Criminal Records in Victoria:

Proposals for Reform

FITZROY LEGAL SERVICE INC.

A Community Legal Centre

IN CONJUNCTION WITH

Job Watch

The Employment Rights Watchdog

This report was written jointly by Peter Noble, Legal Projects Officer at the Fitzroy Legal Service, a Victorian community legal centre, and Gabrielle Marchetti, Solicitor at Job Watch Inc. Its purpose is to stimulate informed debate on issues relating to criminal records and the law, and to encourage the development and implementation of a range of reforms to mitigate against discrimination on the basis of a criminal record.

About the Fitzroy Legal Service

The Fitzroy Legal Service (FLS) is a generalist community legal centre. FLS provides a free legal advice service five nights a week, staffed by over 140 legal and non-legal volunteers. FLS also operates a casework practice, conducts community legal education, actively campaigns for social change and has a publishing department that produces and distributes a range of resources, including the ***FLS Law Handbook***.

FLS's objectives are:

- to provide a free and readily accessible service to people in necessitous circumstances who qualify under the FLS's eligibility criteria and who live, work or study in the catchment area, and to such other persons as the FLS may from time to time decide;
- to seek guidance and direction on policy and its development from the community;
- to involve local citizens in the recognition, understanding and solution of their own legal and related problems;
- to establish programs of preventative law;
- to provide legal education in the community; and
- to initiate and participate in law reform programs.

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About Job Watch Inc

Job Watch Inc is an employment rights legal centre. It aims to improve the quality of workers' lives and strives for a fair and just working environment for all, especially the most disadvantaged workers in the community.

Job Watch was established in 1980 and is the only service of its type operating in Victoria. It has a state-wide focus and services a broad range of Victorian workers, responding to approximately 19,000 telephone enquiries each year.

Job Watch's core activities include:

- The provision of advice, information and referral to Victorian workers via its free and confidential telephone advisory service.[1]
- A community education program that includes publications, information via the Internet, and talks aimed at workers, students and other organisations.

[1] The Job Watch advice service has 11 incoming phone lines, including a designated 1800 telephone number which prioritises calls from rural and remote areas of Victoria.

- A legal casework practice which assists and represents disadvantaged workers and workers experiencing abuses of human rights.
- Campaign and law reform activity with a view to promoting workplace justice and equity for all Victorian workers.

Job Watch maintains a database record of its callers, from which it is possible to identify key trends in the Victorian labour market.

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Contents

Executive Summary

There are numerous deficiencies in the current approach to the use of criminal record information in Victoria. These deficiencies are highly significant when set in the context of upward spiralling rates of police record checks for employment, volunteering and licensing. This trend is graphically evident in the area of criminal record checks for employment purposes, which have reached epidemic proportions. Statistics released under Freedom of Information from Victoria Police on 3 December 2004 reveal an increase in checks from 3,459 in 1992/93 to 221,236 in 2003/04. That is an increase of 6,295% over the period.

Fitzroy Legal Service (FLS) and Job Watch are particularly concerned about the following perceived deficiencies:

- the absence of a spent convictions scheme in Victoria;
- the absence of a statute based criminal record management system in Victoria;
- the absence of any state-wide anti-discrimination protections in Victoria or any effective anti-discrimination protections at a federal level;
- the general misunderstanding of non-conviction sentences;
- the general confusion as to disclosure rights and responsibilities; and
- the operation of private criminal record databases throughout Australia.

Accordingly, FLS and Job Watch make the following recommendations.

Recommendations

Recommendation 1: *That only a recorded criminal conviction from a recognised Court of Law should come within the scope of a national spent convictions scheme, or any Victorian scheme.*

Recommendation 2: *That findings of guilt where there is no recorded conviction, details of arrests or criminal investigations, or details of disciplinary proceedings should not be included within the definition of conviction for the purposes of a spent conviction scheme and, accordingly, should not be made available on a person's official criminal record.*

Recommendation 3: *That any spent convictions scheme be defined as broadly as possible, with exclusions used to remove certain types, categories or classes of offence from the operation of the scheme.*

Recommendation 4: *That all offences be capable of becoming spent, unless expressly excluded.*

Recommendation 5: *That bodies exempt from the operation of a spent convictions scheme be required to particularise certain categories of offences (such as those involving children) and that disclosure of criminal record information above and beyond spent convictions information be limited to those categories only.*

Recommendation 6: *That exempt status should only be awarded to specific professions/ organisations and licensing bodies, which can provide strong, persuasive and demonstrable reasons for an exemption.*

Recommendation 7: *That further investigations be made into the adoption of variable waiting periods rather than blanket waiting periods of ten years for adults and five years for children.*

Recommendation 8: *That the waiting period for a spent conviction should commence:*

- *upon the completion of the sentence imposed, where a custodial sentence was imposed; and*
- *at the date of conviction, where no sentence was imposed.*

Recommendation 9*: That a finding of guilt without conviction, or convictions that have been quashed, set aside or pardoned should not affect the spent status of prior convictions.*

Recommendation 10: *That in the light of Recommendation 7, further investigations be made into the alternative approaches to ameliorating the negative consequences of convictions for minor or trivial offences upon the operation of a spent convictions scheme.*

Recommendation 11: *That unless otherwise exempted, an individual is not obligated to disclose to any third party a spent conviction.*

Recommendation 12: *That unless a specific exemption applies, questions regarding a person's criminal history are taken to refer only to any unspent convictions.*

Recommendation 13: *That federal, state and territory equal opportunity and anti-discrimination laws (including s170CK(2)(f) of the* Workplace Relations Act 1996 *(Cth)) be amended and enforced so as to prohibit discrimination on the ground of (irrelevant) criminal record.*

Recommendation 14: *That all Australian federal and state governments take positive steps (including legislative, educative, financial, social and administrative measures) to address the special needs of people with a criminal record so as to enable them to realise all of their human rights and freedoms.*

Recommendation 15: *That the implications of a recorded criminal conviction be explained as part of the sentencing process.*

Recommendation 16: *That clear guidance and support to explain the implications of a recorded criminal conviction (and to support offenders through the consequences of such a conviction) be made available through Correctional Services, and other organisations involved with the rehabilitation and resettlement of offenders.*

Recommendation 17: *That a voluntary Code of Practice be developed for employers (led by the public sector) to govern the use of disclosures in the recruitment process.*

Recommendation 18: *That more detailed guidance and support be made available to those organisations willing and able to take a more direct approach to the employment of people with previous convictions through links with ex-offender support organisations, and an expansion of existing 'broker' or partnership arrangements between such organisations and Correctional Services.*

Recommendation 19: *That the principles on which the Code of Practice are based will be equally applicable to educational establishments, and other service providers who may require the disclosure of previous convictions.*

Recommendation 20: *That upon application, educational institutions and/or professional/ licensing bodies be obliged to provide a preliminary 'screening for suitability' based on an established Code of Practice and pre-selected offences of interest. Alternately, that such institutions or bodies be required to determine whether an individual may, upon actual application for registration or employment in the future, have to 'show cause' in relation to particular offences of concern on their criminal record.*

Recommendation 21: *That trading in criminal record information, without the consent of individuals identified by such information, be a criminal offence.*

Recommendation 22: *That obtaining criminal record information from any businesses trading in criminal record information, without the consent of any individual identified by such information, be a criminal offence.*

Chapter 1: Background

The origins and scope of this report

The origin of this report lies in the accounts of discrimination on the basis of a criminal record provided by clients of the Fitzroy Legal Service (FLS) and callers to the Job Watch telephone advice service.

Between May 1999 and 1 February 2005 Job Watch responded to 48 telephone enquiries which specifically related to discrimination on the basis of criminal record in the area of employment.[2] The alleged acts of discrimination consisted of terminations of employment, refusals to employ, victimisation and unfair treatment at work. Of these 48 callers, 35 could not have filed an unfair dismissal claim, even if they had wanted to, as they would have been excluded from that jurisdiction by virtue of their status as, for example, casual or probationary employees, or because the discriminatory conduct had taken place at the recruitment stage,[3] before they had become employees. Further, it appears from Job Watch's database records that a significant proportion of these 48 callers[4] were confused about what information, if any, would appear on their criminal record.

The combined experiences of Job Watch's callers and FLS's clients stimulated research into the law concerning criminal records. This in turn revealed a range of deficiencies in the current approach to the use of criminal record information in Victoria. These deficiencies are highly significant when set in the context of upward spiralling rates of police record checks for employment, volunteering, licensing and registration. This trend, which appears to have resulted in a steady increase in the number of telephone enquiries to the Job Watch advice line regarding possible discrimination in this area,[5] is graphically evident in the area of criminal record checks for employment purposes, which have reached epidemic proportions. Statistics released under Freedom of Information from Victoria Police on 3 December 2004 reveal an increase in checks from 3,459 in 1992/93 to 221,236 in 2003/04. That is an increase of 6,295% over the period.

[2] A further three calls related to discrimination on the basis of criminal record in the areas of insurance and licensing. During the same period, Job Watch also responded to many more calls about general issues to do with criminal records or criminal investigations being undertaken, but these are not captured here as the focus is on people's experiences of discrimination on the ground of an existing or presumed criminal record. Hence, the 48 calls analysed do not include situations where, for example, the caller was being investigated either at work or by the police in relation to alleged criminal conduct or the caller was concerned about privacy issues regarding disclosure of a criminal record.

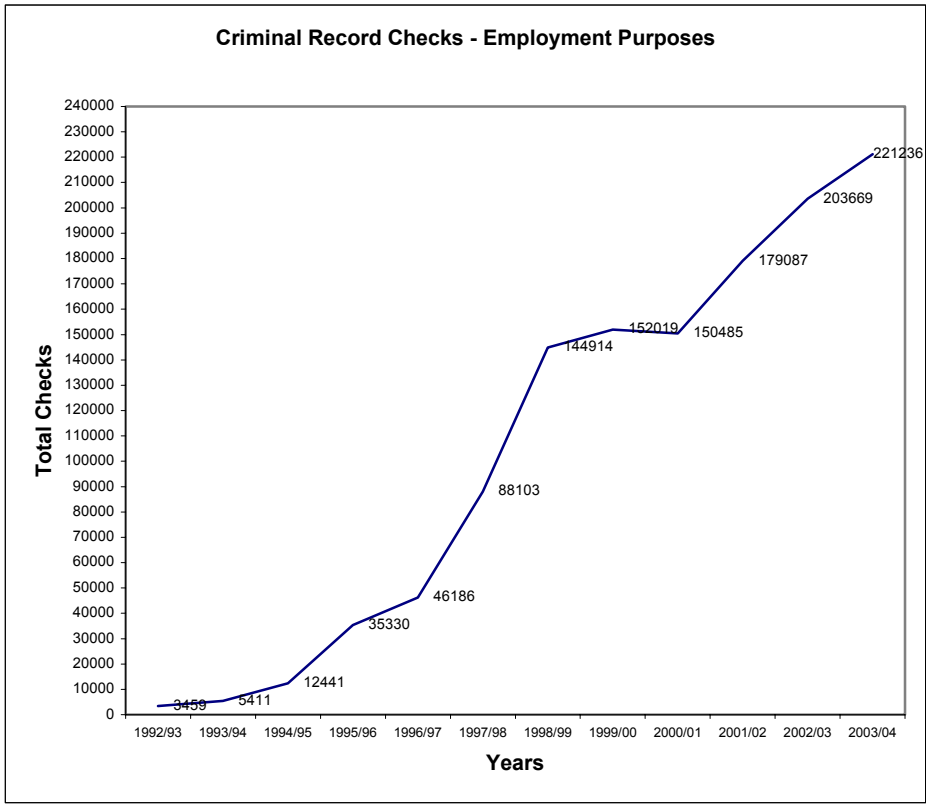
[3] Four out of the 48 callers had experienced discrimination at the recruitment stage.

[4] Job Watch's advice cards indicate a level of confusion in this regard for nine out of the 48 callers.

[5] For example, the number of enquiries relating to discrimination on the basis of criminal record in the area of employment has risen as follows: 1 enquiry for the 2000 calendar year; 6 for 2001; 8 for 2002; 9 for 2003; and 15 for 2004.

Criminal Record Checks – Employment Purposes[6]

Years	Total Checks
1992/93	3459
1993/94	5411
1994/95	12441
1995/96	35330
1996/97	46186
1997/98	88103
1998/99	144914
1999/00	152019
2000/01	150485
2001/02	179087
2002/03	203669
2003/04	221236



This report is set in the context of three current law reform initiatives:

- Discussions within the Standing Committee of Attorneys-General regarding the establishment of a Uniform Spent Convictions Scheme. The Victorian Department of Justice has assumed carriage of this brief within the SCAG and has recently released its discussion paper for comment: *Uniform Spent Convictions: A Proposed Model – Discussion Paper: August 2004*.

- A review by the Human Rights and Equal Opportunity Commission (HREOC) of discrimination in employment on the basis of a criminal record. HREOC has also recently released its discussion paper for comment: *Discrimination in Employment on the Basis of Criminal Record: December 2004.*

- A proposal by the Victorian Department of Justice to introduce a Working with Children Check, to screen people who wish to work with children in order to enhance the safety of Victorian children. A discussion paper has also been released for comment: *Working with Children Bill 2005.*

This report touches on a range of issues canvassed in all of these discussion papers. Predominantly, however, it focuses on HREOC's discussion paper regarding federal discrimination laws and on the

[6] Statistics released under Freedom of Information from Victoria Police, 3 December 2004.

SCAG proposal to establish a Uniform Spent Convictions Scheme. Importantly, we note that Recommendation 48 of Proposed Model in the SCAG discussion paper provides that, unless a specific exemption applies, discrimination on the basis of spent conviction should be a ground for formal complaint under the applicable equal opportunity legislation in each of the Australian jurisdictions. Job Watch and FLS strongly agree that, at least in Victoria, but preferably in each jurisdiction, anti-discrimination laws ought to be amended so as to protect, as far as reasonably practicable, people with criminal records from discrimination. A brief discussion of what the specific attribute to be protected ought to be (for example, 'spent conviction' or 'irrelevant criminal record') is outlined in Chapter 3. In relation to a working with children check, this report is intended to complement the submissions of other stakeholders who are committed to the rehabilitation of Victorian offenders.

Criminal records

A criminal record is legally defined, in general terms, as 'a written history detailing a person's past criminal convictions'.[7] This also corresponds with the common understanding of what constitutes a criminal record. However, in practice what constitutes a criminal record varies from one jurisdiction to another, creating significant confusion and uncertainty.

For example, Victoria Police maintains criminal records for its own law enforcement purposes. This information is stored on Victoria's Law Enforcement Assistance Program computer system (LEAP) and is very broad. For example, it not only encompasses all records of court attendances and outcomes, but also includes information about current criminal investigations.

Victoria Police also maintains criminal records for the purpose of conducting National Police Record checks, upon application, in relation to employment, voluntary work and occupation-related licensing or registration.[8] Information released for the purpose of these checks is much more restricted in scope.

Victoria Police applies guidelines to the release of criminal history information to individuals and organisations outside Victoria Police. This is to protect the integrity of investigations and to comply with privacy laws[9] that govern the use of private information like criminal records. In circumstances where a person consents to the release of their criminal record to a third party, such as a prospective employer, the release of information is determined by the Police Records Information Release Policy. Under this policy:

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[7] *Butterworths Australian Legal Dictionary* (1997) Butterworths, North Ryde, p. 305.

[8] *Victoria Police Records Information Release Policy* (2005).

[9] *Information Privacy Act* 2000 (Vic).

- if the individual was an adult (17 years or over) when last found guilty of an offence and 10 years have elapsed, no details of previous offences will be released;
- if the individual was a child (under 17 years) when last found guilty of an offence and 5 years have elapsed, no details of previous offences will be released;
- if the last finding of guilt resulted in a non-custodial sentence or a custodial sentence of 30 months or less, the 10 or 5 year period commences from the day the individual was found guilty;
- if the last finding of guilt is an appeal or a re-hearing, then the 10 or 5 year period will be calculated from the original court date;
- if the last offence qualifies to be released, then all findings of guilt will be released, including juvenile offences; and
- if the record contains an offence that resulted in a custodial sentence of longer than 30 months, the offence will always be released. If 10 years have elapsed since the last finding of guilt, then only the offence(s) that resulted in a custodial sentence of longer than 30 months will be released.

Under this Policy findings of guilt without conviction and findings resulting in a good behaviour bond are considered to be findings of guilt and will be released. If the check shows that the individual has been charged with an offence or is under investigation, but has not yet been to court, details will be released with a statement that they are yet to be determined in court. Traffic offences are only released if the court outcome involved imprisonment.

There are some circumstances when a record that is over 10 years old will be released. These are:

- if the record includes a term of imprisonment longer than 30 months;
- if the record includes a serious offence of violence or a sex offence and the records check is for the purposes of employment or voluntary work with children or elderly, disabled or vulnerable people;
- if the records check is for the purposes of employment in prisons, state or territory police forces or the gaming industry; and
- in other exceptional circumstances where the release of older information is in the interests of crime prevention, the administration of justice or public safety.[10]

[10] *Victoria Police Records Information Release Policy* (2005).

The Police Records Information Release Policy clearly demonstrates that, at least in Victoria, it would be incorrect to assume that Victoria Police applies the legal definition of a criminal record – which focuses solely on criminal convictions – when determining what information to release. Hence, the average Victorian is likely to have a mistaken understanding of what amounts to a criminal record for the purpose of a police check. There is also a deep confusion about the nature of a conviction, as distinct from a mere finding of guilt, making the Victorian system difficult to comprehend and negotiate.

> *Des applied for a job as a warehouse assistant. At the interview, he was asked whether he had any criminal convictions. He said he did not. Des did, however, have a criminal record, being a finding of guilt which resulted in a good behaviour bond. When his employer found out about his criminal record, Des was accused of lying at the interview and he was accordingly dismissed. Des maintained that he had answered the question accurately.*

Sentencing in Victoria

The sentencing of criminal offenders in Victoria is regulated by the *Sentencing Act 1991* (Vic). This Act dictates the process by which Victorian Judges and Magistrates are to determine appropriate sentences. One of its key purposes is to provide a framework for sentencing to prevent crime and promote respect for the law by:

(i) providing for sentences that are intended to deter the offender or other persons from committing offences of the same or a similar character;
(ii) providing for sentences that facilitate the rehabilitation of offenders;
(iii) providing for sentences that allow the court to denounce the type of conduct in which the offender engaged; and
(iv) ensuring that offenders are only punished to the extent justified by—
  (a) the nature and gravity of their offences; and
  (b) their culpability and degree of responsibility for their offences; and
  (c) the presence of any aggravating or mitigating factor concerning the offender and any other relevant circumstances.[11]

The imposition of a conviction by a court as a serious sanction is recognised under the *Sentencing Act*[12]. Not only can a conviction act immediately as a powerful punishment for the offence, it is an enduring denunciation of the offender's conduct. Many years after the offence, and many years after the offender has completed any sentence imposed for the offence, the effects of a conviction may still be felt. So serious are the perceived consequences of a conviction – both for future sentencing

[11] *Sentencing Act* 1991 ss. 1(d)(i)–(iv).

[12] ss. 7 and 8.

purposes (should an offender return before the courts) and for the rehabilitation of an offender – that the *Sentencing Act* provides that a finding of guilt without the recording of a conviction must not be taken to be a conviction for any purpose.[13] Accordingly, a conviction is not automatically recorded following a finding of guilt. Although a conviction must be recorded in some circumstances, including where terms of imprisonment or detention in a youth training centre are imposed or where a suspended sentence of imprisonment is ordered, the court exercises a discretion whether to record a conviction when it imposes low order sanctions such as fines and community based orders.

In exercising its discretion whether or not to record a conviction, a court must have regard to all the circumstances of the case. These will include the nature of the offence, the character and past history of the offender and the likely impact of a recorded conviction on the offender's economic or social well-being or on his or her employment prospects.[14] However, contrary to the objects of this task, the daily exercise of judicial discretion to not impose convictions is routinely and systematically undermined in Victoria by the contradictory philosophy underpinning the Police Records Information Release Policy. Indeed, subject to the parameters of this Policy, Victoria Police releases findings of guilt without conviction to third parties regardless of the circumstances surrounding a case including:

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

[13] s. 8.

[14] s. 8(1).

Chapter 2: Concerns About the Existing Framework

According to the Victorian Department of Justice discussion paper *Uniform Spent Convictions: A Proposed Model – Discussion Paper: August 2004*, a criminal record has enduring consequences for an offender and creates a range of obstacles, including:

- securing lawful employment, especially in certain occupations such as working with children or vulnerable people;
- acquiring certain licences;
- appointment as a company director;
- obtaining credit or insurance;
- participating in public life; and
- admittance to a particular profession.[15]

These obstacles are created or exacerbated by a range of deficiencies in Victoria's current legal framework. These include:

- the absence of a spent convictions scheme in Victoria;
- the absence of a statute based criminal record management system in Victoria;
- the absence of any state-wide anti-discrimination protections in Victoria or any *effective* anti-discrimination protections at a federal level;
- the general misunderstanding of non-conviction sentences;
- the general confusion as to disclosure rights and responsibilities; and
- the operation of private criminal record databases throughout Australia.

Absence of a Victorian spent convictions scheme

Many legislatures around the world have acknowledged the desirability of ameliorating the effects of past convictions in order to assist the rehabilitation of offenders.[16] One way of ameliorating these effects is through the operation of a spent convictions scheme, under which certain convictions become spent, or lapse, after a period of time.

Victoria and South Australia are now the only jurisdictions in Australia without spent convictions schemes.[17] A Victorian scheme was proposed in the late 1980s; however, although draft legislation

[15] *Uniform Spent Convictions: A Proposed Model – Discussion Paper: August 2004,* Department of Justice (Victoria) p. 15.

[16] *Criminal Records Act 1970* (Canada); *Rehabilitation of Offenders Act 1974* (UK).

[17] *Crimes Act 1914* (Cth), *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), *Spent Convictions Act 1988* (WA), *Criminal Records Act 1991* (NSW), *Criminal Records (Spent Convictions) Act 1992*, *Spent Convictions Act 2000* (ACT).

was prepared, the scheme did not proceed.[18] A nationally uniform spent convictions scheme, to which Victoria would be a party, is presently the subject of discussion by the Standing Committee of Attorneys-General.[19]

What is a spent convictions scheme?

Under a spent convictions scheme certain convictions become 'spent' and no longer form part of a person's publicly accessible criminal record, once a specified period of time has passed, during which time the person has not been convicted of any further crimes.[20] The purpose of a spent convictions scheme is to ameliorate the effects of certain past convictions in order to assist the rehabilitation of offenders. According to the Victorian Department of Justice discussion paper *Uniform Spent Convictions: A Proposed Model, August 2004:*

> *In the absence of re-offending, the relevance of a criminal conviction diminishes over time. Research into the recidivism of convicted offenders indicates that the likelihood of committing further criminal offences decreases over time. Essentially, the older a conviction, the less relevance it has in predicting an individual's character and future offending behaviour. In these circumstances, the prejudice that a past offender may experience as a result of an old conviction will generally outweigh its value as an indicator of their future behaviour.*[21]

The operation of a spent convictions scheme only entails the removal of some convictions from publicly accessible criminal records. There are circumstances where maintaining certain convictions is in the public interest. Accordingly people sentenced for serious offences (such as sexual or child related offences) or to lengthy periods of imprisonment are often excluded from the operation of such schemes. Other exemptions also usually apply to certain categories of employment (such as teaching) and access to 'spent convictions' information is most often limited to criminal justice officials and certain government agencies.[22]

Some arguments in favour of and against a spent convictions scheme

Arguments in favour:

- People should not be unnecessarily re-penalised for conduct that has already been punished.
- Many people who have been convicted of an offence are never convicted again, especially when the offences were committed during adolescence.

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[18] Victoria, Attorney-General's Department, 'Spent Convictions', (1987) 61 *Law Institute Journal* 1247; *Spent Convictions Bill 1991*.

[19] *Uniform Spent Convictions*, above n 15.

[20] *Uniform Spent Convictions*, above n 15, p. 14.

[21] p. 14.

[22] *Uniform Spent Convictions*, above n 15, p. 14.

- The older a conviction becomes, the less relevant it is when predicting the person's future conduct.
- A spent convictions scheme is consistent with government philosophy of promoting community safety, crime prevention and protection of civil liberties while supporting an offender's rehabilitation and reintegration into society.
- There is some pressure on governments from persons who have been adversely affected by their old and minor criminal records to introduce provisions to ameliorate the effects of their convictions. [Examples of such cases are clearly evidenced later in this report.]
- Society is rejecting the contribution of persons who are needlessly excluded because of previous conduct which is irrelevant to their present circumstances.[23]

Arguments against:

It is in the public interest that:

- public information should be widely available and without restriction;
- law enforcement agencies and the general community should have information available about offenders to prevent crime;
- professional and occupational bodies should have available all relevant information about a person before allowing them to practise or operate;
- offenders should be made to pay for their crimes and continue to suffer the consequences of their wrongdoing.[24]

Job Watch and FLS jointly submit that on balance the arguments in favour of a spent convictions scheme outweigh those against it. We consider that, subject to certain limited exceptions, there is insufficient compelling evidence to justify the release of criminal record information after a specified 'rehabilitation' or waiting period, particularly where no conviction is recorded.

Absence of a statute based criminal record management system

Although Victoria does not have a spent convictions scheme, it does have a de facto scheme that is based on policy determined by Victoria Police. This scheme was outlined in the earlier section, **Criminal Records**. This scheme does not have a legislative foundation, save that Victoria Police has lawful authority to administer criminal record information in the State of Victoria.

[23] Australian Law Reform Commission, *Spent Convictions*, 1987, p. 4.

[24] *Spent Convictions*, above n 23, p. 4.

The scheme is vulnerable to the variable interpretations of when exceptions to the non-disclosure policy might arise. For example, for the purpose of assessing whether a record that is over 10 years old ought to be released, no guidance is offered regarding what constitutes the 'interests of crime prevention, the administration of justice or public safety'.[25] As this scheme is policy based and not prescribed by legislation, its underpinning policy is also vulnerable to alteration by the police themselves, rather than by the Victorian legislature. This is unacceptable in an area which is both sensitive and of high public interest.

Under the present system, individuals have also encountered difficulties coping with the consequences when erroneous information is released:

> ***MATTHEW***
> *Matthew failed to pay a restaurant bill and was charged with obtaining goods by deception. At the court hearing Matthew specifically addressed the Magistrate on the issue of a non-conviction disposition because he had concerns about the impact of a conviction on his employment prospects. Matthew was found guilty and received a fine without conviction.*
>
> *Unfortunately for Matthew the offence mistakenly appeared as a conviction on a police check undertaken by his employer within three months of the commencement of his employment. Matthew pointed out this error to his employer, but he was not given time to correct the entry. Matthew was dismissed. Matthew lodged a complaint with the Victorian Ombudsman (Police Complaints). The Victoria Police admitted their mistake. The employer refused to withdraw the termination arguing that it was lawful because it fell within the three-month probationary period.*
>
> *Matthew was told by the Ombudsman that to sue the Police for their error would be a drawn out affair, and could be costly. Although Matthew also knew two other people who had suffered as a result of incorrect police checks, he just wanted to get on with his life and gave up the fight.*
>
> *Matthew felt that the offence was irrelevant to his employment because it was trivial, irrelevant to his role in the work place and no conviction had been recorded.*[26]

Absence of effective anti-discrimination protections

Unlike some Australian jurisdictions, Victoria currently lacks any state-wide legislative provision that effectively prohibits discrimination on the basis of a criminal record, however described. That is, the *Equal Opportunity Act 1995* (Vic) (EO Act), which lists all the attributes (currently 16) on the basis of which discrimination is prohibited, is silent with respect to criminal record or spent convictions.

By comparison, in both the Northern Territory and Tasmania discrimination on the basis of 'irrelevant criminal record'[27] is prohibited. Subject to limited exceptions, this prohibition extends to all the areas

[25] *Victoria Police Records Information Release Policy* (2005).

[26] 'CRIMINAL HISTORY CHECK' (Police Checks) – Survey 1, Fitzroy Legal Service, 2004.

covered by the anti-discrimination legislation of those jurisdictions (including, but not limited to, employment, accommodation, education, provision of goods and services and activities of clubs).

In the Australian Capital Territory, the *Discrimination Act 1991* (ACT) protects people from discrimination on the basis of a 'spent conviction within the meaning of the *Spent Convictions Act 2000*'.[28] This applies across the areas of work, education, access to premises, accommodation, clubs and in the provision of goods, services and facilities. In Western Australia, whilst the *Equal Opportunity Act 1984* (WA) is silent on the issue, the *Spent Convictions Act 1988* (WA) makes it unlawful[29] to discriminate against a person on the basis of a 'spent conviction', in both employment and employment-related areas.

Returning to Victoria, it is evident that there are only extremely limited avenues for redress that are available to people who experience discrimination on the basis of their criminal record. They include unfair dismissal proceedings or complaints to HREOC.

Unfair dismissal proceedings

In Victoria, if the discriminatory conduct to which a person has been subjected consists specifically of a termination of employment, and that person is eligible to apply to the Australian Industrial Relations Commission (AIRC) for relief in respect of the termination,[30] one option may be to lodge an unfair dismissal claim seeking reinstatement or compensation in lieu of reinstatement.[31]

Perhaps not surprisingly, there have been very few decisions handed down by the AIRC in circumstances where the alleged unfair dismissal was the direct result of an employer finding out about an employee's past criminal record. In one decision,[32] a detention officer was dismissed because of his adverse police clearance certificate which revealed convictions for stealing as a servant. The AIRC held that whilst there was a valid reason for the termination, in that the employer's operational requirements necessitated absolute trust and confidence in its employees which it could

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[27] Section 4(1) of the *Anti-Discrimination Act* (NT) *defines* 'irrelevant criminal record' so as to include a spent record within the meaning of the *Criminal Records (Spent Convictions) Act* (NT) or a record relating to arrest, interrogation or criminal proceedings where, broadly speaking, either no conviction is recorded or, if there is a conviction, the circumstances surrounding the offence are not directly relevant to the situation in which the discrimination arises. Section 3 of the *Anti-Discrimination Act 1998* (Tas), whilst it does not make reference to any spent convictions legislation, defines 'irrelevant criminal record' in very similar terms. In both cases, it is clear that if the criminal record is not 'directly relevant' to the situation and it forms the basis of some discriminatory act or omission in a protected area, that discriminatory conduct will be prohibited under the relevant legislation.

[28] s. 7(1).

[29] Part 3 Division 3.

[30] Part VIA, Division 3, of the *Workplace Relations Act 1996* (Cth), together with the *Workplace Relations Regulations*, limits the categories of employees who are eligible to lodge claims for unfair dismissal. Excluded categories of employees include, for example, those serving a three month qualifying period, casuals who have not worked for the same employer on a regular and systematic basis for at least 12 months and those employed on fixed-term contracts.

[31] Such claims must be lodged within 21 days of the termination of employment: s. 170CE(7).

[32] *Parody v Australasian Correctional Management P/L* (AIRC, 21 February 2003) PR928052.

not have in the applicant because of his convictions, the termination was nevertheless unfair as the applicant had disclosed his criminal record prior to his employment beginning and he had taken the job in good faith. The employer had not, in the view of the AIRC, been diligent in conducting its police checks before employing candidates and it had not given the applicant a fair go.

Another relevant decision of the AIRC[33] involved the dismissal of a used car salesman after the employer was advised by its insurer that it would exclude him from any cover under its policy. The salesman had disclosed on a questionnaire that he had in the past been fined for not wearing a seat belt and he had two convictions for driving whilst disqualified and for assault. In this case, the employer again used the operational requirements argument to justify the dismissal. That is, it claimed that as the insurance company had deemed the employee to be a 'prohibited employee' under the *Motor Car Traders Act 1986* (Vic) and had declined to insure him, he could not perform his duties. The AIRC held that there was no valid reason for the dismissal. This conclusion was reached on the basis that, firstly, the employer could have submitted forms to the Business Licensing Authority to enable the employee to continue in employment despite his criminal record and, secondly, the AIRC was not convinced that the employee's duties necessarily entailed the driving of vehicles, for which insurance was essential. The AIRC was not persuaded that the operational requirements of the business in this case called for an immediate termination of employment, without some consideration of possible alternatives, including querying the insurer's assessment process for policy coverage.

Whilst these two decisions might offer some solace to employees with a criminal record, the reality is that the unfair dismissal laws only offer a piecemeal solution and they are not accessible to large numbers of people who are likely to encounter discrimination in this area. It is noteworthy that 35 of the 48 Job Watch callers[34] who enquired about discrimination on the basis of criminal record in the area of employment would have been statutorily excluded from the unfair dismissal jurisdiction because of their status as, for example, casual or probationary employees, or because the discriminatory conduct took place at the recruitment stage, before they had become employees.

The following case studies, taken from the records of both Job Watch and FLS, illustrate some of the issues facing job seekers and employees in the early days of their employment who are either denied employment or dismissed because of their police records and who are barred from issuing proceedings for unfair dismissal:

> ***DIMITRI***
>
> *Dimitri had a history of drink driving and had even spent a short time in jail because of it. He had never been charged or found guilty of dishonesty offences. He secured employment as a cleaner in a large suburban shopping complex. After working for three weeks his employers learned of his criminal history and terminated the employment. He was told his services were no longer required because of his*

[33] *Stoilkovski v Spencewill Nominees t/as Trentarc Motors* (AIRC, 30 April 2002) PR917182.

[34] between May 1999 and 1 February 2005.

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.

MARK

Mark had a criminal history and had been to jail. He successfully secured employment in an auto-spares store. He was not asked anything in the job interview about his criminal history. After commencing the job he was given some forms to complete by his employer, in which he disclosed his history. Mark's employment was terminated.

JENNY

Jenny was a young woman who had spent some time in jail. Now out, she was living in supported housing awaiting public housing. She secured employment. Although Jenny's employer had not made enquiries about her criminal history, the employment was subject to the usual three month probationary period. Jenny informed the Office of Housing of her employment, as this would impact her eligibility. The Office of Housing contacted Jenny's employer to verify some details regarding the employment. Within two days Jenny's hours were reduced from full time to casual and soon thereafter she was sacked. Jenny had worked for two months. Although the Office of Housing did not directly disclose Jenny's criminal record, she believes that the employer drew inferences and made associations regarding her past criminal conduct. Jenny had to find new work and get on the list for public housing, again.

DAVE

Dave was convicted of a theft-related offence in the early 1980s when he was 16 years old. He'd 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.[35]

WAYNE

Wayne's application for a job as a security officer was rejected after a police record check revealed a five year old criminal conviction for culpable driving. The position for which he had applied did not involve any driving whatsoever.

CON

Con was dismissed from his position as a nurse on the last day of his probationary period. He was specifically told that the termination was due to his 20 year old conviction even though back when he was interviewed for the position he had voluntarily disclosed the information relating to his criminal record and had been reassured that it was not problematic.

VINCE

Vince had been employed on a casual full time basis as a labourer for between three and six months when his employer checked his criminal record and subsequently dismissed him. He was charged and convicted of theft 10 years prior to applying for this job when he was 13 years old. At the recruitment stage, he had been required to fill out a form asking about any criminal convictions. In good faith he had responded negatively, believing that juvenile offences did not appear on police checks and also being under the misapprehension that a 'conviction' necessarily entailed a jail sentence.

[35] *Midweek Crisis* (2004) RRR Community Radio talkback.

Complaints to HREOC

If a person has experienced discrimination on the ground of 'criminal record' but is excluded from the unfair dismissal jurisdiction, s/he might lodge a complaint with HREOC.[36] Unfortunately, this process is also severely limited in the protections it affords. Firstly, the HREOC complaints process is only open to people complaining of discrimination in employment. Secondly, the *Human Rights and Equal Opportunity Commission Act 1996* (Cth) (HREOC Act), whilst recognising that any 'distinction, exclusion or preference' in employment or occupation that is based on a person's criminal record may amount to discrimination,[37] does not itself render such discrimination unlawful. HREOC's statutory powers are limited to conciliating disputes and preparing a report with recommendations, with which an employer may or may not comply.[38] HREOC does not have any power to make orders or impose penalties or award compensation to victims of discrimination.

In light of the above, we are of the firm view that there are currently **insufficient** legal protections in Victoria – and indeed federally – to guard against discrimination on the basis of criminal record. This is true of both discrimination in employment – where the federal laws are rendered ineffective because of the lack of enforcement mechanisms – and, even more evidently, discrimination in other areas of public life, where there is a patent dearth of legislative protections. Below are two case studies of people for whom the currently available anti-discrimination provisions offer no remedy.

> ***KELVIN*** *(as described by John, Support Worker, Salvation Army)*
> *Kelvin was released from prison and lived for a short period with his girlfriend. He was referred to the PILCH Homeless Person's Legal Clinic by police after his relationship broke down and he became homeless.*
>
> *Kelvin stayed in our service for six weeks, and was supported to investigate private rental. He was apprehensive, believing he had no hope of finding private rental. At one real estate agent I accompanied him to the front door and he went in to make an enquiry. Shortly after he came out saying, 'I told you they won't even listen to my enquiry' as he was only able to give them a brief window of the past and his prison story. Next day I wrote a letter to the management but no answer was received, despite follow up calls.*
>
> *During his time with us, Kelvin was an excellent tenant, rigid in keeping his unit clean and in paying rent. The real issue was discrimination by the real estate agent towards homeless people and ex-prisoners. In fact, if one reflects upon a prison existence, many prisoners have pretty good living and house skills which can be carried into civilian life.*
>
> ***LE***
> *Le was a highly qualified company secretary, but after defrauding a company of one million dollars she served three years in jail. Following her release, Le found employment as the manager of hostel*

[36] Regulation 4 of the *Human Rights and Equal Opportunity Regulations* include 'criminal record' as a ground of 'discrimination' as defined in s. 3(1) of the *Human Rights and Equal Opportunity Act 1986* (Cth).

[37] Provided, however, that the distinction, exclusion or preference is not based on the 'inherent requirements' of a particular job: see the definition of 'discrimination' in s. 3 of the HREOC Act.

[38] See generally Division 4 of the HREOC Act.

accommodation. Le was candid with her employer about the offence, and he was willing to give her a go. However, when the employer informed the government agency who funded the hostel about Le's appointment, the agency threatened to remove him as a housing provider. With an annual turnover of some 6 million dollars the employer felt obliged to accede to the funder's demands and terminate Le's employment.

Le now works as a personal care assistant, notwithstanding the fact that personal carers are currently required to undertake police checks. These checks do not specify categories of relevant offences in advance but rely on the discretion of employers to discern which offences are relevant.[39]

Impact of discrimination on the basis of a criminal record

To gain a sense of the prevalence of discrimination on the basis of a criminal record, FLS interviewed agencies that advocate on behalf of or otherwise support people with criminal records. These included: The Brotherhood of St Laurence, Employment Focus, Education Centre Gippsland, Melbourne City Mission, Youth Projects, Public Interest Law Clearing House – Homeless Persons Legal Clinic, The Brosnan Centre, VACRO (Victorian Association for the Care and Resettlement of Offenders), and the Australian Education Union.[40]

When asked *'Have any of your service users experienced discrimination (less favourable treatment) on the basis of a criminal history?'* eight (8) answered yes and one (1) no. The agency that answered no qualified the response by saying that clients actively sought to avoid the threat of discrimination by self-excluding themselves from jobs requiring criminal record checks.[41]

When asked *'In what contexts have any of your service users experienced such discrimination?'* agencies responded:

Context of discrimination	Total
Employment	8
Work experience	2
Volunteering	2
Obtaining insurance	2
Housing and housing services	3
Other (business registration, Centrelink, health service provision)	3

When asked *'How does your organisation rate the impact of such discrimination on your service users' capacity to lead a normal life?'*, agencies responded on a scale from Very Significant to Significant to Limited Effect:

[39] 'CRIMINAL HISTORY CHECK' *(Police Checks)* – Survey 3, Fitzroy Legal Service 2004.

[40] Ibid.

[41] Ibid.

Impact of discrimination	Total
Very significant	5
Significant	2
Limited effect	1

Lastly, when asked to give examples of the effects (economic, social, emotional, psychological, etc), if any, on service users that had suffered such discrimination, responses included:

> *[The effects] go across the board. If a person can't get employment because of an employer's preconceived ideas, it immediately limits all of their other opportunities in the community. When people aren't given these opportunities, reoffending behaviour often seems to be the only option they've got. Being excluded from employment has a big impact on their self-esteem and confidence. This barrier is very hard to adapt to and there aren't a lot of options for them unless they can access significant advocacy services. Often people can't use skills and trades they've developed in institutions because employers don't want them because of their criminal records.* Brotherhood of St Laurence
>
> *[It can leave people feeling] physically and emotionally depressed, having lost hope in ever working again. One client was devastated. Part of his offending behaviour was impulse control. He was straight for six months and made a concerted effort*, *[but when he was discriminated against he felt like] society was throwing it back in his face.* Employment Focus
>
> *Frustration. The criminal record barrier compounds many problems in the area including unemployment…lack of opportunity in jobs, lack of skills and training, attitudes, drug related issues, and the overall presentation of individuals.* Education Centre Gippsland
>
> *[Some of the effects include] lack of self esteem, feeling like they will never get a second chance, being unable to support their families financially, and giving up looking for work.* Melbourne City Mission
>
> *Clients self exclude themselves from jobs requiring a criminal history check…People feel they wouldn't be successful in the application stage, which is another knock back which knocks their self esteem and makes them think 'no-one will give me a second chance'. You don't want another rejection when you may have had several anyway.* Youth Projects
>
> *[There are] deleterious social and psychological impacts. Social and economic exclusion that can result from discrimination often results in an exacerbation of the causes of homelessness or criminal conduct. For example a client who can't secure gainful employment is more likely to resort to low level offences, like begging and theft, to secure a reasonable standard of living than someone who can achieve gainful employment.* PILCH Homeless Persons Legal Clinic
>
> *[Discrimination] reinforces a whole range of things: 'me against the system', 'there's a reason why I'm not progressing in life and what's the point'. Trying to channel negativity into self-advocacy is very difficult. A lot of anger and frustration builds up and this leads to anti-social behaviour and hopelessness. It's another knock back or rejection. It is so hard to get people back up if they get a knock back, they might not try for another job for a month. It reinforces distrust in organisations and what we as adults represent. Employers are nonchalant and don't care about the effects of a knock*

back. Some industries aren't particularly ethical about how they treat jobseekers, who are there to be used and abused, for example: factories, small businesses, unskilled labouring. The Brosnan Centre

There is the full gamut of effects. When trying to reintegrate into the community, if people can't have access to opportunities it makes it incredibly difficult to develop supports. [Discrimination] prevents them from breaking out of bad patterns. It affects their confidence, social interactions, economics, it's huge. VACRO

It falls into two categories. For those seeking employment it can mean no job. This has a serious economic detriment. It increases a range of anxieties for the person going through the [criminal record check process]. For those in employment, but who get promoted or transfer and have to undergo police record checks, it can lead to a state of high anxiety and agitation. Australian Education Union[42]

In relation to Job Watch's experience, the following case study provides some further insight into the possible personal ramifications of discrimination on the basis of criminal record. This case study, in particular, highlights some of the complexities involved in trying to strike a balance between the different sets of interests of stakeholders. Inevitably, the personal circumstances of some former offenders will inspire greater sympathy than those of others. However, even where an individual presents with a lengthy criminal history, Job Watch and FLS maintain that the interests of society are better served if, instead of simply permitting knee-jerk reactions on the part of employers, a requirement is introduced whereby individuals are given an opportunity to discuss their criminal record before a final, potentially discriminatory, decision is made regarding their employment.

SAM

Sam, aged 38, was employed on a permanent full time basis as a yards person with a car dealership which had a written equal opportunity policy that made discrimination on the basis of a person's criminal history unacceptable. His employment duties included keeping the yard and cars clean, keeping the cars fuelled up, putting new number plates on the customers' cars, running cars to and from a service, booking in new cars, cleaning the coffee machine etc. All his duties were to be performed during standard business hours in the presence of other staff. He did not directly handle any cash. He worked for just under three months when he was unexpectedly dismissed.

During the recruitment process for this job, Sam was required to fill out an employment application form which asked, among other things, 'Have you been convicted of a serious offence in the past 10 years?' No guidance was given regarding what might constitute a 'serious' offence. Not believing that his previous convictions were sufficiently related to the inherent requirements of this job, Sam answered 'no'. He did, however, consent to a criminal check, which revealed his criminal history. He also told his boss that his criminal history would reveal a number of burglaries. In response, his boss told him that he was doing a good job, so not to worry.

Throughout most of his probationary period Sam felt that his employer had been very positive about his employment. He had even been invited to his boss's house for a Christmas dinner.

[42] Ibid.

About one week before Sam's probationary period was due to end, he was dismissed on the basis of the results of his police check, which had taken a long time to be processed for disclosure. His criminal record revealed a series of convictions relating to approximately 60 offences of burglary. Sam was not asked questions about his criminal history or given an opportunity to explain himself. There was no attempt to explore possible alternatives to a termination of employment (including, for example, varying any of his duties).

In describing the impact of this treatment on his morale, Sam explained that all his offences were drug related. His last conviction had resulted in a two year jail sentence, from which he was released about 14 months prior to the termination. He had stopped using heroin in 2002, whilst he was in jail. He had then been on the methadone program and had 'stayed clean' until he found himself in deep depression over the termination. He felt that he had tried to do the right thing and change his life around but this termination of employment had really 'knocked" him down. 'I really tried to make things work this time but now I wonder what's the point. Being treated like this just makes you feel like you're worthless.'

Interestingly, the factual circumstances surrounding Sam's termination of employment, following the employer's discovery of his criminal record, were very similar to those of Mr Stoilkovski, who successfully issued unfair dismissal proceedings in the AIRC in 2002 (as described above under **Absence of effective anti-discrimination protections**).[43] However, as Sam had not yet completed his probationary period when he was dismissed, he was barred from pursuing such an action, thus highlighting the inadequacy of present statutory safeguards against unfair or discriminatory treatment of employees in this area.

Operation of private criminal record databases

According to the Victorian Department of Justice in its Discussion Paper *Uniform Spent Convictions: A Proposed Model – August 2004,* the emergence of new technologies and increased use of the internet have made it apparent that past criminal records and personal information can be used in adverse ways not intended by the criminal justice system.[44] Below are some examples of situations where employers have discovered criminal record information about prospective employees through the internet and without the individual's consent.

BILL

Bill had served time in prison but was now out and looking to rebuild his life. He applied for a job in a butcher's shop. On Wednesday he was told he had been successful and could start work the following Monday. Two days later, Bill was contacted and told by his employer that they had checked the internet, and seen that Bill had been to jail, so he could not work there.

[43] *Stoilkovski v Spencewill Nominees t/as Trentarc Motors* (AIRC, 30 April 2002) PR917182.

[44] *Uniform Spent Convictions*, above n 15, p. 13.

CASEY

Casey had been in jail. After she was released she successfully applied for a job at a service station. Prior to commencing work she was also informed that her employer had checked the internet, discovered that she had been in jail, and that she would not be retained.

MIGUEL

Miguel had served time for fraud and embezzlement. After his release he secured employment as an accountant for AMP at a large suburban shopping complex. He was on trial for three months. After working for two and a half months his employers advised that he was likely to be retained on a full time basis and that arrangements had been made for further induction. His employers requested his full name and date of birth, ostensibly to create a 'user identity' on their computer system. The next day he was told that his services were no longer required and he was dismissed. Miguel subsequently discovered that information about his criminal history was available on the internet at a website called CrimeNet (see below).[45]

CrimeNet

One example of a privately owned and run Australian criminal record database is that of CrimeNet. Launched in May 2000, the CrimeNet website (at http://www.crimenet.com.au/) claims to be 'the world's first site to provide a combined information service on criminal records, stolen property, missing persons, wanted persons, con artists and unsolved crimes'.[46] It further claims that since its inception, the site has 'built up a database of thousands of mostly Australian criminal records, with emphasis on records relating to fraud, paedophilia, sex-related crimes and crimes of violence'.[47] It asserts that thousands of corporations, small businesses, legal firms, banks, airlines, employment agencies and individuals regularly use the service.[48]

The CrimeNet site cites some of the difficulties encountered with privacy protections and State-based criminal record check administrations regarding disclosure: *'State Police Clearance Certificates can only be issued to the applicant and relate only to offences in that state. CrimeNet covers all jurisdictions, is faster and does not require the permission of the person being checked' (emphasis added).*[49]

Under a heading of 'frequently asked questions', the CrimeNet site explains that the types of convictions it records are those where a person: (a) has been convicted and sentenced to imprisonment to a term of not less than three months; (b) has been convicted in relation to a sex offence, paedophilia, fraud or violence; or (c) is in a position of public trust. The site also states, however, that CrimeNet can exercise its discretion to include convictions 'which in our opinion are in

[45] 'CRIMINAL HISTORY CHECK', above n 39.

[46] CrimeNet website under the heading 'Welcome to CrimeNet', http://crimenet.com.au (accessed 25 January 2005).

[47] Ibid.

[48] Ibid.

[49] Ibid.

the public interest'. Its operations are based on the premises that 'in democratic countries, criminal court procedures are open to the public… [and] criminal records are public documents'.[50]

Scope of privacy legislation

The Victorian Department of Justice discussion paper *Uniform Spent Convictions: A Proposed Model – August 2004* concludes that notwithstanding *'the enactment of privacy legislation or administrative guidelines in all Australian jurisdictions…privacy legislation and guidelines have their limitations: they do not, and cannot, apply to information already in the public domain'.*[51] However, despite the existence of some limitations and difficulties, the view expressed in this report is that privacy legislation and guidelines do provide some important protections to the abuse of criminal record information.

As earlier explained, Victoria Police provides a service to Victorian individuals and organisations wishing to obtain national police certificates for employment, voluntary work and occupation-related licensing or registration purposes. In these cases Victoria Police does not release information about an individual's criminal history to an organisation without the written consent of that individual.[52] This is in line with the obligations imposed by the *Information Privacy Act 2000* (Vic), which treats criminal record information as sensitive information, which is thereby subject to special restrictions.

While the *Information Privacy Act 2000* covers Victorian government agencies, statutory bodies and local councils, including Victoria Police, it does not cover individuals and organisations in the private sphere. Instead, the *Privacy Act 1988* (Cth) covers federal government agencies and parts of the private sector.

The private sector provisions of the Commonwealth *Privacy Act* apply to organisations (including not-for-profits) with an annual turnover of more than $3 million and some small businesses with an annual turnover of $3 million or less. Small businesses caught by the Act can include businesses trading in personal information, being ones that:

- disclose personal information about another individual to anyone else for benefit, service or advantage; or
- provide a benefit, service or advantage to collect personal information about another individual from anyone else (unless they do so with the consent of the individual concerned or are required or authorised to do so under legislation).[53]

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[50] Ibid, under the heading 'About CrimeNet'.

[51] *Uniform Spent Convictions*, above n 15, p. 13.

[52] Victoria Police website, http://www.police.vic.gov.au/showcontentspage.cfm?contentspageid=21422 (accessed 27 January 2005).

[53] s. 6(D)(4)(c) *Privacy Act 1988* (Cth).

In light of the above it is strongly arguable that businesses such as CrimeNet (regardless of whether they have an annual turnover of more than $3 million) are covered by the Commonwealth *Privacy Act*. If that is so, then individuals may be entitled to seek a legal remedy for a business' breach of its legislative obligations, such as failing to obtain the individual's consent before collecting, using or disclosing any sensitive information (including information about a criminal record)[54] regardless of whether that information could have been obtained from another source in the public domain, such as a court or the media.

Misunderstanding of non-conviction sentences

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

> ***RHIANNA***
>
> *Rhianna was charged and found guilty on several counts of obtaining property by deception. She was assured by her lawyer that if she pleaded guilty and the Court did not convict her, then the offences would not be recorded on a police check, which she might be required to undertake in the future. Rhianna pleaded guilty mindful of this and no conviction was recorded. She received a fine and a Community Based Order for six months to perform 70 hours of unpaid community work.*
>
> *When Rhianna applied for work a short time later she was requested to undergo a police check. To her surprise the check revealed the guilty verdict. She was refused employment due to her record. Not only was Rhianna shocked because she did not think that a non-conviction would be recorded on her criminal record; she was also upset because she did not feel that the charges were relevant to the job.*
>
> ***JASON***
>
> *Jason was found guilty of possessing a drug of dependence (less than eight grams of marijuana) when he was 23 years old. Jason pleaded guilty to the charge hopeful that no conviction would be recorded against him. He received a good behaviour bond without conviction. When undertaking tertiary studies in education, Jason was obliged to obtain a police check prior to his student placement. Upon graduation he was again required to disclose the offence prior to registration as a teacher. These checks revealed the guilty verdict, notwithstanding the non-conviction sentence, necessitating further explanation by Jason as to broader circumstances surrounding the offence.*
>
> ***JEREMY***
>
> *Jeremy was 18 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*

[54] Office of the Federal Privacy Commissioner, *Guidelines to the National Privacy Principles*, September 2001, p. 15.

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 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.

VAN

Van was charged with a minor dishonesty offence when he was 21 years old. At the time of the offence his parents were splitting up, 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, in order 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.

NATALIE

When Natalie was 17 years old she was charged with assault and possessing/trafficking a drug of dependence. When she was 21 years old she was charged with burglary and theft, including theft of a motor vehicle. On all occasions she pleaded guilty hopeful that no conviction would be recorded against her. She was found guilty of each charge and received sentences including bonds, fines and community work, all without conviction.

Natalie made some positive changes in her life and decided to study youth work. She sought placements for her practicum component and was required to undergo police checks. Natalie felt that she had moved on with her life and was surprised that the offences, especially the offences that occurred when she was 17 years old, were revealed on the check when no convictions had been recorded. As a consequence of these disclosures, Natalie was refused a placement in a juvenile justice centre and was told that she could not be placed there because she might 'bump into someone she knew'! Natalie felt that the assessment of her suitability was based on the limited information appearing on her police check, and she was denied the opportunity to explain the circumstances of the offence, which would have put a very different complexion on things.

PREM

Prem was a high school teacher of 35 years' experience without a blot on his professional record. At the age of 54 he and his wife were charged in Victoria for leaving their young child unattended for several hours. Prem and his wife were found guilty by the Magistrate, fined and convicted. Because

Prem had concerns about the impact of the conviction on his ability to teach he instructed his legal representatives to appeal the sentence.

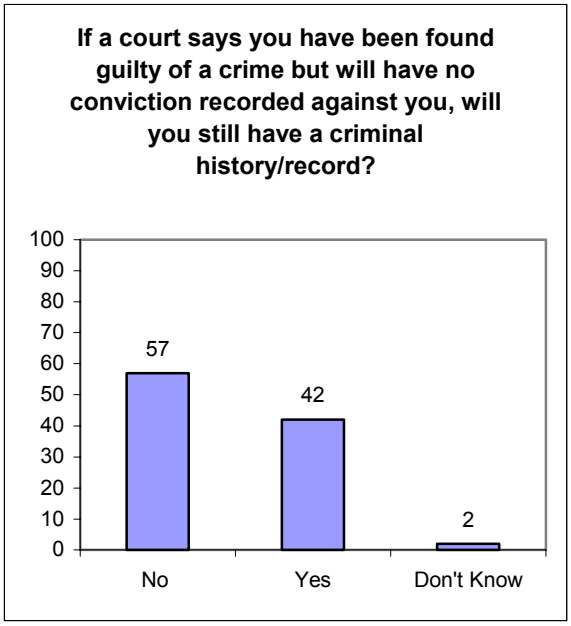
On appeal, the Court agreed with Prem. The original sentence was set aside and he was fined without conviction. To Prem's great frustration the offence was nevertheless disclosed when he applied, nine years later, to be re-registered as a secondary school teacher in New South Wales. Prem was dismayed because the Court had carefully considered the nature of his profession and the impact the offence could have on his capacity to teach and had decided that no conviction should be imposed. Prem was forced to engage in the embarrassing and lengthy process of explaining the circumstances of the offence and obtaining statutory declarations as to his good character. Prem was forced to seek other employment and became a taxi driver. The Victorian Taxi Directorate was also informed of the offence through a police check, but had no concerns regarding Prem's suitability.[55]

Gauging general community understanding

In an attempt to gauge general community understanding of the effect of a non-conviction sentence, FLS surveyed 63 clients attending its night legal service and asked:

'If a court says you have been found guilty of a crime but will have no conviction recorded against you, will you still have a criminal history/record?'

In this survey, 57% of people answered 'No', 42% 'Yes' and 2% 'Don't Know'.[56]



These responses demonstrate the widespread belief that if no conviction is recorded then no details about the offence will appear on a criminal record. They also point to a general misunderstanding as to the effect of the Police Records Information Release Policy.

It is noteworthy that even where clients appeared to understand that non-convictions may nevertheless appear on a criminal record, they were often confused about the circumstances in which, and the purposes for which, criminal records are maintained. This misapprehension was further evidenced by the comments which accompanied many of the 'yes' responses. For example:

- *[You will still have a criminal history…] because it will be written down anyway – what are they going to do, throw the file out? And whoever's there will remember it, you can't erase memories. There are archives of all court cases.*

[55] 'CRIMINAL HISTORY CHECK' above n 39.

[56] 'CRIMINAL HISTORY CHECK' (Police Checks) – Survey 2, Fitzroy Legal Service, 2004.

- *It is my experience that any criminal history can be brought up no matter how long ago or how old you are.*

- *I think I will have a black mark against my name.*

- *I know that strictly speaking I would not have a record, however I believe that it would still be on record (in secret) for police purposes.*

- *…Everything is kept on computers – memory...I believe that all records will be stored, and could be retrieved at any time required.*[57]

[57] Ibid.

Chapter 3: Proposals for Reform

FLS used its interviews with the nine agencies that advocate on behalf of, or otherwise support, people with criminal records in order to explore possible proposals for reform. Three questions were asked:

- How have your service users sought to resolve issues of discrimination based on their criminal record?
- Give examples of measures that in your view would have assisted your service users to avoid such discrimination.
- What measures would assist your service users to resolve issues raised as a result of the disclosure of their criminal records?

Agencies responded with the following:

Q. How have your service users sought to resolve issues raised by discrimination based on their criminal record?

Response	Total
Most clients do not seek to resolve the issues, they just accept the discrimination and move on.	7
No formal process is undertaken to pursue legal remedies.	6
Clients generally don't disclose their record when seeking employment.	6

They wouldn't try to take legal action. They don't see it as an option perhaps because they see the discrimination as ongoing punishment that they have to cop. Taking legal action is seen as a further deterrent to actually securing employment.

Usually they don't disclose their record when seeking employment – therefore avoiding the issue. Often the people who have done the right thing by disclosing it fear further discrimination. This is particularly discouraging for people who have not been in trouble but for the period they were in trouble. Brotherhood of St Laurence

Most put up with it – they move on. They complain to the support agency but don't go through any process. They're not willing to go and make the issues public again. Employment Focus

People just pretty well move on. Education Centre Gippsland

None have sought to complain about it. They don't know where to go or that anyone would take them seriously. They feel that to challenge discrimination would be fruitless. Melbourne City Mission

We've provided advice about anti-discrimination regimes at state and federal levels. They can only bring an action at the federal level. Clients opted not to take this action due to the difficulty in enforcing HREOC determinations.

The vast majority accept the discrimination as one of the prejudices associated with crim history – they resign themselves to marginalisation and discrimination. PILCH Homeless Person's Legal Clinic

Often people don't try to deal with the discrimination as it's very difficult emotionally – they just move on and shut out options. VACRO

Have no choice but to comply or they live with non-employment, non-promotion, non-transfer – they have to go through the process. If they do suffer the detriment then there's nothing more that they can do. Australian Education Union[58]

Q. Give examples of measures that in your view would have assisted your service users to avoid such discrimination.

Response	Total
Comprehensive employer and job seeker educational campaigns	8

A lot of people in the community think that as soon as you have a police record it's a capital offence. There should be an alternative to the police record system to grade offences or make certain offences applicable to certain industries…

An education campaign to make employers realize that there's a work-ready and skilled labour force ready to work but for a glitch in the radar that's holding them back. Brotherhood of St Laurence

A lot of companies/agencies are doing needless police checks. They're not relevant to the type of work being done. They should be delineating what's relevant and what's not in the company context…

Education to change perceptions/attitudes of employers and job agencies. Employment Focus

Unless there is a massive block on internet info then it's impossible to stop this…

Until there is a win/test case on this issue regarding a breach of contract or discrimination, nothing will change. A strong precedent is their only protection, otherwise their mistakes will follow them wherever they go. Melbourne City Mission

The key to prevention is comprehensive community education and in particular regarding non-discrimination. [That is…] education of people with criminal histories of their rights. To have legislative protection would create a positive right and would have a significant deterrent effect. PILCH Homeless Persons Legal Clinic

You can risk alienating people further by having anti-discrimination legislation legally protecting people with a criminal record. There are paths that haven't been tried yet…

[58] 'CRIMINAL HISTORY CHECK' (Police Checks) – Survey 3, Fitzroy Legal Service, 2004.

Being fully informed of rights and responsibilities eg: disclosure brochures. Clients being confident to assert their rights and responsibilities. Brosnan Centre

If the charge/offence was stale (if there was a spent convictions scheme) the offence could not be used against them. Therefore, having an effective spent convictions scheme is crucial. In this scheme you must make allowances whereby some offences no matter how old always make you ineligible to teach…

Better education for employers and employees helps but you'd think that in the State of Victoria employers would be aware of anti-discrimination legislation issues. Training of the community could help but it could also have a significant effect in reinforcing strong prejudices when it comes to criminal records. Australian Education Union

Q. What measures would assist your service users to resolve issues raised as a result of the disclosure of their criminal records?

Response	Total
Effective legal remedies e.g: anti-discrimination protection	6
Employer advocacy	5

If there was some sort of independent arbitration available it would be useful, e.g: VECCI or the Victorian Chamber of Manufacturers where an impartial person could weigh things up and give employers advice…

If you're going to release prisoners you have to give them a go. You're going to get burned occasionally but that's just part of it. Employment Focus

Having an effective avenue of redress and associated comprehensive education programs. Adding 'criminal history' as a protected attribute thereby giving access to the EOC and VCAT in the ordinary way…

Effective anti-discrimination legislation protecting the rights of people. Without this legislative framework people's attitudes are difficult to change. PILCH Homeless Person's Legal Clinic

Direct advocacy with employers – the 'please explain' process is important…

Effective careers counseling before undertaking a course of study. The problem is it is a discretionary matter – it may or may not preclude you at the time of the application. The enrolment process in courses may need to be more stringent…

Training institutions should perhaps be required to undertake the please explain process, e.g. for serious offences, whilst for minor offences it could be disregarded. Australian Education Union

Spent convictions schemes

As noted, a nationally uniform spent convictions scheme, to which Victoria would be a party, is currently the subject of discussion by the Standing Committee of Attorneys-General (SCAG).[59] The present proposal for this scheme, detailed in *Uniform Spent Convictions: A Proposed Model – Discussion Paper: August 2004*, affirms several of the common themes that emerged back in 1987 when the Australian Law Reform Commission considered the various submissions it had received in support of a uniform spent convictions scheme. Those themes, which are also supported by FLS and Job Watch, include the following:

- Simplicity – that record keepers, decision-makers, and former offenders need to be able to understand their rights and obligations under a spent convictions scheme;
- Uniformity and consistency – that there should be a uniform, or at least consistent, approach to spent convictions legislation by the States, Territories and Commonwealth;
- Exemptions from the effects of a spent convictions scheme – that the public interest in effective administration of justice, and criminal intelligence activity, requires that exemptions should be recognised in the scheme.[60]

Notwithstanding our support for a uniform and consistent scheme, FLS and Job Watch submit that the Victorian Government should give urgent consideration to independently implementing a spent convictions scheme, appropriate anti-discrimination protections and ancillary reforms in the event that a national uniform scheme cannot be agreed upon in the near future. We call on the Victorian Government to prioritise these reforms in light of the demonstrated disadvantage suffered by many Victorians under the current system, and to set a deadline for negotiations with the SCAG, after which time if no national uniform scheme is agreed upon the Victorian Government will implement an independent scheme.

The scope of a criminal record

As evidenced earlier in this report, criminal records are defined and understood in different ways in different contexts, creating confusion and uncertainty. Victoria Police's Records Information Release Policy clearly demonstrates that the common understanding of what information constitutes a criminal record, i.e. criminal convictions alone, is incorrect. It also reveals a deeper confusion about the nature of a conviction as distinct from a mere finding of guilt, making the system difficult to comprehend and negotiate.

[59] *Uniform Spent Convictions*, above n 15.

[60] *Uniform Spent Convictions* above n 15, Appendix 1; Australian Law Reform Commission Report No.37 *Spent Convictions* (1987), p. 11.

Different definitions of a conviction are applied across Australian jurisdictions, and differences can also be found between legislation, common law and popular meanings.[61] The word conviction is at times used as meaning the *verdict* or *decision* of a court, and at others the *sentence* or *penalty imposed*. While many jurisdictions in Australia adopt the former definition, the *Sentencing Act 1991* (Vic) interprets conviction, with some exceptions, as meaning the sentence of the court.[62]

Varying definitions of 'conviction' effectively determine what information comes within the scope of a spent convictions scheme. According to *Uniform Spent Convictions*, the treatment of discharge provisions or finding of guilt without conviction (both of which are often used in matters before the lower courts to demonstrate leniency by reducing the adverse consequences of a criminal conviction) are a case in point.[63] Because the adverse consequences of a criminal conviction generally include effects on an individual's ability to seek employment, acquire certain licences and participate in public life, the inclusion of a mere finding of guilt without conviction in the definition of a conviction for the purposes of a national uniform (or independent Victorian) spent convictions scheme would not only be confusing, it would substantially reduce the benefits of such discharge provisions, effectively undermining the ability of the courts to express leniency in appropriate circumstances.[64]

So as to restore the power of Victorian courts to effectively express leniency in appropriate circumstances, and to ensure clarity in the minds of those appearing before the courts, FLS and Job Watch call for urgent reform so as to address the deep division that currently exists between the policy underpinning sentencing practices in Victoria and that governing Victoria Police's records information release practices.[65]

> ***Recommendation 1: That only a recorded criminal conviction from a recognised Court of Law should come within the scope of a national spent convictions scheme, or any Victorian scheme.***

Similarly, information concerning mere contacts with the police, arrests, criminal investigations or the outcomes or details of disciplinary proceedings should not come within the meaning of conviction or the operation of a spent convictions scheme, because no criminal act has been made the subject of a recorded criminal conviction.[66]

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[61] *Uniform Spent Convictions* above n 15, p. 18.

[62] *Uniform Spent Convictions*, above n 15, p. 18; *Sentencing Act 1991* (Vic) s. 8.

[63] *Uniform Spent Convictions*, above n 15, p. 19.

[64] *Uniform Spent Convictions*, above n 15, p. 19.

[65] In so doing, FLS and Job Watch give their firm support to Recommendation 2 of the SCAG proposal.

[66] *Uniform Spent Convictions*, above n 15, pp. 22–3.

> ***Recommendation 2: That findings of guilt where there is no recorded conviction, details of arrests or criminal investigations, or details of disciplinary proceedings should not be included within the definition of conviction for the purposes of a spent convictions scheme and, accordingly, should not be made available on a person's official criminal record.***

Offences capable of becoming spent

The type of offence capable of becoming spent is of significant concern to governments administering spent convictions schemes because of the competing principle of community safety. While in some countries, like Canada and Switzerland, all offences are technically eligible to become spent, and while the Australian Law Reform Commission argued in 1987 that *'strong and persuasive reasons are required before particular classes of offences are excluded, whether because of their innate seriousness or for any other reason',*[67] the vast majority of Australian spent convictions schemes depart from this approach.[68] Instead, they endeavour to define and exclude serious offences from the operation of their respective schemes.

'Serious or less serious offences' are defined in different ways in different jursidictions. Offences may be classified using a range of methods including: the type or class of offence, the maximum sentence allowable for an offence, or the sentence imposed for an offence. *Uniform Spent Convictions* advocates a three-pronged approach: pragmatism, the 'type or class of offence' method and the 'sentence length imposed' method.[69]

> *Developing the standard sentence length to determine spent conviction eligibility requires compromise and negotiation by jurisdictions. As this approach is best used in conjunction with another method for defining seriousness, the nominated time period or standard sentence length should be sufficiently lengthy to be as inclusive as possible, before exclusions and exemptions are applied to the scheme to narrow its scope…If the scheme is to be as inclusive as possible, then the standard sentence length should be longer than 6 months, but no greater than 30 months.*[70]

While this report appreciates the need for compromise and negotiation, the case for rejecting the counsel of the Australian Law Reform Commission must not simply rely on the fact that many other

[67] The Law Reform Commission (1987), *Spent Convictions* Report No.37, p. 28.

[68] *Uniform Spent Convictions*, above n 15, p. 26.

[69] *Uniform Spent Convictions*, above n 15, p. 29.

[70] *Uniform Spent Convictions*, above n 15, p. 29.

jurisdictions have previously done so. This is especially so in the light of the British Home Office report *Breaking the Circle*, which recommended that the cut-off point of a 30-month custodial sentence (under the *Rehabilitation of Offenders Act 1974* UK) should be removed so that the scheme applies to all ex-offenders who have served their sentence.[71]

> *Under the [Rehabilitation of Offenders Act], anyone sentenced to custody for over 30 months will always be subject to a requirement to disclose their previous convictions, no matter what changes may have occurred in their lives since the offence was committed. The changes in sentencing practice demonstrate that, whilst a 30-month custodial sentence may have been considered lengthy in 1974, this is no longer the case. However, not only has there been 'sentence inflation' but also changes in attitudes towards rehabilitation and resettlement. The successful rehabilitation work undertaken by the Prison and Probation Services with prisoners with lengthy custodial sentences, and the relatively low reconviction rates for this category of offender, indicate that there is no group of offenders who should be automatically excluded, by virtue of their sentence, from the disclosure scheme. The only exception to this rule will be those who remain on life sentence.*
>
> *It is estimated that the total number of people with previous convictions who will never be rehabilitated under the current arrangements is around 100,000. Removing the cut-off point of 30 months custody would bring the majority of this group of people within scope, and would have a significant impact on their employability.*

This report unequivocally acknowledges the need to balance offender rehabilitation with ensuring community safety. However, FLS and Job Watch do not consider that the latter objective is necessarily achieved by defining offences capable of being spent according to the length of sentence imposed. Community safety is perhaps more appropriately ensured by excluding certain types, categories or classes of offences (such as sexual offences) from the scope of a scheme, and by exempting particular groups or organisations from being subject to the limitations on information imposed by the scheme.

> ***Recommendation 3: That any spent convictions scheme be defined as broadly as possible, with exclusions used to remove certain types, categories or classes of offence from the operation of the scheme.***

[71] Home Office *Breaking the Circle: A Report of the Review of the Rehabilitation of Offenders Act* (July 2002) p. 26.

Offences excluded from the scheme

In implementing a spent convictions scheme the rehabilitative benefits available to an offender under the scheme must be weighed against the protection of the community. A scheme must act in the public interest, balancing the private value of 'rewarding' and assisting in the rehabilitation and integration of a prior offender in addition to protecting their privacy, with the public value of protecting the community from dangerous or recidivist offenders.[72]

The operation of such an exclusion scheme arises in circumstances envisaged by the Victorian Department of Justice in its *Working with Children Bill 2005 – Discussion Paper.*[73] The *Working with Children Bill* proposes a screening process intended to reduce the risk of sexual or physical harm to children. Under the proposed check, if a person has a relevant criminal record or an adverse finding made against them by a professional disciplinary body, then this information will be assessed to determine whether that person should be prohibited from working or volunteering with children. Under the Bill relevant criminal records include:

- convictions or findings of guilt for serious sexual offences;
- convictions or findings of guilt for other serious offences that are related to children or where the victim is a child;
- pending charges for serious sexual, or other serious child-related, offences.

Information supplied by a professional disciplinary body is broader still and includes all findings of the Victorian Institute of Teaching, some of which may be unrelated to children (for example, fraud).

While the *Working with Children Bill 2005* provides a good example of where exclusions may be justified, FLS and Job Watch consider that the Bill goes too far in requiring the Secretary of the Department of Justice, who will be responsible for the agency that will conduct the checks, to examine all findings of professional disciplinary bodies, such as the Victorian Institute of Teaching, regardless of whether those findings are related to children. Such a requirement appears to undermine the policy rationale for the exclusion and does not achieve a sufficient balance between private interests and public protection.

Recommendation 4: That all offences are capable of becoming spent, unless expressly excluded.

Recommendation 5: That bodies exempt from the operation of a spent convictions scheme be required to particularise certain categories of offences

[72] *Uniform Spent Convictions*, above n 15, p. 67.

[73] *Working with Children Bill 2005 Discussion Paper*, Dec 2004 Department of Justice (Victoria).

(such as those involving children), and that disclosure of criminal record information above and beyond spent convictions information be limited to those categories only.

Exemptions to the scheme

As is the case with the exclusion of certain offences, it arguably serves the public interest of community protection – over the private value of rehabilitation – if particular groups or organisations (such as the police, correctional services, and courts, as well as certain select groups outside the criminal justice system) are exempted from a spent convictions scheme. Such an exemption means that these groups or organisations have access to a person's full criminal record – including spent convictions and mere findings of guilt, among other things.

Uniform Spent Convictions argues that exempt status should only be awarded to specific professions/ organisations and licensing bodies which can provide strong, persuasive and demonstrable reasons for an exemption.[74] While FLS and Job Watch support this approach, we again recommend that groups be required to particularise certain categories of offences (such as those involving children) and that disclosure of criminal records above and beyond spent convictions information be limited to those categories only.

Recommendation 6: That exempt status should only be awarded to specific professions/organisations and licensing bodies which can provide strong, persuasive and demonstrable reasons for an exemption.

When do convictions become spent?

For a conviction to become spent, an offender must not be convicted of a further criminal offence within a certain period of time. While *Uniform Spent Convictions* notes that determinations of the appropriate length of this waiting period are often based upon findings of research into offender recidivism, and that an appropriate waiting period should reflect the period after which a conviction can no longer be reasonably regarded as an accurate indication of a past offender's future conduct, it adopts a self confessed arbitrary and single waiting period for all offences. *Uniform Spent Convictions* claims that periods of 10 years for adults and 5 years for juvenile offenders are the most appropriate waiting periods from the perspective of simplicity, practicality of administration, certainty and consistency across the scheme.[75] We note that in New Zealand, pursuant to the *Criminal Records*

[74] *Uniform Spent Convictions*, above n 15, p. 45.

[75] *Uniform Spent Convictions*, above n 15, pp. 34–7.

(Clean Slate) Act 2004, the waiting period for adults with less serious offences is 7 years. Hence, we submit that if a single waiting period is implemented, further consideration should be given to how long that period should be.

An alternative approach, as recognised by *Uniform Spent Convictions*, is to apply variable waiting periods which may depend, for example, on the seriousness of the offence. Variable rehabilitation periods have been adopted in the United Kingdom, where pursuant to the *Rehabilitation of Offenders Act 1974* the periods vary from 6 months to 10 years. There, however, the rehabilitation (or waiting) periods vary according to the sentence imposed, not the type of offence committed. A key objective of the ROA scheme is to reduce the disclosure periods wherever it is safe to do so, targeting those most at risk and setting the requirements to disclose appropriately within that framework, rather than penalising the majority. FLS and Job Watch support this approach and its philosophical underpinnings.

Recommendation 7: That further investigations be made into the adoption of variable waiting periods rather than blanket waiting periods of ten years for adults and five years for children.

Commencement of waiting periods

The issue of when a waiting period is to commence is treated differently across Australia. In some jurisdictions the period commences from the date of conviction; in others it begins at the end of the period of imprisonment served; whilst in Western Australia it commences at the end of the period for which a person is sentenced, regardless of the period of imprisonment actually served.[76]

Certainly it appears that at present there is considerable confusion in the community regarding when a conviction might become spent and, accordingly, when it might no longer need to be disclosed.

> *Ben was employed as a call centre worker 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, Ben 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*

[76] *Uniform Spent Convictions*, above n 15, p. 38.

> *Ben 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. Ben 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 Ben's employment was teminated 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, as his position required him to deal with confidential information including credit card details. Ben 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.*

For the purpose of a uniform national scheme, *Uniform Spent Convictions* recommends the adoption of a dual track process, i.e. that the waiting period for a spent conviction should commence:

- upon the completion of the sentence imposed, where a custodial sentence was imposed; or
- at the date of conviction, where no sentence was imposed.[77]

The latter of these periods appears to be both logical and reasonable, and is supported by FLS and Job Watch. The former period, however, warrants further comment.

Uniform Spent Convictions supports the argument that a spent convictions scheme should only be eligible to past offenders that have demonstrated that they have rehabilitated themselves above and beyond any custodial sentence imposed by the court:

> *It is difficult to argue that an offender serving a custodial sentence has demonstrated that they have begun the rehabilitative process;*[78] *and*
>
> *…it would be inappropriate for the waiting period to commence whilst an offender is serving a custodial sentence, as it is difficult to argue that a convicted offender has begun a rehabilitative process if they are removed from everyday life and the temptations of criminal behaviour. It would be inappropriate that a conviction could become spent whilst the offender is incarcerated, and would not be in keeping with community expectations for a spent convictions scheme.*[79]

[77] *Uniform Spent Convictions*, above n 15, p. 39.

[78] *Uniform Spent Convictions*, above n 15, p. 38.

[79] *Uniform Spent Convictions*, above n 15, p. 41-42.

The UK report *Breaking the Circle* also accepts the argument that a rehabilitation period requires more than just the time spent in prison. In the context of discussions concerning the length of waiting periods, *Breaking the Circle* recommends that the disclosure (or rehabilitation) period should comprise the period of the sentence plus an additional buffer period:

> *There are strong arguments for equating the disclosure period with the sentence itself, as this is the period in which 'rehabilitation' should be taking place, through a range of programmes to address the risk and needs relevant in each case. However, it can be argued with equal force that the risk of re-offending is, to an extent, minimised whilst an individual is under supervision in the community, and particularly in prison…An additional 'buffer' period would allow people with previous convictions…to give a clear indication that they are able and willing to avoid criminal activity beyond the period of their sentence..."*[80]

In light of the above arguments, FLS and Job Watch acknowledge the policy rationale underpinning the former period recommended by *Uniform Spent Convictions*.

> ***Recommendation 8: That the waiting period for a spent conviction should commence:***
>
> - ***upon the completion of the sentence imposed, where a custodial sentence was imposed; and***
> - ***at the date of conviction, where no sentence was imposed.***

Effects of convictions during waiting periods

The effect of a subsequent conviction during a waiting period for a spent conviction is usually to 'restart the clock' for the earlier offence. This is consistent with the philosophy that the benefit of a spent conviction can only be claimed in the absence of subsequent offending. Accordingly, the 'clock is reset' for the initial offence, to the relevant waiting period for the subsequent conviction.

While such an approach may appear reasonable, it can have unjust outcomes when a subsequent offence constitutes a minor relapse, or occurs near the end of the initial waiting period, and is not indicative of any significant propensity to re-offend.

Uniform Spent Convictions consistently argues that because a finding of guilt without conviction or a conviction that has been quashed, set aside or pardoned should not come within the definition of a 'conviction' for the purposes of a spent convictions scheme, neither should they disrupt or adversely affect the waiting period for a prior conviction. FLS and Job Watch strongly agree.

[80] *Breaking the Circle*, above n 71, p. 27.

In relation to minor relapses, *Uniform Spent Convictions* argues that:

> *Excluding convictions for certain offences from disrupting the spent waiting period for a prior conviction provides incentive for convicted offenders to rehabilitate themselves, whilst not unfairly penalising an offender's spent status because of a subsequent trivial offence. It could be argued that if the 'relapse' was for a very minor or trivial offence, then the offender has made steps towards rehabilitation.*[81]

Uniform Spent Convictions goes on to recommend that a 'minor conviction', which should be defined as a conviction for which no penalty is imposed or the penalty is a fine of $1000 or less, should not disrupt the spent status of a prior conviction.[82]

While this report strongly agrees that an offender's spent status should not be unfairly penalised because of a subsequent trivial offence, it may create greater confusion if a conviction for an offence triggers the scheme for one purpose but not another.

There are at least three possible, albeit partial, solutions to this problem. The first would be to exclude convictions for some offences from all aspects of the scheme because of their relatively trivial nature. The second would involve adopting variable waiting periods, thus reducing, in part, some of the unjust consequences of a subsequent trivial offence (i.e. if a waiting period happened to be two years following a particular sentence, for example, rather than an arbitrary ten year period, then the likelihood for a subsequent offence to occur in the initial waiting period would be diminished). The third would be to ensure that there is a clear explanation given to offenders of the effect of a subsequent trivial offence; and perhaps most appropriately at the point of sentencing, as recommended in ***Community Education*** below.

> ***Recommendation 9: That a finding of guilt without conviction, or a conviction that has been quashed, set aside or pardoned, should not disrupt the spent status of prior convictions.***
>
> ***Recommendation 10: That in the light of Recommendation 7, further investigations be made into the alternative approaches to ameliorating the negative consequences of convictions for minor or trivial offences upon the operation of a spent convictions scheme.***

[81] *Uniform Spent Convictions* above n 15, p. 41.

[82] *Uniform Spent Convictions*, above n 15, pp. 42–3.

Consequences of convictions becoming spent

When a conviction becomes spent there are a number of consequences for a past offender. The major consequence, of course, is that limitations are placed on third parties' access to criminal record information. That is, once a conviction has become 'spent', a third party (such as an employer or insurer) no longer has the right to seek that information unless they have been specifically exempted from the scheme or an offence is excluded from the scheme's scope.[83] The knowledge that a conviction will at a particular point in time become spent, and will therefore no longer be publicly accessible, may provide some solace to individuals such as Sandy and Michael, in the following case studies:

> ***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.*[84]
>
> ***MICHAEL***
>
> *Michael was released from jail after serving four years and was determined to make a go of things. He decided to set up a sub-contractor courier service and was assisted to access his super to raise the necessary capital. Michael's plans came to an abrupt halt when he could not secure motor vehicle insurance on account of his criminal history. Michael is very disappointed and feels that although he has made a concerted effort to be straight, society has thrown this back in his face.*[85]

The obligation to disclose

FLS and Job watch strongly agree with the view articulated in *Uniform Spent Convictions* that an effective spent convictions scheme should do more than simply limit access to spent convictions; rather, it should also protect past offenders from the requirement to disclose or acknowledge spent convictions information to a third party, unless a specific exemption applies.[86] According to *Uniform Spent Convictions* the obligation not to disclose is usually implemented through one of two different approaches. First, through provisions allowing for a 'statutory lie', where it is lawful for persons to deny spent convictions, whether under oath or otherwise. Second, by prohibiting the asking of

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[83] *Uniform Spent Convictions*, above n 15, p. 52.

[84] *Midweek Crisis* (2004) RRR Community Radio talkback.

[85] 'CRIMINAL HISTORY CHECK' (Police Checks) – Survey 3, Fitzroy Legal Service, 2004.

[86] *Uniform Spent Convictions*, above n 15, p. 53.

questions regarding spent convictions information.[87] We note that the 'statutory lie' approach (adopted by the Commonwealth and Queensland) has been criticised on ethical grounds, whilst the prohibition of questions (adopted in Tasmania, the Australian Capital Territory, New South Wales, the Northern Territory and Western Australia) has been similarly criticised for requiring the 'statutory lie' provision as a back stop when the questioner violates this prohibition.[88] Accordingly, we agree with the recommendation made in *Uniform Spent Convictions*.

Recommendation 11: That unless otherwise exempted, an individual is not obligated to disclose to any third party a spent conviction.

Interpreting criminal history information

While a person with a criminal history may not be obligated to disclose a spent conviction, they may be put in the invidious position of being asked broader, peripheral questions relating to their history. For example, the following problematic questions may presently be asked:

- 'Have you ever been in trouble with the police?'
- 'Have you ever been to court?'
- 'Have you ever been charged with a criminal offence?'

Confronted by such a question, people run the risk of having their employment terminated if they answer in the negative and they are subsequently 'found out'; or, where insurance is concerned, for example, they risk having their insurance terminated on the basis of having given 'false information'. However, if questions concerning a person's criminal history or criminal record were to be interpreted as referring only to 'active' and not spent convictions, then a person could ethically deny a spent conviction and any peripheral details of contacts with the criminal justice system that may be construed as a criminal record.

Recommendation 12: Unless a specific exemption applies, questions regarding a person's criminal history are taken to refer only to any unspent convictions.

Anti-discrimination protection

As noted in Chapter 2, under ***Absence of effective anti-discrimination protections***, Victoria does not have anti-discrimination legislation that prohibits discrimination on the basis of a criminal record in

[87] *Uniform Spent Convictions*, above n 15, p. 52.

[88] *Uniform Spent Convictions*, above n 15, p. 52.

any area of activity. Nor do Victorians with criminal records have adequate anti-discrimination protections – either in the area of employment or other areas – under federal laws (including the HREOC Act), given that HREOC's powers are limited to conciliating disputes and making recommendations which are not enforceable.[89]

These gross inadequacies have continued to prevail despite Australia's ratification of important international human rights treaties over the years, including the International Labour Organisation Convention 111, *Discrimination (Employment and Occupation) Convention 1958*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, all of which seek to protect the human right to non-discrimination. By ratifying these treaties, the Australian government has made a commitment that the human rights contained in those treaties would be fully implemented at each of the Federal, State and local levels.[90]

Job Watch and FLS call on the Victorian and Commonwealth governments to fulfil the three key obligations arising by virtue of the international human rights framework and summarised by Philip Lynch in *Discrimination on the Ground of Criminal Record: The Human Right to Non-Discrimination* as follows*:*

> *First…to respect the right to non-discrimination on the basis of 'criminal record'; that is, to themselves abstain from discrimination on the basis of a person's criminal record.*
>
> *Second…to protect people from discrimination on the basis of 'criminal record'; that is, to ensure that their legislation prohibits unwarranted discrimination against people because of their criminal record. To this end, federal, state and territory equal opportunity and anti-discrimination laws should be amended and enforced to prohibit discrimination on the ground of 'criminal record'.*
>
> *Third…to fulfil the right to non-discrimination; that is, to take positive steps to address the special needs of people with a criminal record so as to enable them to realise all of their rights and freedoms. These steps should include legislative, educative, financial, social and administrative measures that are developed and implemented using the maximum of available governmental resources. Such steps should include developing and implementing policies and programs to ensure that people with a criminal record are afforded opportunities to obtain adequate housing, employment and the other requirements of an adequate standard of living.*[91]

Job Watch and FLS submit that additional safeguards – both statutory and non-statutory – are required to protect people against discrimination on the basis of criminal record. We consider that at

[89] As already indicated, HREOC lacks any statutory power to make orders, impose penalties or award compensation.

[90] Lynch, P (2005) *Discrimination on the Ground of Criminal Record: The Human Right to Non-Discrimination*, PILCH Homeless Persons' Legal Clinic.

[91] Ibid.

State and Federal levels there ought to be a statutory prohibition against such discrimination. These protections would need to be supplemented, however, by practical guidelines aimed at clarifying applicable rights and responsibilities of the various stakeholders in this area, including employers and prospective/existing employees. In this regard, guidance may be had from some of the British attempts that have been made to explain, among other things, the relevant legislative provisions to employers,[92] those working with ex-offenders[93] and ex-offenders themselves.

Guidelines about how employers might consider a criminal record in a recruitment context, for example, would be likely to assist individuals like Nora:

> *Nora has been working as a permanent full time call centre worker for 18 months. She was recently promoted to the position of supervisor. Her employer is now in the process of negotiating a new contract for services with a large company and, consequently, it has asked all its staff to consent to criminal history checks. It has not provided any guidance at all on how a criminal record might be considered. Nora, who was charged with theft a couple of years ago, is reluctant to consent to the check as she suspects that she will be dismissed as a result of her record, regardless of her established employment record.*

In relation to possible statutory changes, a number of important questions should be considered before deciding what form the desired legislation should take. Among others, they include the following:

- What specific attribute should be protected?
- In an employment context, if it is accepted that there ought to be an inherent requirements exception, how should the test for that exception be formulated?
- When should discrimination on this ground be prohibited?
- What remedies should be available?

Attribute to be protected

The most obvious options to choose from, in terms of what attribute ought to be protected, would appear to be:

- 'Criminal record', as contained in the *HREOC Regulations* (without further definition or guidance regarding what constitutes a 'criminal record');
- 'Irrelevant criminal record', as prohibited by the Northern Territory's Anti-Discrimination Act (we note that this was also the ground sought to be protected by the Victorian Law Reform

[92] See, for example, Chartered Institute of Personnel and Development, *Employing Ex-Offenders: A Practical Guide,* available online at http://www.disclosure.gov.uk/docs/pdf/Employing%20Ex-offenders%20practical%20guide%202004%2007.pdf (this publication also contains the details of several useful organisations and weblinks for further information).

[93] See, for example, leaflet produced by Nacro's Resettlement Plus Helpline, *Rehabilitation of Offenders Act 1974*, November 2003, available online at http://www.disclosure.gov.uk/docs/pdf/ROA%20Leaflet.pdf.

Commission when it recommended, in 1990, that the prohibitions in Victoria's equal opportunity legislation be extended); or

- 'Spent conviction', as prohibited in the Australian Capital Territory and Western Australia.

A prohibition against discrimination on the ground of a spent conviction would seem to be too limited, as it would only offer protection upon expiry of the rehabilitation period. On current recommendations,[94] this would mean that an adult who has committed an offence would have to wait 10 years before being safeguarded against discrimination on the ground of a spent conviction. This would be unacceptable in the view of Job Watch and FLS.

In recognition of the fact that sometimes, in very limited circumstances, a criminal record may in fact be relevant to the decision-making process and consequently justify a discriminatory act or practice, a model whereby the protected attribute is specified as 'irrelevant criminal record' may be more appropriate. This would ensure consistency with the anti-discrimination legislation of the Northern Territory and Tasmania, where the protected attribute is also 'irrelevant criminal record'.

Formulating the attribute in terms of 'irrelevant criminal record' would necessarily require that there be a direct relationship between the offence committed (or, preferably, the nature of the recorded conviction) and the specific activity (for example, in an employment context, the specific employment sought or obtained). As a threshold issue, therefore, a complainant would need to prove on the balance of probabilities that they have the attribute of 'irrelevant criminal record', and it would then be up to a respondent to disprove that (by showing how the record is in fact relevant to the applicable activity).

Alternatively, however, we acknowledge that there may be benefits to prospective complainants in adopting the more general term of 'criminal record', one of which would seem to be that such a term gives scope for recognising unlawful discrimination on the basis of the following:

- a characteristic that a person with a criminal record generally has;
- a characteristic that is generally imputed to a person with a criminal record; and
- a presumed (present or past) criminal record.

Whilst for the purpose of making recommendations in this report we simply refer to discrimination on the ground of 'criminal record', we remain open to the possibility that the better alternative might be to list the protected attribute as 'irrelevant criminal record'. We recommend that in the process of drafting any future anti-discrimination legislation in this area, at either State or Federal levels, a more comprehensive analysis be undertaken of the relative merits of adopting one of these two terms and we would welcome an opportunity to participate in further discussions on this point.

[94] Recommendation 19 of *Uniform Spent Convictions*, above n 15, p. 37.

Inherent requirements exception in an employment context

Job Watch and FLS accept that in certain limited situations actions or practices which are discriminatory on the basis of a person's criminal record may be justified if, for example, they are necessary in order to protect vulnerable people[95] or where the criminal record renders the person incapable of performing the inherent requirements of a job. Indeed, the notion of an 'inherent requirements' exception has already existed for some time in anti-discrimination legislation around Australia and can presently be found in the *HREOC Act*[96] as well as other State and Federal statutes.[97]

We consider, however, that any such exception must be drafted narrowly, so as to ensure that it only applies where there is a clear and close correlation between the inherent requirements of the job and the criminal record in question. Further guidance should be given on how to determine the inherent requirements of a job, emphasising for example that these must be essential – not merely incidental or desirable – in order for the goals of the job to be achieved. A test for identifying the inherent requirements of a job could be drafted providing that a requirement could only be considered to be inherent if it could be shown that its removal would fundamentally change the tasks, method or purpose of the job.[98] This way, employers discriminating against prospective or actual employees on the basis of sweeping generalisations, such as claims that the individual is an unsuitable candidate because of universal trust and honesty requirements, would be less likely to avoid liability.

> *Prue was dismissed in January 2004, 10 days after she had been employed by an Australian financial institution in the role of Customer Service Representative.*
>
> *During the recruitment phase of her employment application she provided her consent for the recruitment agency, who was liaising between Prue and the financial institution, to conduct a police record check into her criminal history. She also completed a form which required her to disclose any relevant criminal history. Before filling out this form, she was told by the recruitment agency that she was only required to disclose any criminal matters relating to financial dishonesty. Accordingly, she did not disclose that in April 2002 she had been charged with assault in the Queensland Magistrates' Court and that, later, a warrant had been issued for her arrest for failing to appear at the hearing. At the time of recruitment, that warrant was still outstanding.*
>
> *Ten days after an employment agreement between Prue and the financial institution had begun, Prue consented to the recruitment agency disclosing the results of the police check to the financial institution.*

[95] For example, consideration of a criminal record in accordance with any future Victorian statutory provisions under a *Working With Children* scheme.

[96] Section 3 of the *HREOC Act* provides a definition of 'discrimination' but excludes '*any distinction, exclusion or preference … in respect of a particular job based on the inherent requirements of the job*'.

[97] Including, for example, ss. 15(4), 19(2) and 21(2) of the *Disability Discrimination Act 1992* (Cth), s. 170CK(3) of the *Workplace Relations Act 1996* (Cth) and s. 22 of the *Equal Opportunity Act 1995* (Vic).

[98] See, for example, *CCH Australian and NZ Equal Opportunity Commentary*, 13-808.

Two days later, she was asked to attend a meeting with her employer to discuss the Queensland police record. During that meeting, among other things, Prue confirmed the following matters:

- *she had been charged with assault; and*
- *she denied the allegations.*

Prue also explained the surrounding circumstances of the charge and the outstanding warrant, but was notified that her employment was terminated. The written confirmation of her dismissal referred to the 'outstanding arrest warrant for assault in Queensland' as the basis for the conclusion that she was not 'a suitable candidate for employment'.

Had she remained in employment, Prue's role would have involved responding to customer queries, providing information about her employer to the public and processing transactions. In her view, her criminal record would not have impacted on her ability to perform the inherent requirements of her job as a Customer Service Representative.

Prohibited discrimination

Job Watch and FLS support the creation of federal and state laws prohibiting both direct and indirect discrimination on the ground of (irrelevant) criminal record not only in the area of employment but in all areas of activity which are presently covered by the *Equal Opportunity Act 1995* (Vic).[99]

We submit that, in an employment context, any statutory prohibition should extend to job applicants and contract workers, as well as employees.

We also propose that separate provision be made to prohibit people (not only employers, but all those who engage in areas of activity which are presently covered by the *Equal Opportunity Act 1995* (Vic) such as service providers) from asking questions or requesting information regarding a criminal record which could then be used to form the basis of discrimination.[100] Such a prohibition – which would complement a requirement espoused in a national uniform (or otherwise Victorian) spent convictions scheme, that questions about a person's criminal history generally be taken to refer only to unspent convictions – could be subject to strict limitations, including the following:

- an exception where the request for information is made with statutory authority;[101] and
- an exception where the request is reasonable, having regard to all the surrounding circumstances.

[99] The present areas covered are employment and employment-related areas, education, the provision of goods, services and disposal of land, accommodation, clubs, sport and local government.

[100] A similar prohibition is presently contained in s. 100 of the *Equal Opportunity Act 1995* (Vic) but it is not applicable to questions or information regarding criminal records.

[101] It is likely that such an exception would, in any event, be applicable as a general exception to any act of discrimination, not just to this prohibition. In practical terms, such an exception would, for example, allow people to seek criminal record information pursuant to any future Victorian *Working with Children* legislation or in relation to particular professions or occupations for which disclosure of a criminal record must be made.

This latter exception, if implemented, would need to be carefully and narrowly drafted in order to achieve the dual aims of appropriately balancing the rights of former offenders and those of the broader community and, at the same time, eliminating, as far as possible, discrimination on the basis of criminal record.

In addition, Job Watch and FLS recommend that any statutory prohibition should be drafted so as to allow for three types of liability:

- primary liability, where respondents, such as employers, educational authorities or service providers, are held liable for their own discriminatory acts or practices;
- vicarious liability, where employers or principals are held liable for any discriminatory acts or practices committed by their employees or agents, unless they can show that they took reasonable precautions to prevent the unlawful discrimination; and
- accessory liability, where a person who requests, instructs, induces, encourages, authorises, assists, incites, promotes, aids, causes or permits[102] another to engage in unlawful discrimination may be solely, or jointly and severally, liable for the unlawful discrimination.

Finally, Job Watch and FLS consider that any statutory prohibition against discrimination on the basis of criminal record should also provide for a requirement that an individual be given an opportunity to explain their criminal record before a decision is made which might otherwise result in direct or indirect discrimination.[103] Such a requirement could be framed in broadly similar terms to section 170CG(3)(c) of the *Workplace Relations Act 1996* (Cth), which requires the AIRC, in determining whether a termination of employment was harsh, unjust or unreasonable, to consider whether the employee was given an opportunity to respond to any reason for the termination which related to capacity or conduct. In the view of Job Watch and FLS it is likely that such a provision would assist in eliminating discrimination on this ground.

> *Renato was employed for seven months as a Service Technician by a medium sized company which makes building control automation systems. His duties included installing and maintaining automation devices in high rise buildings. At no stage was he asked about his criminal history by his employer; nor was he asked to consent to a police check. There were never any issues raised about his work performance. Unexpectedly, he was called to meet with his boss, who said he had been informed by a third party that Renato had a criminal record and that consequently Renato should resign.*
>
> *The boss did not ask for any details about the criminal record and Renato was not given any opportunity to discuss or explain his record or his options with the employer. The boss indicated that any record at all*

[102] Section 90 of the *Equal Opportunity Act 1995* (Vic) prohibits a person from requesting, instructing, inducing, encouraging, authorising or assisting contraventions of that Act. The additional acts sought to be covered by a provision dealing with accessory liability are based on equivalent provisions in Federal anti-discrimination legislation, including the *Racial Discrimination Act 1975* (Cth) (e.g. incite and promote) and the *Sex Discrimination Act 1984* (Cth) (e.g. aid, cause and permit).

[103] Such a decision would include, for example, a decision not to employ or to dismiss someone, a decision not to admit someone as a student, a decision to refuse a person's application for accommodation etc.

was completely incompatible with employment with that company, especially as the company was the holder of a security licence. This had never been raised as an issue around the time of Renato's appointment.

Remedies

Job Watch and FLS submit that provision should be made for a number of enforceable remedies in the event of an adverse finding of discrimination on the basis of a criminal record. These should include at least the following:

- an injunction preventing the respondent from committing any further unlawful acts;
- an order for damages (including special, general or aggravated damages); and
- an order compelling a respondent to redress the loss or damage suffered by the complainant (for example, an order for reinstatement, an apology, an undertaking regarding staff training etc).

In addition, it may be appropriate to ensure that any court or tribunal vested with the power to hear discrimination complaints on the basis of a criminal record has the power to cancel contracts or agreements or vary their terms so as to rectify any discriminatory provisions.

Recommendations

In accordance with the above, Job Watch and FLS propose that, in light of the paucity of enforceable rights and inadequate enforcement mechanisms available to former offenders who experience discrimination, separate Commonwealth legislation be introduced prohibiting discrimination on the ground of criminal record and, concurrently, that the *Equal Opportunity Act 1995* (Vic) (and any other State or Territory equal opportunity anti-discrimination laws that remain silent on this issue) be amended so as to include criminal record as an additional protected attribute.

We further submit that section 170CK(2)(f) of the *Workplace Relations Act 1996* (Cth), which lists a number of attributes on the basis of which it is unlawful for an employer to terminate someone's employment, should be amended so as to include 'criminal record' (or, in order to ensure consistency, 'irrelevant criminal record', if that is the attribute to be protected in anti-discrimination legislation).

Recommendation 14: That Federal, State and Territory equal opportunity and anti-discrimination laws (including s170CK(2)(f) of the WR Act) be amended and enforced so as to prohibit discrimination on the ground of (irrelevant) criminal record.

Recommendation 15: That all Australian Federal and State governments take positive steps (including legislative, educative, financial, social and administrative measures) to address the special needs of people with a criminal record so as to enable them to realise all of their human rights and freedoms.

Community education

There is an urgent need for a comprehensive community legal education campaign targeting a range of issues associated with criminal records. The most obvious of these issues include:

- the effect of a finding of guilt under the current criminal record disclosure policy of Victoria Police;
- the effect of a recorded criminal conviction should a spent convictions scheme be introduced;
- the general operation of a spent convictions scheme should it be introduced;
- understanding/interpreting criminal record information;
- obligations to disclose criminal record information;
- current legal protections against discrimination on the basis of a criminal record afforded by the HREOC Act;
- current legal obligations imposed on employers by the HREOC Act; and
- the general value of rehabilitation and reintegration as opposed to punishment and isolation.

These needs are not only demonstrated by the responses of participants to surveys conducted in the course of researching this report. They are, in all likelihood, essential to the successful operation of all spent conviction schemes and programs targeting effective offender rehabilitation and reintegration.

For example, in reflecting on the operation of the *Rehabilitation of Offenders Act 1974* (UK), *Breaking the Circle* reported that:

> *Offenders do not understand how it* [the Act] *applies to their particular circumstances. It is not explained in court as part of the sentencing process and, although such information is sometimes made available to individuals in custody or under supervision in the community, more often than not it is never explained at all. It is not just people with previous convictions who are confused. Many employers know little or nothing about the ROA.*[104]
>
> *…every opportunity should be taken to change attitudes to ex-offenders in the community. Prevailing attitudes are partly based on ignorance about criminal behavior, its prevalence, and its associated risk factors. Key messages on the numbers of ex-offenders in the*

[104] *Breaking the Circle*, above n 71, p. 5.

> *community, and the limited risk posed by them, should be used in a variety of formats to try to dispel ignorance and misunderstanding. However, attitudes are also based on a moral disapproval of crime that can lead to the belief that blanket discrimination is acceptable. Information campaigns will need to address such views.*[105]

Breaking the Circle made a series of recommendations in relation to disclosure requirements that are worthy of consideration as ancillary reforms to the establishment of a spent convictions scheme. These reforms target offenders, job seekers, employees, employers, professional bodies and educational institutions.

First, that the impacts of a recorded criminal conviction should be explained as part of the sentencing process.

Second, that further clear guidance and support should be made available through prison and probation services, youth offending teams, employment agencies and other organisations involved with the rehabilitation and resettlement of offenders (i.e. that appropriate funding be given to these services to provide the necessary supports).

Third, that a voluntary Code of Practice be developed for employers (led by the Public Service) to govern the use of disclosures in the recruitment process.

> *The Code of Practice should be in the form of clear and simple guidance so that it is usable across the board, including by organisations with less sophisticated recruitment processes. It should also signpost existing advisory help lines, including Jobcheck (the Apex Trust) and the Resettlement Plus Help line (Nacro). There may be a case for funding an additional help line to advise employers on the use of criminal record information in borderline cases. It is important that the Code of Practice should also be made available to those organisations concerned with the resettlement of offenders, to careers advisers, and to Jobcentre Plus.*[106]

The Code of Practice would include practical advice on:

- enhancing the reputation of the organisation as an equal opportunity employer;
- including a statement in recruitment literature on the organisation's willingness to consider the recruitment of people with previous convictions;
- governing the stage in the recruitment process when any previous convictions may be taken into account, and providing an opportunity for the applicant to explain the circumstances of the offending behavior;

[105] *Breaking the Circle*, above n 71, p. 31.

[106] *Breaking the Circle*, above n 71, p. 23.

- conducting an objective risk assessment, including an assessment of the relevance of the conviction to the position on offer;
- the training required for recruiters; and
- governing the way in which the conviction information is handled within the organisation, including a commitment to data protection principles.[107]

> *Employer resistance to such schemes, based on fear and apprehension, may be overcome by good examples of where the employment of people with previous convictions has worked, and worked well. Examples of organisations – both large and small – with employees with previous convictions recruited along the lines of the principles to be set out in the Code of Practice should also be encouraged to act as 'champions'.*[108]

Fourth, that more detailed guidance should be made available to those organisations willing and able to take a more direct approach to the employment of people with previous convictions through links with ex-offender support organisations, and an expansion of existing 'broker' or partnership arrangements between such organisations and prison and probation services.[109] The Correctional Services Employment Pilot Program currently operating in Victoria is a good example of a creative partnership arrangement addressing issues of social exclusion by offering relevant, sustainable employment solutions to people who have been sentenced to a term of imprisonment or placed on court based orders.[110]

Fifth, that the principles on which the Code of Practice is based should be equally applicable to educational establishments, and other service providers who may require the disclosure of previous convictions.[111]

In the context of specific case studies in this report relating to the use of criminal record information by educational institutions (whether in the course of providing practical training or otherwise) and professional/licensing bodies, FLS and Job Watch further recommend that such educational institutions and/or professional/licensing bodies be required to provide to interested individuals, adequate careers guidance information regarding the relevance and impact of a criminal record prior to the commencement of a course of study in a given field. This guidance should extend to providing, upon application, a preliminary 'screening for suitability' based on an established Code of Practice and pre-selected offences of interest. This pre-screening would give an individual pursuing a career in a given field the opportunity to consider, well in advance, the impact that any relevant offence may have on her or his employment/educational prospects. In the event that such educational institutions

[107] *Breaking the Circle* above n 71, p. 23.

[108] *Breaking the Circle*, above n 71, p. 24.

[109] *Breaking the Circle*, above n 71, p. 24.

[110] Job Futures, *Correctional Services Employment Pilot Program – Program Overview*, *JOB futures, 2003*.

[111] *Breaking the Circle*, above n 71, p. 24.

and/or professional/licensing bodies were opposed to making an actual determination as to suitability, a compromise may be for them to determine only that an individual may, upon actual application for registration or employment in the future, have to 'show cause' in relation to particular offences of concern on their criminal record.

Recommendation 16: That the implications of a recorded criminal conviction be explained as part of the sentencing process.

Recommendation 17: That clear guidance and support to explain the implications of a recorded criminal conviction (and to support offenders through the consequences of such a conviction) be made available through Correctional Services, and other organisations involved with the rehabilitation and resettlement of offenders.

Recommendation 18: That a voluntary Code of Practice be developed for employers (led by the Public Service) to govern the use of disclosures in the recruitment process.

Recommendation 19: That more detailed guidance and support be made available to those organisations willing and able to take a more direct approach to the employment of people with previous convictions through links with ex-offender support organisations, and an expansion of existing 'broker' or partnership arrangements between such organisations and Correctional Services.

Recommendation 20: That the principles on which the Code of Practice is based be equally applicable to educational establishments, and other service providers, who may require the disclosure of previous convictions.

Recommendation 21: That upon application, educational institutions and/or professional/licensing bodies be obliged to provide a preliminary 'screening for suitability' based on an established Code of Practice and pre-selected offences of interest. Alternately, that such institutions or bodies be required to determine whether an individual may, upon actual application for registration or employment in the future, have to 'show cause' in relation to particular offences of concern on their criminal record.

Prohibition of private databases and accessing private databases

The operation of businesses (such as CrimeNet) which trade in criminal record information is an emerging trend and is of concern. *Uniform Spent Convictions* recommends that disclosure of spent convictions information by businesses in the trade of providing criminal record information be a criminal offence.[112] The purpose of such a sanction is to ensure compliance by criminal justice officials, and prevent attempts to obtain spent convictions information fraudulently or through electronic databases.[113]

While this recommendation is supported by this report, it does not go far enough in controlling the use and abuse of criminal record information by businesses in the trade of providing it, or third parties seeking access to such records without the consent of the individual identified by the record. Accordingly, two further recommendations are made.

> ***Recommendation 22: That trading in criminal record information, without the consent of individuals identified by such information, be a criminal offence.***

This recommendation is supportive of a stringently regulated criminal record information industry, and does not merely seek to control the misuse of spent conviction information. As all criminal record information is sensitive information, it must not, without the consent of the individual identified by such information, become the subject of trade.

> ***Recommendation 23: That obtaining criminal record information from any businesses trading in criminal record information, without the consent of any individual identified by such information, be a criminal offence.***

This recommendation acknowledges the difficulty in regulating and policing an industry which is internet based and potentially beyond the jurisdictional control of Australian law enforcement authorities. Similar difficulties are evident with internet based child pornography. Accordingly, just as individuals who access and download internet child porn can be the subject of criminal sanction, so too should individuals and organisations who obtain criminal record information from any businesses trading in criminal record information, without the consent of the individuals identified by such information.

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[112] Recommendation 45, pp. 10 and 59–60.

[113] *Uniform Spent Convictions*, above n 15, p. 13.