect an enforceable obligation in terms such as these would align Victoria with the Commonwealth and all other states and territories, as well as clarify the appropriate approach to balancing risk management and equal opportunity considerations.

Victoria Police disclosure of a person's convictions currently includes where a court has not recorded a conviction - disclosing findings of guilt where no conviction was recorded and outcomes where a person was placed on a good behaviour bond following a finding of guilt.¹ This frustrates and undermines the intentions of Parliament and the judiciary in providing for findings of guilt without conviction. For example, s 8(1)(c) of the *Sentencing Act 1991* (Vic) requires courts to have regard to ‘the impact of the recording of a conviction on the offender’s economic or social wellbeing or on his or her employment prospects’ when deciding whether or not to record a conviction. If a court exercises this discretion in favour of an offender by not recording a conviction, it is essentially futile as it will nonetheless still be disclosed by Victoria Police as part of the person’s criminal record.

Under its Release Policy, Victoria Police releases criminal history information for up to ten years for adults and five years for children since they were last found guilty of an offence, subject to exceptions. It is after these periods that the conviction, and non-conviction, becomes administratively “spent”.

The information remains in Victoria Police’s records and may be obtained by compulsive processes. Furthermore, individuals may still have an obligation to disclose such information, e.g. when asked by prospective employers whether they have a criminal history.

In most cases, after the ten- or five-year period, the information is no longer released. However, Victoria Police exercise discretion, and are not confined to a set of rules or laws that

¹ Victoria Police Information Release Policy http://www.police.vic.gov.au/retrievemedias.asp?Media_ID=38447

promote consistency and fairness. For example, the police may restrict the release of a record for the purposes of employment, voluntary work or occupational licensing/registration. They also may take into account the age of the record and the purpose for which the information is being released. If the waiting period has lapsed and there have been no further convictions, the police, in most instances, will advise that there are no disclosable court outcomes.

Victoria Police may also release the record where:

- the waiting period has elapsed but the initial conviction was a term of imprisonment of more than 30 months, and the offence was of a serious, violent or sexual nature;
- the check is for employment involving children, elderly or disabled persons and it is in the interests of crime prevention or public safety.

The LIV is particularly concerned that findings of guilt without conviction are also released, as well as orders for good behavior bonds. The police can also exercise their discretion to determine whether to release recent charges or matters still being investigated. The highly discretionary nature of this policy is concerning given the widespread use of records in recruitment processes and the prejudicial way in which records may be used by prospective employers.

Legislation will ensure the rules surrounding the nature of release of this type of information is clearly defined, as well as protect persons from being discriminated against on the basis of old, or irrelevant, offending. A legislative scheme will bring Victoria in line with the rest of the States, upholding the intentions of Parliament and the Courts to rehabilitate offenders, as well as define and treat “non-convictions” in a more appropriate and simplified way.

SCAG National Uniform Scheme – History

Since 2004, the issue of spent convictions has been considered by the Standing Committee of Attorneys-General (SCAG)² for the purpose of developing a national, uniform model. Little progress has been made on this since 2009 and Victoria is now the only State which does not have legislation relating to spent convictions.

SCAG attempted to develop a uniform scheme that may be adopted by all States and Territories. The Department of Justice (Vic) released a Discussion Paper and invited feedback from stakeholders on the proposed recommendations. The LIV issued a submission to this paper, titled [Submission to the Department of Justice, Consultation on Proposed Model for Uniform Spent Conviction Scheme \(2004\)](#).

The LIV submits that a nationally uniform scheme would promote consistency across all jurisdictions, on nationally coordinated systems such as Working with Children Checks and

² Now known as the Standing Council on Law and Justice (SCLJ). This council replaced the Standing Committee of Attorneys-General (SCAG) in 2011.

Commonwealth related offences. At present, the scope of spent conviction schemes varies across each Australian jurisdiction. There are various discrepancies between the legislative schemes resulting in inconsistencies. For example, a conviction for a particular offence may be eligible to become spent in one jurisdiction, whereas the same conviction in a neighboring jurisdiction would be ineligible for the scheme.

The LIV submits that it would be prudent to enact a Victorian spent convictions scheme until a Commonwealth uniform scheme is developed.

Comparative Analysis: Commonwealth, States and Territories

Spent convictions legislation was first introduced in Western Australia in 1986. All states and territories, except Victoria, and the Commonwealth, have since enacted spent convictions legislation. The relevant Acts are:

- *Crimes Act 1914* (Cth)
- *Criminal Records Act 1991* (NSW)
- *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld)
- *Spent Convictions Act 2000* (ACT)
- *Criminal Records (Spent Convictions) Act 1992* (NT)
- *Spent Convictions Act 1988* (WA)
- *Annulled Convictions Act 2003* (Tas)
- *Spent Convictions Act 2009* (SA)

The Acts:

- provide for when a conviction becomes spent;
- contain offence provisions prohibiting the unlawful disclosure of a person's spent record; and
- prohibit the taking into account of a person's spent conviction(s) when assessing their character.

Criminal History

LIV members are frequently contacted by the public with concerns and confusion on their convictions and non-convictions status, and the process for releasing criminal record information held by Victoria Police. Currently the Victoria Police Information Policy governs what information is released as part of a person's criminal history in Victoria.

The Victoria Police Annual Report (2013-2014) reported 481,945 criminal history checks in the 2013-2014 year. The mere volume of checks indicates that a legislative, rather than policy, approach is necessary.

The LIV submits that the introduction of legislation in Victoria will prevent discrimination on the basis of criminal records, particularly in employment where record checks are often a routine part of the recruitment process. With an increased reliance on criminal record vetting comes an increased risk of discrimination on the basis of released information. LIV members noted that dated or irrelevant information is disclosed during the recruitment process, causing both inconvenience and discrimination. The potential long-term exclusionary impact a criminal record check can have is the same for minor and serious offences.

Further, the LIV submits that a criminal record does not always reflect, and potentially undermines, processes of rehabilitation, reintegration and personal change since the offending. The '[u]se of information about an old minor criminal conviction, which in itself is not a reliable indicator of future behaviour, can seriously disadvantage people in getting on with their lives, obtaining employment or a promotion, applying for insurance, credit or occupational licence, or seeking registration and membership of organisations'.³

LIV members report that indigenous people have a lower participation rate in employment, yet the incarceration rate is much higher, compared to non-indigenous people. Indigenous people are increasingly disadvantaged by criminal history checks leading to lack of access to employment, including work experience and voluntary placements, as well additional barriers, such as registering as a kinship/foster carer.⁴

By limiting the effects of conviction(s), the 'rehabilitation' aim of sentencing is upheld as the relevance of a criminal conviction diminishes over time. Whilst convictions and sentences are imposed in public, they become part of one's private life as time goes on, particularly when there has been no further offending.

Not everyone who has a criminal record is a serious offender. Many people have less serious charges incurred in a variety of circumstances. On occasion, charges may relate to behaviour that might have occurred during a momentary lapse of judgement, a period of difficulty, mental health issues, or during a phase of a person's life that they may have moved on from by the time the charges are heard by the Court. Any initial punishment imposed for a proven offence is right and just, but it should not prevent an offender from rehabilitating, reintegrating and reengaging with society. Our members report that for many people, a 'criminal record' has proven to be the most significant penalty for their offending.

³ Bronwyn Naylor, *Do not pass go, the impact of criminal record checks on employment in Australia* Aug (2005) *AltLJ* 30.4, 74

⁴ Comments made by members of *Woor-Dungin Inc* <www.woor-dungin.com.au> (April 2015)

Case Study: Jeremy

Jeremy was eighteen years old when he was found guilty of stealing a motor vehicle, driving on a probationary licence with a positive blood alcohol content, and resisting police arrest. He was found guilty of the offences on his own admission of guilt. Jeremy hoped that his guilty plea would sway the Court in not imposing a conviction. The sentencing Magistrate commented that the offences were a stupid mistake, completely out of character, and influenced by extraneous circumstances. Jeremy was fined, ordered to undertake community work, had his licence suspended for a period, and did not receive a conviction.

Jeremy was devastated to discover that the non-conviction appeared on a police record check when he applied to be a volunteer with St John's Ambulance Australia. He was shocked that although being told that the police check was necessary to screen for violent or sexual offences, the findings of guilt still appeared. Jeremy did not feel that the charges were relevant to the Ambulance service, especially as no conviction had been recorded.

After Jeremy completes his tertiary studies he would like to apply to be a Paramedic with the Melbourne Metropolitan Ambulance Service. However, he holds concerns that these offences may again be disclosed and bar his application.

Definition of conviction

In all jurisdictions, the definition of 'conviction' appears to encompass all convictions; however, the language differs between the Acts. Western Australia⁵ and Northern Territory⁶ use the plain language definition of 'any conviction'. Queensland's definition is 'conviction by or before any Court'.⁷ All other Acts (Commonwealth,⁸ New South Wales,⁹ Australian Capital Territory,¹⁰ Tasmania¹¹ and South Australia¹²) define it as a conviction, whether on summary or on indictment. Despite the differences in language, all the Acts encompass all convictions in all Courts.

The Commonwealth¹³ and Tasmania¹⁴ Acts include 'finding[s] of guilt' without conviction in their definitions. In Western Australia, charges disposed of without conviction are still convictions.¹⁵ In the Northern Territory, convictions include findings where the offence is proven and any order is recorded without proceeding to conviction.¹⁶ In New South Wales, a finding of guilt or whether the offence is proven, without proceeding to conviction, is included in

⁵ *Spent Convictions Act 1988* (WA) s 3(1).

⁶ *Criminal Records (Spent Convictions) Act 1992* (NT) s 3(1).

⁷ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(1).

⁸ *Crimes Act 1914* (Cth) s 85ZM(1)(a).

⁹ *Criminal Records Act 1991* (NSW) s 4(1).

¹⁰ *Spent Convictions Act 2000* (ACT) s 6(A).

¹¹ *Annulled Convictions Act 2003* (Tas) s 3(1).

¹² *Spent Convictions Act 2009* (SA) s 3(1).

¹³ *Crimes Act 1914* (Cth) s 85ZM(1)(b).

¹⁴ *Annulled Convictions Act 2003* (Tas) s 3(2).

¹⁵ *Spent Convictions Act 1988* (WA) s 12(b)(ii).

¹⁶ *Criminal Records (Spent Convictions) Act 1992* (NT) s 3(1).

the definition of conviction¹⁷ however it is immediately spent upon the finding being made.¹⁸ Similarly in the Australian Capital Territory, a proven charge that is disposed of without conviction is still a conviction but is spent immediately after dismissal.¹⁹

The Commonwealth Act notes that, whilst someone may be found not guilty, the matter may be taken into account in the sentencing for another offence.²⁰

The New South Wales legislation includes in its definition orders that a person be of good behaviour, and any Order made by the Children's Court.²¹

Recommendation 1:

The LIV recommends that the definition of conviction encompasses only recorded convictions, aligning with all Australian jurisdictions.

Non-Convictions

The inconsistent practice of disclosure of criminal records in Victoria has created a significant level of misunderstanding within the general public regarding the effects of non-conviction sentences. This misunderstanding is felt most by those who receive non-conviction sentences and subsequently believe that no record will appear on their police record check.²²

Section 76 of the *Sentencing Act 1991* (Vic) (Victorian Sentencing Act) provides the Courts with the ability to dismiss a charge without recording a conviction, upon being satisfied of a person's guilt in relation to an offence.

In deciding whether or not to record a conviction, under section 8(1) of the Victorian Sentencing Act, the court must consider:

- the nature of the offence;
- the character and past history of the offender; and
- the impact of a conviction on the offender's economic or social well-being or on their employment prospects.

¹⁷ *Criminal Records Act 1991* (NSW) s 5(a).

¹⁸ *Ibid* s 8(2).

¹⁹ *Spent Convictions Act 2000* (ACT) s 12(2)(a).

²⁰ *Crimes Act 1914* (Cth) s 85ZM(1)(c).

²¹ *Criminal Records Act 1991* (NSW) ss 5(b) & (c).

²² Fitzroy Legal Service Submission to the Criminal Law Policy Unit, Department of Justice Draft Model Spent Convictions Bill – Consultation Paper (2009) http://www.fitzroy-legal.org.au/cb_pages/images/Submission%20Spent%20Convictions%202009.pdf

Section 8(2) of the Act provides that a “finding of guilt without the recording of a conviction must not be taken as a conviction for any purpose”. Interpreting these provisions together, it is clear that the legislation requires the court to balance individual and community interests taking into account relevant considerations, implying that non-convictions are not convictions and should not form part of any person’s record.

When a court decides not to impose a conviction, the affected individual will often think that the offence will consequently not appear on a criminal record check.

The *Crimes (Sentencing Procedure) Act 1991* (NSW) allows for a finding of guilt without a record of conviction. In these cases, the court may make one of the following *three* Orders under Section 10 of that Act²³:

- Directing that the charge against the person be dismissed;²⁴
- Discharging the person on the condition that they enter into a good behaviour bond not exceeding two years; or²⁵
- Discharging the person on the condition that they enter into an agreement to participate in an intervention program and to comply with any intervention plan arising out of the program.²⁶

The orders listed above provide the NSW Criminal Court with alternatives to recording a conviction, including the option to dismiss the finding of guilt outright.

Section 10 of the NSW Act allows the Court to dismiss the charge and not record a conviction; however, the conviction will remain temporarily on a person’s record for the duration the conditions set upon their sentence, such as the bond or program.

The Victorian Sentencing Act does not stipulate the status of a defendant during the period of adjournment for a bond, or undertaking, where a person is found guilty without a record of conviction. At the end of the adjournment period, there is a court hearing (even though the defendant is not required to attend) and the Court may issue a finding, where dismissal without a conviction is entered.

Similar to the New South Wales and Australian Capital Territory legislation, the Northern Territory Act also immediately spends convictions that are not recorded where the person is

²³ *Crimes (Sentencing Procedure) Act 1991* (NSW).

²⁴ *Criminal Records Act 1991* (NSW) s 10(1)(a).

²⁵ *Ibid* s 10(1)(b).

²⁶ *Ibid* s 10(1)(c).

discharged.²⁷ The Northern Territory Act also spends convictions where the offence is proved, no conviction is recorded and certain conditions are completed by the offender.²⁸

The LIV strongly submits that non-convictions should not to be released on a criminal record check, as adopted in other jurisdictions including New South Wales, Queensland, South Australia and the Northern Territory.

Case Study: Van

Van was charged with a minor dishonesty offence when he was 21 years old. At the time of the offence, his parents were separating, his older brother had become addicted to drugs and Van carried the responsibility of financially supporting his mother and siblings. At the hearing, Van followed his lawyer's advice and pleaded guilty in the hope of receiving a non-conviction disposition. He received a fine without conviction.

Several years later, Van was studying to be a social worker and sought placements for his practicum component. He was required to undergo police checks on two occasions. While he understood the need for the checks to screen people with serious criminal records for child abuse and sexual offences, he was shocked to find that his offence was also revealed under the check. Van felt that his 'record' was trivial, irrelevant to his placement and would not appear because he had not received a conviction. On the first occasion, the record delayed his placement for two months as his suitability was questioned. Van is concerned that if the 'record' is revealed in the future, it will create employment problems for him: he will be given less of a fair go by prospective employers who will think 'once a dog always a dog'. The 'record' will always hang over him.

Recommendation 2:

The LIV recommends that a finding of guilt for offences proven and dismissed be immediately spent aligning with the NSW and ACT legislation.

The LIV further recommends that an offence ought to become spent immediately if the court dismisses the matter without recording a conviction, or at the end of any bond, undertaking, adjournment, or any other condition imposed by the Court, if a person is released without a conviction.

²⁷ *Criminal Records (Spent Convictions) Act 1992* (NT) s 7(1).

²⁸ *Ibid* s 7(4).

Convictions capable of being spent

Jurisdictions with spent convictions legislation detail which sentences may be spent, and when.

The Commonwealth²⁹ and Queensland³⁰ Acts allow sentences with no imprisonment or 30 months or less of imprisonment to be spent. The South Australian scheme allows sentences with no imprisonment or a 12 month sentence or less to be spent.³¹ In New South Wales,³² Australian Capital Territory,³³ Northern Territory³⁴ and Tasmania,³⁵ sentences for six months of imprisonment or less can become spent.

Under the Commonwealth scheme, pardons for reasons other than where a person is wrongly convicted are also capable of becoming spent.³⁶

The Commonwealth, New South Wales, Australian Capital Territory, Northern Territory, South Australia and Tasmanian Acts contain exceptions related to the expiry of the prescribed number of months of sentence. In the Commonwealth, a conviction against a body corporate is not capable of being spent.³⁷ In New South Wales,³⁸ Australian Capital Territory,³⁹ Northern Territory,⁴⁰ South Australia,⁴¹ these exceptions include sexual offences, offences by bodies corporate and prescribed convictions. In Tasmania, the exceptions are sexual offences and prescribed convictions.⁴²

All sentences with no imprisonment are capable of being spent; however it is only in the Commonwealth,⁴³ Queensland⁴⁴ and South Australia⁴⁵ Acts that this is made explicit.

In all other jurisdictions, this is implied. The New South Wales, Australian Capital Territory, Northern Territory and Tasmania Acts allow sentences of six months or less to become spent. Any sentence with no imprisonment is interpreted as one that is of six months imprisonment or less, meaning it can be spent.

²⁹ *Crimes Act 1914* (Cth) s 85ZL.

³⁰ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(2)(b).

³¹ *Spent Convictions Act 2009* (SA) s 3(1).

³² *Criminal Records Act 1991* (NSW) s 7(1)(a).

³³ *Spent Convictions Act 2000* (ACT) s 11(1)(2)(a).

³⁴ *Criminal Records (Spent Convictions) Act 1992* (NT) s 6(1)

³⁵ *Annulled Convictions Act 2003* (Tas) s 6(1).

³⁶ *Crimes Act 1914* (Cth) s 85ZM(2)(a).

³⁷ *Crimes Act 1914* (Cth) s 85ZM(2).

³⁸ *Criminal Records Act 1991* (NSW) s 7(1)(b)-(d).

³⁹ *Spent Convictions Act 2000* (ACT) s 11(2)(b)-(d).

⁴⁰ *Criminal Records (Spent Convictions) Act 1992* (NT) s 5(a)-(c).

⁴¹ *Spent Convictions Act 2009* (SA) s 5(2)(a)-(c).

⁴² *Annulled Convictions Act 2003* (Tas) s s 3(1).

⁴³ *Crimes Act 1914* (Cth) s 85ZM(1)(b).

⁴⁴ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(2)(a).

⁴⁵ *Spent Convictions Act 2009* (SA) s 3(1).

The Western Australia scheme is particularly distinct from the other jurisdictions. Convictions that cannot be spent include sentences of life imprisonment⁴⁶, as well as three specified provisions from three separate pieces of criminal legislation.⁴⁷ The convictions capable of being spent are otherwise classified as ‘serious’⁴⁸ or ‘lesser’⁴⁹ convictions. Serious convictions, being a sentence of imprisonment of one year or more or for an indeterminate period, or a fine of \$15,000 or more, may become spent only by application to a District Court Judge.⁵⁰ Any declaration by a Judge that a conviction is spent is at the discretion of the judge, having regard to factors such as time since the conviction was incurred, the kind of sentence and the nature and seriousness of the offence.⁵¹ Lesser convictions, being sentences of less than one year and not for an indeterminate period, are capable of being spent upon application to the Commissioner of Police.⁵² The Commissioner does not have discretion to issue or not issue a certificate that the conviction is spent, meaning all applications he/she receives must be approved and lesser convictions must be processed to be spent.

Recommendation 3:

The LIV recommends that sentences with no imprisonment or sentences for 30 months or less be eligible to become spent, aligning with the Commonwealth and Queensland legislation. Exceptions to this would be sexual offences, in line with all other jurisdictions.

Waiting period

In all jurisdictions, the waiting period between the conviction and it becoming spent is 10 years for adults. For child offenders, all jurisdictions prescribe a five-year period, except for New South Wales where it is three years⁵³ and the WA Act which does not provide a separate waiting period for juveniles.

The New South Wales, Australian Capital Territory and Northern Territory schemes further detail certain convictions that may be spent before the stated waiting periods. The New South Wales and Australian Capital Territory Acts list the same kinds of convictions that may be spent prior to the end of the waiting period. As stated above, findings without convictions are immediately spent.

⁴⁶ *Spent Convictions Act 1988* (WA) s 4(2).

⁴⁷ *Ibid* see s 4(1)(a) to (c).

⁴⁸ *Spent Convictions Act 1988* (WA) s 6.

⁴⁹ *Ibid* s 7.

⁵⁰ *Ibid* s 9, s 6(1).

⁵¹ *Ibid* ss 6(4)(a),(b) and (e).

⁵² *Ibid* ss 10, 7(1).

⁵³ *Criminal Records Act 1991* (NSW) s 10(1).

Children's Court orders dismissing the charge and cautioning are immediately spent,⁵⁴ as are good behavior bonds upon the satisfactory completion of ordered conditions.⁵⁵

Case Study: Dave

Dave was convicted of a theft-related offence in the early 1980s when he was sixteen years old.

Dave had taken his dad's car for a joy ride. Some 17 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 employment was terminated on the basis of his conviction and he was told that he could not work for Correctional Services unless he had a clear criminal record.

Recommendation 4:

The LIV recommends that the Victorian scheme align with all other jurisdictions by spending adult convictions after 10 years, from the date of the conviction being recorded, with the exception of juvenile convictions.

The LIV recommends a three-year waiting period for juvenile convictions, which is in line with the New South Wales Act.

Means by which convictions become spent

In all jurisdictions except the Northern Territory and Western Australia, convictions are automatically spent upon the expiration of the prescribed waiting period, subject to no further convictions.⁵⁶

In the Northern Territory, convictions against juvenile offenders in the Juvenile Court and adult offenders are automatically spent upon the expiration of the waiting period and provided there has been no further conviction.⁵⁷ For juvenile offenders convicted in an adult court, a

⁵⁴ *Criminal Records Act 1991* (NSW) s 8(3), *Spent Convictions Act 2000* (ACT) s 12(2)(b).

⁵⁵ *Criminal Records Act 1991* (NSW) s 8(4)(a), *Spent Convictions Act 2000* (ACT) s 12(3).

⁵⁶ *Crimes Act 1914* (Cth) s 85ZL, *Criminal Records Act 1991* (NSW) s 8(1), *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(1), *Spent Convictions Act 2000* (ACT) s 12, *Annulled Convictions Act 2003* (Tas) s 6(1), *Spent Convictions Act 2009* (SA) s 8(1).

⁵⁷ *Criminal Records (Spent Convictions) Act 1992* (NT) s 6(2).

conviction may only become spent upon application to the Police Commissioner.⁵⁸ In Western Australia, as stated above, a conviction becomes spent upon application to a District Court Judge (for serious offences) who will exercise discretion and to the Commissioner for Police (for lesser offences) who cannot exercise discretion.

Recommendation 5:

The LIV recommends that convictions be automatically spent upon the expiration of the prescribed waiting period, aligning with the majority of Australian jurisdictions.

Commencement of time period

In all jurisdictions, the commencement of the waiting period is the date of conviction.⁵⁹ The only exception is Western Australia, where if a person is sentenced to imprisonment, the waiting period commences at the end of the period for which the person is sentenced, regardless of the amount of time actually served.⁶⁰

Recommendation 6:

The LIV recommends that the waiting period commences on the date of conviction.

Cross jurisdictional offending

All State and Territory spent conviction Acts contain provisions which address offending in jurisdictions other than the home state or territory. If a person is convicted of an offence in State X but lives in State Y, the State X conviction becomes spent in the same way as it would if it were committed in State Y.

⁵⁸ *Criminal Records (Spent Convictions) Act 1992* (NT) s 6A(3).

⁵⁹ *Crimes Act 1914* (Cth) s 85ZL, NSW – 9(1), *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(1), *Criminal Records (Spent Convictions) Act 1992* (NT) s 6(2), *Spent Convictions Act 1988* (WA) s 3(A), *Annulled Convictions Act 2003* (Tas) s 6(2), *Spent Convictions Act 2009* (SA) s 7(1)(b), *Spent Convictions Act 2000* (ACT) s 13(1).

⁶⁰ *Spent Convictions Act 1988* (WA) s 3(b).

The New South Wales,⁶¹ Queensland,⁶² Australian Capital Territory,⁶³ Northern Territory⁶⁴ and Tasmania⁶⁵ Acts all include in the definition of 'conviction' those offences committed and convicted in other jurisdictions, for example another state, territory or the Commonwealth. This allows convictions in other jurisdictions to become spent in the same manner as the home State or Territory. The Australian Capital Territory,⁶⁶ Western Australia⁶⁷ and Tasmania⁶⁸ Acts also provide that changes may be made to equate cross-jurisdictional offending (in another State, Territory or the Commonwealth) with internal offending, so that the legislation can flexibly apply to convictions that do not have a counterpart in the respective, relevant jurisdictions. The South Australian Act contains a similar provision which also includes foreign convictions.⁶⁹ Further, in South Australia, if an offence against the laws of another jurisdiction, including overseas, have no correspondence to a South Australia law, it is immediately spent.⁷⁰

In Western Australia, 'conviction' is only taken to mean those against Western Australian laws and those of a foreign country.⁷¹ These are the standard convictions that may be spent under the current scheme. Other sentences imposed outside of Western Australia are treated as sentences of a kind most closely corresponding to a sentence that would be imposed by a Court of Western Australia.⁷²

Case Study: Sandy

Sandy had a theft related criminal conviction recorded in Victoria. She relocated to another Australian State and had to arrange house and contents insurance for her new residence. When applying for cover she was asked whether she had any criminal convictions. After disclosing her conviction, Sandy was refused cover, notwithstanding that the insurance company had previously insured her. Sandy has since found it impossible to obtain insurance from other insurers, having now returned to Victoria, who either ask whether she has any criminal convictions or whether she has ever been denied insurance. Since being denied insurance, Sandy has had her home broken into and had property stolen. She feels as if she is being re-punished for her original offence.

⁶¹ *Criminal Records Act 1991* (NSW) s 6(1).

⁶² *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3.

⁶³ *Spent Convictions Act 2000* (ACT) s 9(1).

⁶⁴ *Criminal Records (Spent Convictions) Act 1992* (NT) s 3(1).

⁶⁵ *Annulled Convictions Act 2003* (Tas) s 4(1).

⁶⁶ *Spent Convictions Act 2000* (ACT) s 9(2).

⁶⁷ *Spent Convictions Act 1988* (WA) s 3(2)(c).

⁶⁸ *Annulled Convictions Act 2003* (Tas) s 4(2).

⁶⁹ *Spent Convictions Act 2009* (SA) s 6(3).

⁷⁰ *Spent Convictions Act 2009* (SA) s 6(4).

⁷¹ WA 3(1)

⁷² Wa 3(2)(c)

Recommendation 7:

The Victoria Police Release Policy currently addresses the issue of obtaining records in other jurisdictions, stating:

'Victoria Police conducts national police record checks

If information is obtained from other police jurisdictions the relevant legislation/policy for that jurisdiction is applied to the information before it is released. Where release legislation/policy differs, the original jurisdiction's releasable legislation/policy will be applied first and then the Victorian Information Release Policy. In relation to legislation/policy used by state or territories other than Victoria please contact the relevant police jurisdiction directly for more information.¹

The LIV recommends that upon enactment of proposed legislation in Victoria, provisions should be included in spending cross jurisdictional offences in the same way as internal offences would be spent.

Consequence of conviction becoming spent

In all jurisdictions, a person is not required to disclose information regarding a spent conviction.⁷³ In all State and Territory legislation, 'criminal history' is defined as convictions which are not spent.⁷⁴ In other words, any conviction that is spent is no longer considered a 'conviction'.

⁷³ *Crimes Act 1914* (Cth) s 85ZV(1)(a)&(b), *Criminal Records Act 1991* (NSW) s 12(a), *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 5(2), *Spent Convictions Act 2000* (ACT) s 16(a), *Criminal Records (Spent Convictions) Act 1992* (NT) s 11(a), *Spent Convictions Act 1988* (WA) s 25(2), *Annulled Convictions Act 2003* (Tas) s 9(1)(a), *Spent Convictions Act 2009* (SA) s 10(b).

⁷⁴ *Criminal Records Act 1991* (NSW) s 12(b), *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 5(1), *Spent Convictions Act 2000* (ACT) s 16(b), *Criminal Records (Spent Convictions) Act 1992* (NT) s 11(b), *Spent Convictions Act 1988* (WA) s 25(1), *Annulled Convictions Act 2003* (Tas) s 9(1)(c), *Spent Convictions Act 2009* (SA) s 10(a).

Case Study: Dimitri

Dimitri had a history of drink driving, was convicted and spent a brief time in jail 15 years ago. 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. He was assisted to find similar employment at an organization that did not conduct criminal record checks.

Recommendation 8:

The LIV submits that any proposed Victorian spent convictions scheme remain consistent with all other jurisdictions, by defining criminal history as only referring to convictions which are not spent.

Consequences of disclosing spent convictions

Each of the spent convictions Acts in other Australian jurisdictions contain offence provisions intended to ensure that spent convictions are not disclosed, obtained or taken into account in ways that undermine the legislative purpose of the Acts.

The Western Australian Act prohibits the disclosure or acknowledgement of matters relating to the spent conviction of another person.⁷⁵ All other Acts prohibit the disclosure of spent convictions in varying circumstances. The Commonwealth⁷⁶ and South Australian⁷⁷ Acts provide that a person who knows, or reasonably ought to know, that a conviction is spent, shall not disclose that fact or any related information without the consent of the person to whom the record relates. In the Northern Territory, a person commits an offence if they disclose information relating to a spent conviction without the person's consent.⁷⁸ The Tasmanian Act prohibits the disclosure of spent conviction information without the consent of the person and without lawful authority.⁷⁹ Lawful authority is also required for the legal release of spent

⁷⁵ *Spent Convictions Act 1988* (WA) s 25(2).

⁷⁶ *Crimes Act 1914* (Cth) s 85ZW(b)(i).

⁷⁷ *Spent Convictions Act 2009* (SA) s 11(1)(a)-(c) & 11(2)(a).

⁷⁸ *Criminal Records (Spent Convictions) Act 1992* (NT) s 12(1).

⁷⁹ *Annulled Convictions Act 2003* (Tas) s 11(2).

conviction information in New South Wales,⁸⁰ Queensland⁸¹ and the Australian Capital Territory.⁸²

Case Study: Ms M

Ms M applied for part time employment as a disability support worker with an agency in country Victoria. Ms M was eminently qualified for the position and worked for DHS at the time of her application. Ms M was interviewed for the position and completed a consent form for a police check. Ms M eventually received correspondence from the agency informing her that all employment vacancies had been filled. Ms M had not been successful. Her police records check was enclosed. The check disclosed offences from 1987, 1992 and 2004.

The earlier offences in 1987 and 1992 (the 1992 offence related to the 1987 matters) were all without conviction and occurred when Ms M was 18. An offence in 2004, also without conviction, related to a firearm offence of possessing ammunition without a licence. Ms M did not own a gun and had two old shotgun shells in her possession, which had previously belonged to her step-father. The cartridges were bundled up with other possessions given to Ms M by her mother who lived in Tasmania. (Police found the cartridges while searching the house on the suspicion that Ms M's brother, residing with her at the time, had been using drugs). Given the subsequent offence in 2004, all previous offences were disclosable. Ms M pleaded guilty but now wonders whether this was the right course to have taken, given that mere findings of guilt are disclosable and that this offence triggered the disclosure of the earlier offences.

The early offences had been disclosable when Ms M obtained employment with the Department. They considered her to be of good character at the time. When applying for work with the agency, Ms M was not given the opportunity to explain her record.

Recommendation 9:

The LIV recommends that any proposed Victorian legislation align with provisions included in the Commonwealth and South Australian Acts, which provide that a person must not disclose a conviction that has been spent, where they know or reasonably ought to know, that a conviction has been spent, or unless authorised by law.

⁸⁰ *Criminal Records Act 1991* (NSW) s 13(1).

⁸¹ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) ss 6, 6(b).

⁸² *Spent Convictions Act 2000* (ACT) s 17(1).

In New South Wales,⁸³ the Australian Capital Territory,⁸⁴ the Northern Territory⁸⁵ and Tasmania,⁸⁶ it is an offence for a person to fraudulently or dishonestly obtain spent conviction information. In Western Australia,⁸⁷ a person must not obtain spent conviction information without lawful authority.

Recommendation 10:

The LIV recommends that any proposed legislation makes it an offence for a person to fraudulently or dishonestly obtain, publish or use spent conviction information without lawful authority.

All jurisdictions contain legislative provisions which prevent spent convictions from being taken into account in assessing a person's character and/or fitness. The Commonwealth Act provides that a person who knows, or could be reasonably be expected to know, that a person's conviction is spent shall not take the spent conviction into account⁸⁸. In New South Wales,⁸⁹ the Australian Capital Territory,⁹⁰ Queensland,⁹¹ Western Australia⁹² and South Australia,⁹³ it is illegal to take a spent conviction into account in assessing a person's character and/or fitness.

The LIV submits that spent convictions should not be a factor in any assessment of a person's character. The Tasmanian legislation provides that a spent conviction should not be taken into account in assessing a person's character, as well as for any unauthorized purpose.⁹⁴ The Northern Territory Act provides that a person is not entitled to take a spent conviction into account for any unauthorised purpose but does not address the assessment of a person's character.⁹⁵

The ultimate aim of these offence provisions is to prevent any spent convictions being disclosed, obtained or used in a way that frustrates the legislative intention. If a person's conviction is spent, they ought to be afforded equal opportunity and a clean slate.

⁸³ *Criminal Records Act 1991* (NSW) s 14.

⁸⁴ *Spent Convictions Act 2000* (ACT) s 18.

⁸⁵ *Criminal Records (Spent Convictions) Act 1992* (NT) s 14.

⁸⁶ *Annulled Convictions Act 2003* (Tas) s 12.

⁸⁷ *Spent Convictions Act 1988* (WA) s 28(1).

⁸⁸ *Crimes Act 1914* (Cth) s 85ZW(b)(ii).

⁸⁹ *Criminal Records Act 1991* (NSW) s 12(c)(ii).

⁹⁰ *Spent Convictions Act 2000* (ACT) s 16(c)(ii).

⁹¹ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 9.

⁹² *Spent Convictions Act 1988* (WA) s 26(1).

⁹³ *Spent Convictions Act 2009* (SA) s 10(c)(ii).

⁹⁴ *Annulled Convictions Act 2003* (Tas) s 11(1)(d)(ii).

⁹⁵ *Criminal Records (Spent Convictions) Act 1992* (NT) s 13.

The Western Australian Act makes this explicit by making it unlawful to discriminate against a person on the ground of a spent conviction.⁹⁶

Further, the Tasmanian Act prohibits a person threatening to disclose spent conviction information.⁹⁷

The LIV submits that the community interest in facilitating improved workforce participation should be considered carefully in any proposed legislative framework. The impact of criminal record discrimination such as unemployment, under employment, associated harms to general health and wellbeing, and wasted human resources will have a flow on effect resulting in significant costs to families and the broader community.

Case Study: Bill

Bill, aged 23, was employed as a permanent full time call centre worker. He worked for a large Australian company with a detailed Equal Employment Opportunity and Harassment Policy, which provided that any form of discrimination, including on the basis of irrelevant criminal record, was unacceptable.

During the recruitment process, Bill voluntarily disclosed that, about five years previously, he had been convicted of committing an offence as a juvenile. He also consented to being subjected to a police record check. This revealed that he had been convicted of theft-related offences on two occasions, within about five months of each other. Both convictions related to offences committed in 1998, when Bill had still been a minor, but they were recorded in 1999. The first was recorded just over five years before the criminal check was conducted, whereas the second conviction was just under five years old. Bill had wrongly believed that his convictions had become "lapsed", as they related to offences committed as a juvenile which had occurred more than five years previously.

Within six weeks of being employed Bill's employment was terminated on the grounds that: (a) he had not made a full disclosure about the offences for which he had been convicted; (b) the convictions were not "lapsed": and (c) the offences involved dishonesty and were consequently considered to be relevant to his employment as a call centre worker. Bill subsequently tried to convince the company to re-consider its decision to dismiss him arguing that his record was limited to two minor offences committed when he was a juvenile and requesting the company to take into consideration the fact that he had voluntarily disclosed information about his record. The company, however, refused to review its decision.

⁹⁶ *Spent Convictions Act 1988* (WA) s 18(1).

⁹⁷ *Annulled Convictions Act 2003* (Tas) s 11(1).

Recommendation 11:

The LIV recommends adopting legislative provisions which align with the other jurisdictions, the purpose of which is to prevent spent convictions being taken into account in assessing a person's character and/or fitness.

The LIV further recommends that any proposed legislation should prohibit persons asking a person to consent to the disclosure of their spent convictions.

Equal Opportunity Act

There is legislation in place, both at the Commonwealth and State level that protects job applicants against discrimination on various grounds. The *Australian Human Rights Commission Act 1986* defines discrimination as '*any distinction, exclusion or preference made on the basis of race, colour, sex, religion... that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation*'.⁹⁸ The grounds are expanded in the Regulations, where a criminal record is a ground which constitutes discrimination if it is the basis of any distinction, exclusion or preference.⁹⁹

In Victoria, the list of attributes is comparable to the grounds of the Commonwealth legislation, however notably, criminal record is omitted. An employer in Victoria would not be in breach of s 16 of the *Equal Opportunity Act 2010* (Vic) if he or she were to discriminate against an applicant on the basis of their criminal record.

Recommendation 12:

The LIV submits that recommendations made in the Equal Opportunity Review Final Report, [*An Equality Act for a Fairer Victoria \(June 2008\)*](#) ought to be considered in any proposed legislative scheme.

The LIV recommends that the Government consider incorporating a framework into any proposed legislation with corresponding reform under the *Equal Opportunity Act 2010* (Vic).

⁹⁸ *Australian Human Rights Commission Act 1986* s 3(1).

⁹⁹ *Australian Human Rights Commission Regulations 1989* - Reg 4.

Charter of Human Rights

Section 32 of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) provides that 'so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'. Section 8(3) of the Charter provides that 'every person is equal before the law without discrimination'.

Recommendation 13

The LIV highlights the necessity of adopting a legislative framework that is consistent with the Charter.

Conclusion

The Law Institute of Victoria believes that it is vital to have uniformity in a spent convictions scheme so that principles of proportionality, fairness, equality, privacy, protection of the community and the objective of national consistency may be ensured. These principles must be considered of utmost importance in formulating a spent convictions scheme.

In 2004, Victoria postponed adopting a spent convictions scheme due to the proposed introduction of a national Uniform Spent Convictions Bill. Today, over a decade later, there is still no adequate legal framework to control the release of criminal record information in Victoria. We have provided recommendations which align with those already existing in other Australian States and Territories. We submit that the most effective model for the controlled disclosure of criminal record data will ensure that employment opportunities are available for former offenders as soon as they are possible. This will provide a fair balance in allowing rehabilitation of those offenders, protecting the interests of employers and ensuring community safety.

The LIV is and will remain committed to working collaboratively with government and all relevant stakeholders, on any proposed Victorian legislative framework for a spent convictions scheme.