



FEDERATION
OF COMMUNITY LEGAL CENTRES VIC

SUBMISSION

The Legislative Council's Inquiry into a legislated spent convictions scheme

July 2019

ABOUT THE FEDERATION

The Federation is the peak body for Victoria's Community Legal Centres (CLCs). Our members are at the forefront of helping those facing economic, cultural or social disadvantage and whose life circumstances are severely affected by their legal problem.

For over 40 years CLCs have been the heart of a powerful movement for social change, reshaping how people access justice, creating stronger more equitable laws, and more accountable government and democracy.

We pursue our vision of a fair, inclusive, thriving community through challenging injustice, defending rights and building the power of our members and communities.

WE WANT A COMMUNITY THAT IS FAIR, INCLUSIVE AND THRIVING: WHERE EVERY PERSON BELONGS AND CAN LEARN, GROW, HEAL, PARTICIPATE AND BE HEARD.

The Federation:

- Enables a strong collective voice for justice and equality;
- Mobilises and leads CLCs in strategic, well-coordinated advocacy and campaigns;
- Works with members to continuously improve the impact of community legal services;
- Drives creativity and excellence in the delivery of legal services to communities;
- Helps make justice more accessible.

Read our strategic plan online
fclc.org.au/about



THE FEDERATION ACKNOWLEDGES THE TRADITIONAL ABORIGINAL OWNERS OF COUNTRY AND WE PAY OUR RESPECTS TO ELDERS PAST, PRESENT AND EMERGING. WE RECOGNISE THEIR CONTINUING CONNECTION TO LAND, WATER AND COMMUNITY. SOVEREIGNTY WAS NEVER CEDED.

EXECUTIVE SUMMARY

Victoria is the only Australian jurisdiction that does not have a legislated spent convictions scheme.

We have an opportunity to craft a uniquely Victorian, graduated scheme that imposes varied waiting periods that are commensurate with a person's level of offending.

A graduated scheme would ensure people convicted of a low-level offence are not continuously punished when seeking employment, study or travel, for something they have already been held accountable for through our criminal legal system.

A Victorian scheme would clearly define a conviction to support operation of varied waiting periods. If a court finds someone guilty, but has chosen not to impose a conviction, those convictions must become immediately spent.

Our scheme should outline what convictions are excluded, in line with community expectations. However, a Victorian scheme must be flexible and fair by allowing people to apply to a court or tribunal to have an excluded conviction spent by demonstrating proper rehabilitation and reintegration into their communities.

To ensure our scheme is not burdensome, all convictions must be spent automatically when the required waiting period applies.

As criminal record checks are increasingly used as de-facto tests of someone's character, it is necessary to protect people from discrimination based on their spent convictions, as well as to make it an offence to make people disclose any spent convictions they may have.

To ensure the scheme is not undermined, there should be penalties for the unlawful disclosure of spent convictions or for threatening to disclose someone's spent convictions without authority.

Summary of recommendations

Victoria needs a graduated spent convictions scheme

1. Focus on the rehabilitation and the reintegration of people back into their communities.
2. Introduce a graduated scheme with different waiting periods for eligible convictions for adult offenders.
3. Introduce different waiting periods with a maximum of no more than three years for an eligible conviction, if the offender is a child.
4. Give courts a discretion to extend the waiting period for a child, if their offending is deemed to be very serious. However, this extended time must focus heavily on rehabilitation and diversion.
5. Apply a waiting period from the date a conviction is recorded.

Defining a conviction

6. Define a conviction broadly to enable a range of outcomes to be part of the scheme.
7. Treat convictions as immediately spent if the court dismissed the matter without recording a conviction, at the end of any bond, undertaking or adjournment or any other order imposed by the court, if a person is released without a conviction.

Types of convictions that can be spent

8. Outline the offences that are excluded from the scheme, in line with community expectations.
9. For excluded offences, provide a mechanism that would allow a person to make an application to a court or tribunal for review if they can demonstrate exceptional circumstances or that leniency should apply.

Mechanism by which convictions are spent

10. Applicable convictions must be spent automatically when the required waiting period expires.

Offending during a waiting period

11. If someone commits a summary offence during a waiting period, the waiting period should not restart.

Effect of a spent conviction

12. A person should not be required to disclose a spent conviction, except where required by law.

Penalty for Disclosure

13. Introduce strong penalties that make it an offence to unlawfully disclose a spent conviction.
14. Make threatening to disclose a spent conviction without authorisation an offence, except where required by law.
15. Make it an offence for anyone to ask a person to consent to the disclosure of their spent convictions, except where required by law.
16. Make it an offence to assess a person's character by taking a spent conviction into account, except where required by law.

Discrimination

17. Bring Victoria into line with the Commonwealth in protecting people from discrimination, and include 'irrelevant criminal record' within the list of protected attributes.

SECTION 1: VICTORIA NEEDS A GRADUATED SCHEME

Victoria is the only Australian jurisdiction that does not have a legislated spent convictions scheme.

A graduated spent convictions scheme with varied waiting periods would ensure that people with a criminal conviction, particularly for low level offending, are not continuously punished for something they have duly taken responsibility and been held accountable for through our legal system.

A spent convictions scheme will allow people to get on with their lives, contribute to their communities, and seek employment, travel or study opportunities.

Other jurisdictions in Australia often impose a ten-year waiting period before someone with eligible convictions can have them spent. However, this ten-year waiting period appears to be arbitrary, not informed by evidence or understanding of recidivism and rehabilitation.¹

In the absence of a legislated scheme for spent convictions, the release of a person's criminal history record is governed by Victoria Police's *Information Release Policy*.

The *Information Release Policy* gives Victoria Police broad, discretionary powers to release an individual's criminal history on application. The policy contains several exceptions and exemptions, which are applied at the discretion of Victoria Police, leading to inconsistencies and uncertainty.

Under their policy, the police will release criminal history information where a person has been found guilty at court, as well as matters that are under investigation or awaiting a court hearing².

Victoria Police will also release information about someone's finding of guilt when that matter did not proceed to conviction at court including cautions, and diversions issued to young people.³ The policy to release someone's finding of guilt where a court has chosen not to impose a conviction or if they were placed on a diversion program is inconsistent with the *Sentencing Act 1991 (Vic)* and the complete antithesis to rehabilitation.⁴

The *Sentencing Act 1991* gives a court the authority to not record a conviction if it will help someone's rehabilitation and reintegration into the community, particularly if a conviction will make it hard for them to find a job or be denied other opportunities.

Victoria Police also releases information where it considers it appropriate, giving Victoria Police an arbitrary discretion over the release of someone's sensitive information that may be inconsequential or irrelevant to the purpose it was requested for.

This is particularly worrying, as employers and others are relying on criminal history checks, particularly through profit-driven third parties, as de-facto checks of someone's character.

¹ Winford, Stan, Woor-Dungin Criminal Record Discrimination Project, RMIT University, December 2017, p37.

² Victoria Police, *Information Release Policy: National Police Certificates*, September 2017.

³ Victoria Police, *Information Release Policy: National Police Certificates*, September 2017.

⁴ *Sentencing Act 1991 (Vic)* s8, s76.

The Federation understands that any legislated scheme needs to balance the needs of the community, while also allowing for rehabilitation and the ability for people to freely and fairly move on with their lives by gaining employment, volunteering and participating in other community activities.

Most Australian jurisdictions apply an arbitrary 10 year waiting period for convictions recorded in adult courts and a 5 year waiting period for convictions recorded in Children's Court.

Internationally, the United Kingdom has taken a fair and proportionate approach by introducing a graduated scheme. Therefore, the waiting period required to be served before a conviction can be spent will depend on the sentence imposed by a court.⁵ For custodial sentences the waiting periods vary from two years to seven years and for non-custodial sentences the waiting periods vary, from 12 months to a waiting period imposed by a court on completion of an Order.⁶

This graduated scheme allows for different waiting periods commensurate with the offence committed and does not punish people for unnecessarily and arbitrary long periods, preventing them from gaining jobs that pay a living wage or other opportunities.

In the absence of a legislated scheme in Victoria, we have an opportunity to take what works from other jurisdictions and focus on designing a uniquely Victorian scheme that is proportionate to someone's level of offending and centres the proper rehabilitation and reintegration of people back into their communities.

In developing a maximum waiting period, proper consultation and consideration must be given to modern rehabilitative and recidivist practices in Australia and overseas. The Victorian scheme must be balanced and fair by commencing on the date of a person's conviction.

We acknowledge and endorse the long standing work of both Woor-Dungin and Liberty Victoria's Rights Advocacy Project (RAP), specifically the 2017 RAP report, *A Legislated Spent Convictions Scheme for Victoria: Recommendations for Reform*, which outlines the need for a graduated spent convictions scheme.

The impact of long waiting periods on young people

Youthlaw, a specialist community legal centre and member of the Federation, has advocated for a spent convictions scheme that is balanced and fair, while also protecting the rights of young people⁷.

In the absence of a scheme, a young person convicted of an offence could be impacted by their offending their entire lives, like Dave was.

Dave was convicted of a theft-related offence when he was 16 years old. He'd taken his Dad's car for a joyride.

Some 17 years later, Dave sought employment within the Correctional Services system, was successful and he underwent a four-month training course.

⁵ Rehabilitation of Offenders Act 1974 (UK) s5.

⁶ Rehabilitation of Offenders Act 1974 (UK) s5.

⁷ YouthLaw, *Advocacy About the Justice System* <<http://youthlaw.asn.au/campaigns-advocacy/youth-detention-and-sentencing/>> July 2019.

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.⁸

Society recognises that young people's offending must be treated differently to adults, and most spent convictions schemes elsewhere provide for this. The Victorian Aboriginal Legal Service (VALS), a member of the Federation, state that despite media reports to the contrary, there are very few young people that are acute or persistent offenders⁹.

VALS has argued that flexibility must be given to any waiting periods imposed on young people who commit crimes and that the five-year waiting period imposed by some jurisdictions may be too excessive.¹⁰ Imposing an arbitrary waiting period of five years on a young person may be excessive and disproportionate to that young person's potential to change their offending behaviour.¹¹

VALS argues that for serious offences committed by young people, a court could consider a longer waiting period if it does not compound the punishment imposed on the young person. If a court imposes a longer waiting period however it should focus heavily on rehabilitation and diversion.¹²

Because the aim of a spent convictions scheme is to give people a second chance, then we must adequately support young people in particular to get their lives back on track through rehabilitation and diversion, not more punishment.

A Victorian legislated scheme for spent convictions must continue the practice of differentiating between adult and child offending and apply different waiting periods accordingly. Our submission is that children should have a waiting period of no longer than three years, except where a court imposes a longer waiting period for very serious offences. Any extra waiting period must however focus on rehabilitation, reintegration and, diversion.

⁸ Criminal Records in Victoria: Proposals for Reform, Fitzroy Legal Service Inc in conjunction with Job Watch 2005, <http://jobwatch.org.au/wp-content/uploads/2018/04/Criminal-records-Final-Copy.pdf>, p 20.

⁹ Victorian Aboriginal Legal Service Co-Operative Ltd, *Submission to the Department of Justice in Response to the Standing Committee of Attorneys-General 'Draft Model Spent Convictions Bill'*, 6 February 2009, p 11.

¹⁰ Victorian Aboriginal Legal Service Co-Operative Ltd, *Submission to the Department of Justice in Response to the Standing Committee of Attorneys-General 'Draft Model Spent Convictions Bill'*, 6 February 2009, p 11.

¹¹ Victorian Aboriginal Legal Service Co-Operative Ltd, *Submission to the Department of Justice in Response to the Standing Committee of Attorneys-General 'Draft Model Spent Convictions Bill'*, 6 February 2009, p 11.

¹² Victorian Aboriginal Legal Service Co-Operative Ltd, *Submission to the Department of Justice in Response to the Standing Committee of Attorneys-General 'Draft Model Spent Convictions Bill'*, 6 February 2009, p 11.

The impact of long waiting periods on First Nations People

An arbitrary waiting period of ten years can impact First Nations People disproportionately, as their ability to secure a good job can be made even more difficult with a criminal conviction, further entrenching systemic disadvantage.

An incredible 92 per cent of First Nations Peoples reported difficulties in finding jobs due mainly to several structural and systemic issues,¹³ such as discrimination, the scarcity of jobs in rural areas and, by having been in contact with the criminal legal system as adults or children.

61 per cent of First Nations peoples were in the broader labour force, compared to 77 per cent for non-indigenous Australians. However, for First Nations Peoples in the workforce, many work in community services or personal care roles,¹⁴ including in the service or care of members of their own community.

These roles, whether paid or voluntary, often require a criminal record check and most bar a person from holding any type of position if they have a criminal record, even if that record is for very low-level offending.

For a First Nations person, having a criminal record can also prevent them from serving for and with their communities by being a member on government advisory boards or panels.¹⁵

A criminal record can also cause First Nations children to be separated from their culture by limiting First Nations families from caring for children under a kinship-care arrangement.¹⁶ The Department of Health and Human Services does not usually allow people with criminal records from acting as kinship carers.

A criminal record also limits the opportunity for First Nations people to work in corrections facilities either in paid or voluntary employment. This prevents Elders from delivering healing programs to their people in prison or to use their lived experience of the criminal legal system to mentor others in custody to get their lives back on track.¹⁷

A long waiting period for a conviction to be spent, particularly when it is not commensurate with the offence originally committed, prevents people from seeking and attaining good jobs, even in voluntary capacities, and other opportunities.

A long waiting period, particularly for low-level convictions, entrenches disadvantage, particularly for First Nations People. This is made worse by the fact that First Nations People often lack access to culturally safe and responsive diversion programs and other services that may be offered in the criminal legal system, compared to their non-indigenous counterparts.¹⁸

¹³ Australian Institute of Health and Welfare, *Australia's Welfare, Income and Employment for Indigenous Australians*, 2017.

¹⁴ Australian Institute of Health and Welfare, *Australia's Welfare, Income and Employment for Indigenous Australians*, 2017.

¹⁵ Winford, Stan, Woor-Dungin Criminal Record Discrimination Project, RMIT University, December 2017, p11.

¹⁶ Winford, Stan, Woor-Dungin Criminal Record Discrimination Project, RMIT University, December 2017, p11.

¹⁷ Winford, Stan, Woor-Dungin Criminal Record Discrimination Project, RMIT University, December 2017, p11.

¹⁸ Cunneen, Chris, Sentencing, Punishment and Indigenous People in Australia, *Journal of Global Indigeneity*, 3(1), 2018. Available at: <http://ro.uow.edu.au/jgi/vol3/iss1/4>

Recommendations:

1. Focus on the rehabilitation and the reintegration of people back into their communities.
2. Introduce a graduated scheme with different waiting periods for eligible convictions for adult offenders.
3. Introduce different waiting periods with a maximum of no more than three years for an eligible conviction, if the offender is a child.
4. Give courts a discretion to extend the waiting period for a child, if their offending is deemed to be very serious. However, this extended time must focus heavily on rehabilitation and diversion.
5. Apply a waiting period from the date a conviction is recorded.

SECTION 2: DEFINING CONVICTIONS

The Law Institute of Victoria has analysed how a conviction is defined in the enabling Acts across all other jurisdictions. Their analysis has found that all jurisdictions appear to define a conviction as all convictions in all courts.¹⁹

For the sake of uniformity, a Victorian scheme should define a conviction broadly, and clearly define the circumstances where convictions are immediately spent.

Non convictions should be immediately spent

In Victoria, a court can decide not to record a conviction after a finding of guilt or to dismiss a charge without conviction; however non-convictions, cautions or diversions are often released as part of a criminal record check by Victoria Police²⁰.

A court can exercise its discretion to not impose a conviction after considering the nature of the offence, the past history and the character of the offender as well as the impact a conviction would have on someone's wellbeing or job prospects.²¹ Section 8(2) of the *Sentencing Act 1991* (the Act) also requires that a non-conviction *not* be taken to be a conviction for any purpose.

It is therefore reasonable for a person to believe that if a court decides not to proceed with a conviction that this won't appear on a criminal record check. However, due to Victoria Police's *Information Release Policy's* inconsistencies with the Act, as well as its arbitrary application, the community does not have a good understanding that a Without Conviction Order will still appear on a criminal record check. This is particularly difficult for unrepresented litigants at court because they don't have a lawyer advising them in detail about the effects of a Without Conviction Order may be.

The current process is potentially punishing people when they're seeking employment when a court has decided not to record a conviction against a person for that very reason.

Two of our member community legal centres, Fitzroy Legal Service and Job Watch surveyed a cross section of their clients about their understanding of non-convictions (n: 63) by asking:

'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 record?'

Fifty seven per cent of respondents thought a non-conviction sentence would not appear on a criminal record check, 42 per cent thought it would and 2 per cent were not sure²².

¹⁹ LIV Submission Introduction of Spent Conviction Legislation in Victoria, Law Institute of Victoria, 22 April 2015, www.liv.asn.au

²⁰ *Sentencing Act 1991* (Vic) s76.

²¹ *Sentencing Act 1991* (Vic) s8(1).

²² Criminal Records in Victoria: Proposals for Reform, Fitzroy Legal Service Inc in conjunction with Job Watch 2005, <http://jobwatch.org.au/wp-content/uploads/2018/04/Criminal-records-Final-Copy.pdf>, p30.

Fitzroy Legal Service and Job Watch also found that even when people rightly understood that non-convictions may appear on a criminal record, they were still confused about what information would be released and for what purpose²³.

A legislated spent convictions scheme that isn't based on a discretionary policy would have helped 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 recorded²⁴.

Criminal record checks, like the one Matthew was subject to, are increasingly being used as de-facto tests of character by potential employers, schools, colleges and others, which can prevent people from gaining a well-paying job, education or other opportunities.

In 2010/11 Victoria Police carried out 493,200²⁵ criminal record checks, in 2017/18 that number was 716,768²⁶. By comparison Victoria Police processed only 3,500 criminal record checks in 1993²⁷.

The Federation of Community Legal Centres supports The Law Institute of Victoria's position that a Victorian legislated spent convictions scheme should have the effect of treating non-convictions as immediately spent to ensure that do not appear on a criminal record.²⁸

²³ Criminal Records in Victoria: Proposals for Reform, Fitzroy Legal Service Inc in conjunction with Job Watch 2005, <http://jobwatch.org.au/wp-content/uploads/2018/04/Criminal-records-Final-Copy.pdf>, p30.

²⁴ Criminal Records in Victoria: Proposals for Reform, Fitzroy Legal Service Inc in conjunction with Job Watch 2005, <http://jobwatch.org.au/wp-content/uploads/2018/04/Criminal-records-Final-Copy.pdf>, p17.

²⁵ Victoria Police 2010-2011 Annual Report.

²⁶ Victoria Police 2017-2018 Annual Report.

²⁷ Winford, Stan, Woor-Dungin Criminal Record Discrimination Project, RMIT University, December 2017, p9.

²⁸ LIV Submission Introduction of Spent Conviction Legislation in Victoria, Law Institute of Victoria, 22 April 2015, www.liv.asn.au, p8.

Recommendations:

6. Define a conviction broadly to enable a range of outcomes to be part of the scheme.
7. Treat convictions as immediately spent if the court dismissed the matter without recording a conviction, at the end of any bond, undertaking or adjournment or any other order imposed by the court, if a person is released without a conviction.

SECTION 3: TYPES OF CONVICTIONS THAT SHOULD BE CAPABLE OF BECOMING SPENT

When developing a legislated spent convictions scheme for Victoria, it is critical to balance the needs and expectations of the community, as well as rehabilitating and integrating people back into the community.

Across Australia, the types of convictions that can be spent vary, from those with 30 months of imprisonment or less capable to be spent in the Commonwealth and Queensland to convictions of six months or less able to be spent in New South Wales, ACT, the Northern Territory and Tasmania²⁹.

Western Australia takes an unnecessarily burdensome approach and defines the types of convictions that can be spent as either 'serious' or 'lesser.' Serious convictions are deemed to be sentences of imprisonment of one year or more, or a fine of \$15,000 or more.

Serious offences in Western Australia can only be spent by application to a District Court.³⁰

A lesser conviction is defined as a conviction with a sentence of less than one year and these can be spent on application to the Western Australian Commissioner of Police³¹.

We agree with other Australian jurisdictions that convictions against body corporates must be excluded from a Victorian scheme.

International examples

Jurisdictions around the world have taken a different approach to those locally. Canada allows most convictions to be spent, except serious child sexual offences or where a person has been found guilty of three or more indictable offences, each with a sentence of 2 years imprisonment or more.³²

Switzerland effectively allows all sentences able to be spent after pre-determined waiting periods commensurate with the offence.³³

²⁹ Crimes Act (Cth) s85ZL, Spent Convictions Act 2009 (SA) s3(1), Spent Convictions Act 1998 (WA) s7.

³⁰ Spent Convictions Act 1998 (WA) s7.

³¹ Spent Convictions Act 1998 (WA) s10.

³² Government of Canada, Canadian Parole Board, <https://www.canada.ca/en/parole-board/services/record-suspensions/who-is-eligible-for-a-record-suspension.html>

³³ Federal Department of Justice and Police of the Swiss Confederation, <https://www.bj.admin.ch/dam/data/bj/publiservice/service/strafregister/faq-strafregister-e.pdf>

Current practice in Victoria

Victoria Police's policy currently allows for convictions of 30 months' imprisonment or less to become spent, that is, to not appear on a criminal record check, however this policy is not applied consistently by the police and allows Victoria Police absolute discretion to release it regardless.

Victoria Police practice is to release information of serious violent offences or sex offences, particularly when a criminal record check is for someone wanting to work with children or other vulnerable people or for other factors at the discretion of Victoria Police.

The Federation of Community Legal Centres understands that the community would regard that serious violent or serious sexual offences should not be able to be spent.

Most jurisdictions (New South Wales, the Australian Capital Territory, Northern Territory and South Australia) do not allow for convictions for sexual offences to be spent.

Sexual offences

The Federation of Community Legal Centres supports the current practice of not allowing serious sexual offences to be spent, particularly those committed against children. However, a Victorian scheme should have regard to the fact that some sexual offending among young people can be regarded as minor in some circumstances, such as 'sexting.'

Instead of imposing a blanket ban on all sexual offences, it would be more equitable to instead define the type of sexual offences that cannot be spent.

There is precedent for not treating all sexual offending in the same way. In Victoria, young people who are convicted of some sexual offences can apply to a court to exempt them from registration in the sex offender registry.³⁴

Exclusions

Permanently excluding specific offences or types of offences from a Victorian spent convictions scheme doesn't allow for the proper consideration of a person's individual circumstances.

A one-size-fits-all approach can undermine someone's rehabilitative efforts or overlook other mitigating factors that may have influenced their offending behaviour, like mental illness or family violence.

For any offences that are excluded, a uniquely Victorian scheme should provide people with a mechanism to have that conviction spent on application to a court or tribunal; if they can demonstrate leniency or exceptional circumstances should apply.

³⁴ Winford, Stan, Woor-Dungin Criminal Record Discrimination Project, RMIT University, December 2017, p37.

Recommendations:

8. Outline what offences are excluded from the scheme, in line with community expectations.
9. For excluded offences, provide a mechanism that would allow a person to make an application to a court or tribunal for review if they can demonstrate exceptional circumstances or that leniency should apply.

SECTION 4: MECHANISM BY WHICH CONVICTIONS BECOME SPENT

Most jurisdictions allow convictions to be spent automatically after the applicable waiting period, only the Northern Territory and Western Australia differ.³⁵

The Federation of Community Legal Centres considers any scheme that doesn't automatically allow for convictions to be spent as unnecessarily burdensome on the individual, particularly for people experiencing disadvantage.

Recommendation:

10. All applicable convictions must be spent automatically when the required waiting period expires.

³⁵ *Criminal Records (Spent Convictions) Act 1992 (NT) s6A(3)*.

SECTION 5: OFFENDING DURING A WAITING PERIOD

The Federation of Community Legal Centres supports our member, Inner Melbourne Community Legal Service's submission to this inquiry regarding someone offending while serving a waiting period.

The Inner Melbourne Community Legal Service submits that minor level offences should not restart someone's waiting periods,³⁶ and we agree. They use Joshua's story as an example as to how this can have unintended, unfair outcomes.

Joshua is 31 years old. Due to an offence Joshua committed when he was 20, Joshua was placed on the Sex Offenders Register (the Register) for 8 years. Joshua's name was due to be removed from the Register in 2015.

In 2015, before Joshua's name was removed, he was charged under the Sex Offenders Act 2004 with two counts of failing to comply with reporting obligations.

The charges were minor – failing to annually re-report a persisting gym membership, which Joshua had previously reported, and failing to report a Twitter account, which Joshua did not use. Fortunately, in this instance [Inner Melbourne Community Legal Service] were able to assist Joshua to successfully contest the charges.

This meant that Joshua's name would be removed from the Register in 2015.³⁷

Low level offences should not restart someone's waiting period, as this can have devastating effects on people's future career and education prospects.

Recommendation:

11. If someone commits a summary offence during a waiting period, the waiting period should not restart.

³⁶ Inner Melbourne Community Legal Service, *Inquiry into a Legislated Spent Convictions Scheme Submission*, July 2019.

³⁷ Inner Melbourne Community Legal Service, *Inquiry into a Legislated Spent Convictions Scheme Submission*, July 2019.

SECTION 6: EFFECT OF A SPENT CONVICTION

In all jurisdictions someone with a spent conviction is not required to disclose it, so in effect a spent conviction equates to not being a conviction at all. This practice is also current Victoria Police policy when disclosing a criminal record.³⁸

The Federation believes that this would align with community expectations of a legislated scheme, or at the very least the plain English definition of what a 'spent' conviction would be deemed to be.

Recommendation:

12. A person should not be required to disclose a spent conviction except where required by law.

³⁸ Liberty Victoria, A Legislated Spent Convictions Scheme for Victoria: Recommendations for Reform, May 2017, p 19.

SECTION 7: PENALTY FOR DISCLOSURE

Current practice in other jurisdictions

In New South Wales, the Australian Capital Territory, the Northern Territory and Tasmania, it is an offence for someone to fraudulently or dishonestly obtain information about someone's spent conviction.³⁹

The Tasmanian legislation goes further by making it unlawful to threaten to disclose someone's spent conviction information and for prohibiting a spent conviction to be taken into account when assessing someone's character except where required by law.⁴⁰

There wouldn't be much use of legislating a spent convictions scheme in Victoria if there were no penalties for the unlawful disclosure of a spent conviction. Without penalties for the unauthorised disclosure of spent convictions, a spent convictions scheme fails in what it is trying to do.

Once a conviction has been spent, a person must be given the chance to start their life again.

Disclosure or potential disclosure by private providers

Penalties for unlawful disclosure are particularly important because of the number of private and profit-driven, criminal record check companies that provide criminal record checks to individuals, employers, and others. These providers are allowed to disclose this information under the Australian Criminal Intelligence Commission's *National Police Checking Service*.⁴¹

The Australian Criminal Intelligence Commission accredits private providers to act as an intermediary between someone requesting a check and the relevant police service in each state. The police service provides the criminal record information in line with each jurisdiction's spent conviction legislation, or Victoria Police policy in Victoria.⁴²

Three of the biggest profit-driven providers: National Crime Check, Equifax, and Checked.com.au have very different policies that govern the use of this sensitive, personal data.

³⁹ LIV Submission Introduction of Spent Conviction Legislation in Victoria, Law Institute of Victoria, 22 April 2015, www.liv.asn.au.

⁴⁰ Liberty Victoria, A Legislated Spent Convictions Scheme for Victoria: Recommendations for Reform, May 2017, p 19.

⁴¹ Australian Criminal Intelligence Commission, *National Police Checking Service*, <https://www.acic.gov.au/our-services/national-police-checking-service/find-out-more-information/how-service-works#accordion-2>, accessed 8 July 2019.

⁴² Australian Criminal Intelligence Commission, *National Police Checking Service*, <https://www.acic.gov.au/our-services/national-police-checking-service/find-out-more-information/how-service-works#accordion-2>, accessed 8 July 2019.

National Crime Check may disclose sensitive data for any purpose provided that this is disclosed to the person requesting the check. This detail is buried deep in their 3,325 word privacy policy that all users must agree to before they can use the website.⁴³

Checked.com.au may disclose personal information to third parties provided they tell the applicant which third parties they will be disclosing this information to as well as what countries these parties are located in.⁴⁴

Equifax allows the sharing of personal data between its other companies and any third party that they may decide to share it with,⁴⁵ this is particularly concerning as Equifax also provide credit history checks in Australia. In late 2017, Equifax announced that hackers had successfully stolen highly sensitive data held by Equifax affecting approximately 145.5 million people⁴⁶.

All providers have policies that allow user data to be sold to third parties for marketing purposes.

It's beyond the scope of the inquiry to investigate how private providers use criminal record data or other sensitive data. Given that private providers play a big role as intermediaries between police services and employers requesting criminal record checks, it's critical that they don't undermine the intent of a spent convictions scheme.

It's not inconceivable that a private provider may require someone to waive their right to not disclose a conviction if there are no penalties to prevent it.

Recommendations:

13. Introduce strong penalties that make it an offence to unlawfully disclose a spent conviction.
14. Make threatening to disclose a spent conviction without authorisation an offence, except where required by law.
15. Make it an offence for anyone to ask a person to consent to the disclosure of their spent convictions, except where required by law.
16. Make it an offence to assess a person's character by taking a spent conviction into account, except where required by law.

⁴³ National Crime Check, *Privacy Policy*, https://www.nationalcrimecheck.com.au/privacy_policy accessed 8 July 2019.

⁴⁴ Checked.Com.Au, *Privacy Policy*, <https://www.checked.com.au/privacy> accessed 8 July 2019.

⁴⁵ Equifax, *Equifax HR Solutions Privay Policy*, <https://www.equifax.com.au/fit2work/sites/default/files/privacy.pdf>, accessed 8 July 2019.

⁴⁶ Todd Haselton, CNBC, *Credit Reporting Firm Equifax Says Data Breach Could Potentially Affect 143 Million US Consumers*, <https://www.cnbc.com/2017/09/07/credit-reporting-firm-equifax-says-cybersecurity-incident-could-potentially-affect-143-million-us-consumers.html>, accessed 8 July 2019.

SECTION 8: DISCRIMINATION

The Commonwealth's *Australian Human Rights Commission Act 1986* (Cth) defines the grounds for protection from discrimination for people applying for jobs. These include race, sex, religion and irrelevant criminal record.⁴⁷

The Victorian equivalent, the *Equal Opportunity Act 2010* (Vic) does not prevent people applying for jobs from discrimination on the basis of irrelevant criminal record.⁴⁸

Aboriginal and Torres Strait Islander Legal Services have argued that without anti-discrimination protections, spent convictions would be of limited use, particularly for First Nations People.⁴⁹

Furthermore, without including an irrelevant criminal record in the list of protected attributes in the Victorian legislation, a person discriminated against would not be able to lodge a complaint of discrimination to the Victorian Equal Opportunity and Human Rights Commission for redress.

Recommendation:

17. Bring Victoria into line with the Commonwealth in protecting people from discrimination, and include 'irrelevant criminal record' within the list of protected attributes.

⁴⁷ *Australian Human Rights Commission Act 1986* s3(1), Australian Human Rights Commission Regulations 1989 – Reg 4.

⁴⁸ *Equal Opportunity Act 2001* (Vic) s16.

⁴⁹ Winford, Stan, *Woor-Dungin Criminal Record Discrimination Project*, RMIT University, December 2017, p39.