SUBMISSION TO THE LEGAL AND SOCIAL ISSUES COMMITTEE IN SUPPORT OF SPENT CONVICTIONS LEGISLATION (JULY 2019)
ABOUT FITZROY LEGAL SERVICE

Fitzroy Legal Service (FLS) is one of the oldest community legal centres in Australia. Since its inception, FLS has worked with a high volume of clients, providing legal assistance in criminal law matters, family law, family violence, employment law and civil law.

Through our criminal law practice and our Drug Outreach Lawyer program, we have worked extensively with people who are experience stigma and criminalisation due to their lived experience of homelessness, institutional trauma and violence, drug use and psycho social disability. We also run an employment law clinic in which we have worked with clients who face barriers to gaining or maintaining employment due to discriminatory or unlawful practices.

In February 2019, Fitzroy Legal Service merged with Darebin Community Legal Centre (DCLC). Darebin Community Legal Centre has expertise in working with criminalised communities.

DCLC manages the Women Transforming Justice ('WTJ'), a two-year pilot project delivered in partnership with Law and Advocacy Centre for Women (LACW) and Flat Out Inc., a support service for women exiting prison. WTJ was established in response to the escalating increases in the number of women in Victorian prisons and works with women in court and in the community to enhance their prospects of bail and support them and their children to live in safety and stability. The work of WTJ is guided by a leadership group of women with lived experience of prison and criminalisation. Their stories are included in our submission to the Committee.

Reference in these submissions to Fitzroy Legal Service ('FLS') hereafter will mean Fitzroy Legal Service (incorporating Darebin Community Legal Centre).

ACKNOWLEDGEMENTS

We acknowledge the Wurundjeri People of the Kulin Nation as the traditional owners of the land on which our offices are located. We pay our respects to their Elders past, present and emerging.

We are grateful to our clients, colleagues and community for trusting us with their stories and for granting us permission to use and share their experiences in this document.

This submission was co-authored by Jennifer Black, Sophie L’Estrange and Hui Zhou for Fitzroy Legal Service.
SUMMARY OF RECOMMENDATIONS

Recommendation 1: that the eligibility limit for the Victorian spent conviction scheme include imprisonment and be based on length of the imposed sentence - aligning closer to that of the United Kingdom (up to 4 years imprisonment) rather than more limited domestic examples.

Recommendation 2: That any legislated offences not eligible should be accompanied by an allowance for judicial discretion in demonstrations of exceptional circumstances and/or applications for leniency.

Recommendation 3: That ‘no conviction’ records be deemed immediately spent, consistent with sections 5, 7 and 8 of the Sentencing Act 1991 (Vic).

Recommendation 4: That ‘not guilty by reason of mental impairment’ records be deemed immediately spent.

Recommendation 5: That while a person is engaged in the diversion program pending charges are non-disclosable.

Recommendation 6: That an automatic mechanism for recognising spent convictions be employed.

Recommendation 7: That any legislated “crime free” period be evidence based.

Recommendation 8: That the “crime free” period accrue at the time of conviction, and not after any sentencing disposition has been served.

Recommendation 9: That any legislated “crime free” period for young people be shorter than a period imposed for older adults, and that this period be determined on evidence, taking into account the characteristics unique to the experience of young people.

Recommendation 10: That “young people” be persons aged 25 or under.

Recommendation 11: That so long as any subsequent conviction is within the eligibility if the Victorian scheme they should not disqualify a person from having both the initial and subsequent convictions eventually spent.

Recommendation 12: That the definition of “minor offence” for the purposes of s(5)(1)(a) of the Draft Bill should be much broader and any definition should be consistent with a framework that centres on fairness and rehabilitation.
**Recommendation 13:** That there be a legislated mechanism to hear application for waivers or reductions of “crime free” periods and applications for eligibility under the scheme. This mechanism should also hear applications to determine whether subsequent convictions should have any effect on the total “crime free” period across the initial and subsequent convictions.

**Recommendation 14:** That the effect of a spent conviction should be that a person is regarded and treated as though they have not committed, been charged with, prosecuted for, convicted of, nor sentenced for that charge. As such:

- They are not required to disclose that spent conviction;
- Questions of a person’s criminal history shall not include that spent conviction; and
- Questions of character or fitness shall not permit reference or consideration of that spent conviction.

**Recommendation 15:** That similar provision to that in the United Kingdom scheme be enacted to prevent the admissibility of evidence in proceedings regarding that spent conviction and the protection of the person in proceedings from being required to answer questions with reference to that spent conviction.

**Recommendation 16:** That ‘irrelevant criminal record” be included as a protected attribute in the *Equal Opportunity Act* – the definition of which includes the circumstances relating to the offence for which the person was found guilty are not directly relevant to the situation in which the discrimination arises.

**Recommendation 17:** That employers must apply to the Commission to be able to request police checks and that a close connection between the role and a criminal record must be demonstrated.

**Recommendation 18:** That people are able to appeal to the Commission if they believe a decision to terminate their employment or reject their application turned unreasonably on the existence of an irrelevant criminal record.
1. The types of criminal records that should be capable of becoming spent

1.1 A Victorian Spent convictions scheme

With this legislation, Victoria has an important opportunity to learn from other jurisdictions\(^1\) and to be a leader in expanding the attainability of a second chance, developing a scheme that genuinely pursues the values articulated in the Inquiry’s terms of reference namely; transparency, fairness, rehabilitation and reintegration and community safety and wellbeing.

1.1.1 Victorian Sentencing law

These values echo principles and purposes already well established in Victorian sentencing law. Parsimony\(^2\) proportionality\(^3\) and just punishment\(^4\) are all underpinned by fundamental concepts of reasonableness, fairness, transparency and justice. Additionally rehabilitation\(^5\) centres on establishing conditions that the individual can reintegrate into the community improving community safety and wellbeing\(^6\).

We submit that once a person has served their sentence and/or complied with their orders and has taken rehabilitative steps the old offending no longer bears a true reflection of their character. Therefore, the continuing substantive stigma and discrimination of that disclosable conviction subverts the sentencing objectives of parsimony, proportionality and just punishment. Furthermore, a Victorian spent conviction scheme would recognise and respect the sentencing principle of rehabilitation.\(^7\)

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\(^1\) See Comparative table. Appendix 1.
\(^2\) Moderating the sentence to ensure it is commensurate with the offence and with the purposes for which the punishment has to be imposed - *Bell 9/8/1990 CCA Vic, O'Bryan J.*
\(^3\) A sentence of imprisonment should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances - *Veen [No 2] (1987) 164 CLR 465, 472*
\(^4\) To punish the offender to an extent and in a manner which is just in all of the circumstances- *Sentencing Act 1991 (Vic) s 5(1)(a).*
\(^5\) *Sentencing Act 1991 (Vic) s 5(1)(c).*
\(^6\) A restorative justice approach in sentencing has been demonstrated to enhance the wellbeing of victims. See Australian Institute of Criminology (2017) *The impact of restorative justice*, accessed at [https://aic.gov.au/publications/rpp/rpp127/impact-restorative-justice], 15 July 2019
\(^7\) Australian studies demonstrate rehabilitation is understood as the most important reason for sentencing in the eyes of the general public. ‘Public Opinion About Sentencing: A Research Overview (Research Overview, Sentencing Advisory Council, State of Victoria, 13 December 2018).
1.1.2 The value and meaning of rehabilitation

Many of our clients suffer the stigma of the disclosure of a 'non conviction' disposition for relatively minor (sometimes once off) low level offending. We therefore support in recommendation 3 that 'no conviction records' be immediately spent. However, the vast majority of our clients have lengthy criminal histories and cycle in and out of prison with sentences of 1 month to 4 years. Additionally many of these clients have experienced significant harms at an early age. These harms often include exposure or direct experience of serious family violence. A very large number of clients have also singular or multiple diagnoses of mental illness. Their reliance on illicit drugs has often begun from ages as early as eleven or twelve, and familial support or social supports are often very limited.

There is also emerging evidence that this cohort is being remanded more often and being sentenced to more prison for 'time served on remand' as a result of recent changes to Victorian Bail laws. See discussion below on the inclusion of imprisonment.

Rehabilitation for these clients is an extraordinary achievement, often involving intensive drug rehabilitation, healing from past trauma and navigating complex systems to obtain necessary social supports such as housing or mental health services. A recovery journey can take many forms, and it is not unusual for recovery to be marked by intermittent periods of relapse and reoffending. Employment is a particularly important part of this process, it is stabilising, protective and integrates our clients into the community they have long been excluded from. There is strong evidence to demonstrate that integration in turn enhances community safety and wellbeing.

The women in our Women Transforming Justice project’s Leadership Group are examples of this extraordinary perseverance. They are all women with lived prison experience who are now employed by Fitzroy Legal Service. They use their knowledge and experience of the system to guide our advocacy regarding women’s criminalisation and incarceration. We submit that cases like theirs deserve recognition in the Victorian scheme. Their stories are presented at part 7 of this submission, each highlighting how the stigma of a criminal record has impacted on their rehabilitation journey.

1.2 The inclusion of imprisonment

We strongly submit that the spent convictions scheme should not exclude people who have served periods of imprisonment.

Recent changes to Victorian bail laws has expanded the number of offences for which there is a presumption against granting bail. This has resulted in people being held on remand for minor breaches of bail conditions, such as curfews, failing to report for bail, shop theft or drug possession.

Additionally, the way in which the tests that courts apply when deciding whether to grant a person bail does not always indicate the seriousness of the charge, but rather vulnerability factors including lack of safe accommodation, lack of community connection and support and can often lead to people with complex needs, including psycho-social disabilities being remanded.

As discussed above there is emerging evidence that these laws are disproportionately affecting vulnerable cohorts including women, people with disabilities and/or Aboriginal Australians.⁹ They have resulted in a 22 percent increase in un-sentenced prisoners since 30 June 2017. For many these remand periods are often longer than any sentence that they would have received for the offences for which they were charged. Excluding all people who have been sentenced to a custodial term of imprisonment from benefiting from a spent conviction will therefore prejudice many people who have lower level offending, and who, but for being sentenced to time served on remand, might ordinarily have benefited from the spent conviction scheme.

We therefore, recommend that the eligibility limit for the Victorian spent conviction scheme include imprisonment and be based on length of the imposed sentence - aligning closer to that of the United Kingdom (up to 4 years imprisonment) rather than more limited domestic examples.

Recommendation 1: That the eligibility limit for the Victorian spent conviction scheme include imprisonment and be based on length of the imposed sentence - aligning closer to that of the United Kingdom (up to 4 years imprisonment) rather than more limited domestic examples.

1.2 Exclusion of certain categories of offending

As the committee will have observed at the ‘open mic’ forum on the evening of the 19th of June, the circumstances of each individual are complex and the gravity of the offending within an offence

category may range significantly from lower end to serious. As such we do not support the exclusion of specific offences or categories of offences from the scheme.

The complexity of individual circumstances and the complex particulars of an offence is demonstrated in the following example:

Julian (a pseudonym) had been charged with low level trafficking. The circumstances around the offending involved his drug use spiralling out of control. This in turn lead to him no longer being able to commit to his work and once unemployed, the drug use increased and his habit was supported by selling small amounts of drugs.

Nonetheless, Julian turned his life around since being charged. He went through the process of an intensive drug rehabilitation program and came out the other side, and was described by his drug and alcohol workers as the ‘model client.’ Having addressed his drug issues, an integral part of his rehabilitation and reintegration into community was being employed in any capacity. He had keenly thrown himself into the job market and on several occasions had made it being one of the final candidates to only be refused after the employer on the final hurdle when making police check. As one potential employer told him, ‘when you have two good candidates, you are going to go with the one without the criminal history.’ Refusal after refusal had led to a deepening question of self-worth and a very real sense of wanting to relapse.

Sentencing submissions were made by his lawyer regarding Julian’s current difficulties with being gainfully employed. The Magistrate recognised Julian’s struggle and gave him a 12 month adjourned undertaking to be of good behaviour (a good behaviour bond) with conviction. There are no conditions of the bond other than to be of good behaviour. The Magistrate wanted to reward him for his efforts with his drug and alcohol treatment in addressing the issues that lead to the offending but the Magistrate stated that this was the best he could do given the law’s stance on trafficking. He hoped his lenient sentence went toward explaining his criminal history to employers a little clearer.

To exclude specific offences, or whole categories of offences, would disallow any consideration of the specific circumstances of the person, including their age, personal histories, rehabilitative
efforts, any contributors to offending, and any other matters mitigating the seriousness of their
offending. Julian’s case is an example of a serious offence committed in circumstances which placed
it on the lower end of the spectrum, and where there is explicit judicial recognition for a person in
Julian’s circumstances to be able to move on with his life and to pursue a career pathway
unimpaired by poor choices made earlier in his life are in the interests of justice and the interests of
community.

The following example demonstrates how the gravity of the offending within an offence category
may range significantly from lower end to serious:

A 17-year-old Melbourne man and his girlfriend, also 17, filmed themselves
having sex. After he turned 18, they broke up and he emailed two still images
from the video to three friends. Police charged him with making and
transmitting child pornography. 10

If all sex offences were excluded from a spent convictions scheme this young person, could never
escape the stigma of his criminal record as a sex offender. Without the assistance of a spent
conviction scheme this extremely poor decision of a young person will haunt them for the rest of
their lives.

We submit that the exclusion of specific offences, or whole categories of offences undermines the
values discussed above and articulated in the Inquiry’s terms of reference, in particular fairness,
rehabilitation and reintegration and community safety and wellbeing.

The stigma of a criminal record (particularly one referencing a sexual offence) interferes with
rehabilitation and rehabilitation. The disclosure of the criminal record and fear of disclosure of the
criminal record will inhibit future employment or volunteer prospects.

Inappropriate employment or volunteer opportunities, working with children for example, could be
managed by certain spent convictions being disclosable under other regimes – through working with
children checks.

Such opportunities as discussed above are stabilising, protective and add valuable change to
integrate into the community they have long been excluded from. As is evidenced above this

10Nicole Brady, ‘‘Sexting’ Youths Placed on Sex Offenders Register’, The Age (online, 24 July 2011)
rehabilitation and integration in turn enhances community safety and wellbeing by reducing reoffending.

This is the case even for certain categories of offending such as sexual offences, that are seen to pose a higher than average risk, and in fact research shows that most effective way to prevent recidivism in sex offenders is a combination of stable employment and treatment.\(^1\)

1.3.1 Judicial discretion and/or applications for leniency for exceptional circumstances

However, if certain categories of offences are excluded, for example sex offences or drug trafficking we would urge the Committee to enable judicial discretion and/or applications of leniency when demonstrated exceptional circumstances are present (please see section 5 below). The above case studies tell the stories of such exceptional circumstances and the potential perverse outcomes of a one size fits all approach.

Recommendation 2: That any legislated offences not eligible should be accompanied by an allowance for judicial discretion in demonstrations of exceptional circumstances and/or applications for leniency.

1.4. ‘No conviction’ sentences

As stated by the Sentencing Advisory Council, a finding of guilt forms part of a person’s criminal record even if ‘no conviction’ is decreed by the sentencing judge and can have negative impacts on a person’s future prospects despite having completed any sentence or complied with all orders.\(^2\) In addition to being able to be relied upon by police in any future case against the person, a finding of guilt without conviction can be included in police record checks “…limiting the [person’s] eligibility for international travel, certain jobs...or volunteer roles, insurance policies [or] various types of license (for example, a taxi driver license).”\(^3\)

This issue has been recognised in the New South Wales scheme where a recording of ‘no conviction’ is immediately spent.\(^4\)

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1\(^1\) Brown, Kevin & W. Spencer, Jonathan & Deakin, Jo. (2007)The Reintegration of Sex Offenders: Barriers and Opportunities for Employment Howard Journal 46


4\(^4\) Criminal Records Act 1991 (NSW) s 8(2).
We support this approach recommending that any 'no conviction' finding of guilt be deemed immediately spent for the following reasons:

1. This approach is also entirely consistent with current Victorian sentencing law.
2. Currently there exists a significant confusion regarding the impact of 'no conviction' sentences. This approach would immediately remedy this confusion.

1.4.1 Victorian Sentencing Law

Deeming no conviction sentencing immediately spent is entirely consistent with current Victorian sentencing law, in particular sections 7 and 8 of the Sentencing Act 1991 which outline the judicial discretion to record conviction. This includes the a) the nature of the offence b) the character and the past history of the offender c) impact on offender’s economic or social well-being or on his or her employment prospects.

Some committee members have questioned the impact of deeming no conviction sentencing immediately spent on recidivist offenders. We submit that in our experience offence that receives a no conviction disposition is generally be very low level offending such as public space offences - begging, drinking in public, offensive language.

Public space offences are those offences relating to a person’s interactions with and use of public space. Naturally, these offences disproportionately affect homeless persons and other persons who spend more time in public places, such as or young people, or who are more visible in public spaces – such as racially targeted persons, young people, those exhibiting psycho-social disability, or persons under, or appearing to be under, the influence of drugs or alcohol. We submit that these sorts of offences are better address with social supports rather than sentencing principles of deterrence.

1.4.2. Current confusion

As discussed above one of the consideration in section 8 of the Sentencing Act 1991 as to whether or not to record conviction is, at (1)(c): impact on offender’s economic or social well-being or on his or her employment prospects. However, without a spent convictions scheme this consideration is

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rendered meaningless as the record will be released to an employer whether or not there is a non-conviction outcome.\textsuperscript{18}

It is our experience that there exists a significant misunderstanding regarding the impact of ‘no conviction’ sentences. For example:

- It seems completely continuative for most affected individuals that their 'no conviction' disposition is disclosable on a criminal record.

This confusion is at times compounded by:

- The increasing number of unrepresented individuals in the court system and thus lack of legal advice prior to entering a plea of guilty;

- Lawyers who may not adequately explain the consequences of a plea of guilty, or rely on 8 of the Sentencing Act in the provision of advice and representation as to the impact of a no-conviction and/or prove and dismiss disposition; and

- Lack of transparency, inconsistency and widespread confusion\textsuperscript{19} surrounding the Victoria police policy on disclosure of criminal records.

As a result many individuals leave court with the firm belief that they have no disclosable prior convictions and later have their honesty questioned when employment and other opportunities are pursued.

1.5 \textit{Risk of a criminal record and its legal decision making.} 

The risk of a criminal record and its impact on other aspects of people’s lives may influence the negotiation of charges and legal strategy. For example an individual with a legitimate defence to charges may accept an offer of diversion, rather than run the risk of a finding of guilt following an unsuccessful contested hearing. This is particularly the case with respect to low level offending, which would ordinarily lead to a non-conviction. Consider for example:

Abbas (a pseudonym) is a middle-aged man who had arrived in Australia seeking asylum and was waiting for the outcome of his application for a protection visa. Abbas suffered from mental health issues arising from previous trauma and was

\textsuperscript{18} \textit{Sentencing Act 1991} (Vic), s 8(1)(c)

\textsuperscript{19} FLS lawyers have witnessed the confusion surrounding disclosure of criminal records in negotiations with senior prosecutors at Magistrates Court level, submissions received in Magistrates Court and County Court proceedings, and had numerous discussions with duty lawyers, solicitors, barristers and senior counsel.
struggling to support his young family with the assistance of limited community supports.

Abbas had been charged with failing to give name, address and car registration at the scene of a car accident and with reversing unsafely. Abbas denied the allegations, however instructed his lawyers that he wanted to pursue diversion rather than to contest the charges and run the risk of an outcome that would further jeopardise his migration law outcome.

This example illustrates the influence of even the possibility of sustaining a criminal record impacts legal decision making. This is another reason why ‘no conviction’ records should be deemed immediately spent. We submit that this would in some cases markedly decrease the pressure for accused people to accept a diversion, choosing instead to run a potentially viable defence, without fear of a finding of guilt and thus a criminal record.

A spent convictions scheme enabling a 'no conviction' finding of guilt to be deemed immediately spent is entirely consistent with current Victorian sentencing law and would immediately remedy the current confusion surrounding disclosure of criminal records and the resulting impact discussed above on legal decision making.

Recommendation 3: That ‘no conviction’ records be deemed immediately spent, consistent with sections 5, 7 and 8 of the Sentencing Act 1991 (Vic).

1.6. Findings of not guilty by reason of mental impairment

In Fitzroy Legal Service experience findings of ‘not guilty by reason of mental impairment’ are usually disclosed under the Victoria Police release policy, regardless of the nature of offending and sentence imposed. We have not been able to confirm this policy approach in the Victoria Police Manual. However, a publically available information sheet summarising the most recent Victoria Policy Release Policy states that Victoria Police will release criminal history information if there is a finding of guilt; if matters are pending; or in the case of a number of exceptions. One of these exceptions is

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in the case of “relevant offences where the result was 'Acquitted by reason of insanity/mental impairment' or ‘Not guilty by reason of insanity/mental impairment.’”

The law recognises that not everyone is responsible for their actions in the same way. For example, children under 10 years of age cannot be charged with a criminal offence in Victoria, as the law recognises that they do not have the full ability to tell right from wrong. Similarly, section 20 of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (CMIA) recognises that in some cases a person with a mental illness or cognitive impairment will not have the capacity to be criminally responsible for their actions—for example, when the person didn’t know what they were doing, or didn’t know that their actions were wrong. This is called the ‘defence of mental impairment’. If the defence is established the court may impose a ‘supervision order’ this means that the person receives mandatory psychiatric treatment.

Allowing, the disclosure of findings of ‘not guilty by reason of mental impairment’ subverts the values discussed above, articulated in the Inquiry’s terms of reference. Fundamentally it is unfair, forcing an individual to carry the stigma of a conviction when they have been found by a court to have established a defence to the charges (namely they didn’t know what they were doing, or didn’t know that their actions were wrong). Furthermore, arguably this policy approach of disclosure would likely be open to challenge for unlawful discrimination on the basis of a protected attribute, being disability.

Additionally it undermines rehabilitation and reintegration and community safety and wellbeing. The defence of mental impairment under the CMIA is in part an acknowledgement that not useful to punish people who are not criminally responsible for their actions by putting them in prison. If a mentally impaired person didn’t understand what they were doing at the time they committed an offence, or didn’t understand that the offence was wrong, it is unlikely that they will understand the reason they are being put in prison. It is also unlikely that putting them in prison will make them behave differently in future.

Furthermore, if a mentally impaired offender is imprisoned, their mental illness may go untreated and may still be present when the person is released. This does not protect the community from future harm. Instead, as a more useful alternative to prison, the CMIA recognises that the community is kept safer by treating people’s illnesses or impairments and supervising them closely.

22 Ibid
This may include mandatory detention in a psychiatric hospital. The focus is not on punishment, but on rehabilitation.  

As discussed above, the stigma of a criminal record, particularly one referencing a mental impairment interferes with rehabilitation and rehabilitation. The disclosure of the criminal record and fear of disclosure of the criminal record will inhibit future employment or volunteer prospects. Such opportunities as discussed above are stabilising, protective and an valuable change to integrate into the community they have long been excluded from. As is evidenced above this rehabilitation and integration in turn enhances community safety and wellbeing.

**Recommendation 4:** That ‘not guilty by reason of mental impairment’ records be deemed immediately spent.

### 1.7. **Diversion – charges pending.**

The criminal justice diversion program allows eligible individuals to have their criminal matter 'diverted' from the mainstream court system. A diversion program will involve the undertaking of several conditions, commonly including not committing another offence for a set period of time – often between 6 months and 2 years. If successful in completing their diversion program a person will avoid a finding of guilt and thus a criminal record.

However, during the period of the diversion program a criminal record will show the matters as “charges pending.” This has an obvious impact for participants seeking employment during the period of their diversion program. Furthermore, as employment significantly reduces the risk of reoffending the disclosure of pending charges arguably negatively impacts a person’s successful completion of the program.

We recommend that “charges pending” should not be disclosed on a criminal record, in the same way that charges should not be disclosed where a person has not finalised their criminal matters by way of a plea of guilty, or acquittal. The result that a finding of guilt and conviction will be imposed if a participant does not successfully complete, the carrot so to speak, will remain. Imposing these

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23 *Ibid*

results only on a failure to complete has the obvious advantage of giving a diversion participant both
the benefit of the doubt and the best assistance possible in successful completion.

**Recommendation 5:** That while a person is engaged in the diversion program pending charges are
non-disclosable.

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2. **The mechanism by which convictions become spent**

2.1. **Automatic mechanism for convictions becoming spent.**

Across domestic jurisdictions and internationally the majority of spent conviction schemes
automatically consider convictions spent on the completion of the “crime-free” period and
compliance with any other fine and/or court order. The alternative is a system of applying for a
conviction to be spent (4:2 respectively).

New Zealand\(^ {25} \) and the United Kingdom\(^ {26} \) for example, employ automatic mechanisms whilst
Canada\(^ {27} \) uses an application process. Domestically, the Commonwealth,\(^ {28} \) New South Wales\(^ {29} \), South
Australia\(^ {30} \), Queensland, the ACT and Tasmania schemes are automatic whilst Western Australia\(^ {31} \)
and the NT via application.

We strongly recommend an automatic mechanism for deeming convictions spent. This is primarily to
counteract the obvious disadvantages of an application system. We know that people interacting
with the criminal justice system are more likely to also be people with disabilities including psycho-
social disability or from other marginalised and disadvantaged groups, experience drug and alcohol
dependent and/or homelessness or be survivors of abuse. That a person may not have their
conviction spent because they were unable navigate an application process for any of a multitude of
reasons which would impact on the ease of doing so is an unfair prospect that should be avoided.

An automatic process for convictions being spent is the most just and equitable process for all
Victorians.

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\(^ {25} \) *Criminal Records (Clean Slate) Act 2004 (NZ)* s 7.
\(^ {26} \) *Rehabilitation of Offenders Act 1974 (UK)* s 1(1).
\(^ {27} \) *Criminal Records Act 1985 (Ca)* s 3(1).
\(^ {28} \) *Crimes Act 1914 (Cth)* s 85ZM(2)(b).
\(^ {29} \) *Criminal Records Act 1991 (NSW)* s 8(1).
\(^ {30} \) *Spent Convictions Act 2009 (SA)* s 8(1).
\(^ {31} \) *Spent Convictions Act 1988 (WA)* s 6(1) and 7(1).
**Recommendation 6**: That an automatic mechanism for recognising spent convictions be employed.

3. Any “crime-free period” that should apply before a conviction may be spent including, whether this should vary according to the age of the offender and type of conviction


The purpose of the introduction of a spent conviction scheme in Victoria, as we understand it, is to:

- provide people with the opportunity to move forward with their lives and away from a criminal past that no longer reflects who they are;
- ensure that people do not serve in effect life sentences after they have well and truly served their time or completed any imposed orders; and
- promote community safety, wellbeing, rehabilitation and reintegration.

We submit that any legislated crime free period should:

- begin to accrue at the time of conviction, not at the time an order and sentence has been completed or served; and
- be the minimum (that is, the least restrictive) period to meet the objectives of the scheme and should be determined based on evidence of recidivism and rehabilitation.

Rehabilitation is one of the factors taken into account and indeed one of the aims of sentencing. The period for which a person serves sentence or completes an order, must therefore be seen as part of the rehabilitation process, and should not be considered separate to their rehabilitation. To impose a crime free period that only activates after a sentence is served, is at odds with a sentencing regime with places weight on rehabilitation and intends, to a large or lesser part, to be rehabilitative.

Studies looking at the predictive effect of a criminal record on a person’s future offending have shown that the more years a person is “crime free” after conviction the less predictive a criminal record is on any future offending. It has been evidenced that after being “crime free” for six to seven years, the risk of future offending is relatively equal to a person with no criminal history.\(^\text{32}\)

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Recommendation 7: That any legislated “crime free” period be evidence based.

Recommendation 8: That the “crime free” period accrue at the time of conviction, and not after any sentencing disposition has been served.

3.2 “Crime free” periods for young people

For young people, rehabilitation is particularly relevant and important. The prospect of rehabilitation for young people is greater and carving out appropriate pathways for engagement with the community is much more effective than punitive measures to preventing recidivism.

Young people in their late teens to early twenties are often at the stage of beginning their careers, and can be particularly vulnerable to discrimination in employment settings.

Until a person completes the “crime free” period their convictions remain fully disclosable. This burden can be additionally pronounced for young people moving through pivotal stages of adolescence and early adulthood. For example, a 23 year old would be severely impeded in building and establishing their career until, under most other schemes, they were 33. For a young person, seven years to a decade on top of completing an imposed sentenced is a long period of time to remain hamstrung. Given the understanding that employment is one of the greatest factors preventing reoffending, imposing a “crime free” period could be setting people up to fail.

Our view is that young people should encompass a broader definition, and should at minimum reflect the definition at s 3(1) of the Sentencing Act, which defines a young offender to be aged 21 or under. We note that there are studies to suggest that the age of adolescence has shifted to 10-24,


33 Office of the Inspector of Custodial Services, Government of Western Australia, Recidivism rates and the impact of treatment programs (September 2014), 11 [5.9].


and therefore encourage the Committee to adopt a broader definition of young person for these purposes. Noting that most services for young people cater for persons aged 25 or younger, understanding the vulnerabilities of an older cohort of young people, we submit that 25 years of age could be a more effective measure.

We recommend that any legislated “crime free” period for young people be shorter than a period imposed for older adults, and that this period be determined based on evidence, taking into account the characteristics unique to the experience of young people.

**Recommendation 9:** That any legislated “crime free” period for young people be shorter than a period imposed for older adults, and that this period be determined based on evidence, taking into account the characteristics unique to the experience of young people.

**Recommendation 10:** That “young people” be persons aged 25 or under.

### 3.3 How a ‘flexible’ “crime free” period could look in practice

In our presentation to the Committee’s public hearing on 1 July 2019, the Chair asked us how this could be articulated in legislation. Noting our recommendation that research into the crime free period needs first to be conducted, we ask the Committee to consider the following suggestion:

**5 When a conviction is spent under this Division**

(2) –

(a) the waiting period for the conviction of an adult offender is no more than X years from the date of conviction.

(b) the waiting period for young people is no more than X years from the date of conviction.

(3) a person may, at any time during the waiting period, apply to a court (or the relevant administrative body) for a reduction or a waiver in full of the waiting period.

(a) in hearing an application the Court (or relevant administrative body) may consider;

(i) any special or exceptional circumstances relevant to the offending, charging or court proceedings; or

(ii) the impact of the wait period due to the person’s age, parenting status, disability, race, or gender; or

(iii) any educational, welfare, or rehabilitative steps the person has engaged in since

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conviction; or
(iv) any unreasonable impediments the person is experiencing in gaining specific employment; or
(v) any other relevant exceptional circumstances or reasons for leniency.

If this is not accepted by the Committee, we recommend the committee consider aligning the Victorian scheme with the more progressive and lenient scheme of the UK where a “crime free” period has a maximum of seven years and is measured on a scale against the severity of the sentenced imposed and that any period for juvenile offender be significantly less than that of adults.

4. The effect of subsequent convictions during the crime-free period

In addition to the above, we support a Victorian scheme that mirrors South Australia and the UK in that the conviction of a subsequent offence does not disqualify a person’s eligibility for both, or all, offences becoming spent\(^{37}\) and that if the offence is minor, the conviction is quashed, or the convicted person is granted a pardon the convictions will be disregarded as impacting on the “crime free”.\(^{38}\)

In the Draft Exposure Bill, the definition of a minor offence is where there is a discharge without penalty, or where a person has been sentenced to a bond or fine of no more than $500, or for young people, released on probation or a youth supervision order. In our view, this is a very low and unpractical threshold. The types of offences that would return a sentence that would fit into this definition of ‘minor offence’ are offences generally impacting people who are marginalised in some way: public order offences, very low level drug possession, minor shop thefts. This exclusion from benefit of a “crime free” period would impact a huge number of people and interrupt steps taken towards rehabilitation. For people who use drugs for example, relapse is a very real part of the journey of rehabilitation, and not building in provisions that acknowledge this reality would be a detriment to the success of any scheme.

As discussed above at 1.2, the operation of the current bail laws have led to some people being remanded for minor matters and then sentenced to ‘time served’. This practice highlights how

\(^{37}\) *Spent Convictions Act 2009* (SA) s 7(2).

\(^{38}\) *Spent Convictions Act 2009* (SA) s 7(4).
placing a low threshold on a subsequent offence that vitiates the “crime free” period could impact on people who should otherwise have had continued benefit from the scheme.

We submit that the definition of “minor offence” for the purposes of section 5(1)(a) of the Draft Bill should be much broader and any definition should be consistent with a framework for this scheme that centres on fairness and rehabilitation.

We also submit that there should be scope to apply for any subsequent convictions to not be taken into account within a “crime free” period (see section 5 below).

**Recommendation 11:** That so long as any subsequent conviction is within the eligibility if the Victorian scheme they should not disqualify a person from having both the initial and subsequent convictions eventually spent.

**Recommendation 12:** That the definition of “minor offence” for the purposes of s(5)(1)(a) of the Draft Bill should be much broader and any definition should be consistent with a framework that centres on fairness and rehabilitation.

5. **A mechanism for review**

Our view is that in order to meaningfully operate, any spent convictions scheme must have an avenue or mechanism for exceptional cases to be considered.

This mechanism would allow a person to make an application for a number of types of relief, including:

- to apply for a waiver or reduction of the crime free period; or
- to apply be included into the scheme, where they would otherwise have been excluded (for example because they have an longer period of imprisonment than allowed under the scheme, or because their conviction is for an offence that is excluded by the scheme); or
- to apply for a subsequent conviction to not be taken into account within a crime free period (this is relevant for example if a person was convicted of a fairly serious offence, and during the crime free period commits something relatively minor) – we say that in
some circumstances they should be able to apply to have this intervening offence not considered in the application of the crime free period

This mechanism would operate to essentially safeguard against perverse outcomes. As already discussed, each individual’s interaction with the criminal justice system is unique and therefore the scheme needs to be flexible enough to fairly apply to those cases that require a more nuanced understanding of the circumstances.

Consider this example:

Simon (a pseudonym) was charged with historical sex offences, dating back to when he as an 18 year old engaged in a sexual relationship with a young person who was 15 years old at the time. The relationship between the two lasted approximately 5 years. Some 40 years later, Simon was charged with and pleaded guilty to two counts of indecent assault of a child, relating to his relationship as an 18 year old. He had no related charges either before or since those offences occurred. Simon was sentenced to a Community Corrections Order.

As a consequence of these historical charges, Simon lost his employment of over 20 years. He has also suffered emotionally and psychologically and has since been unable to find employment due to his criminal record.

Simon’s story is one that reflects how a criminal conviction can come about and unfold in unexpected ways. It would be in the public’s interest for exceptional stories such as these to be able to be considered by an authority (whether an administrative body, or a court), to determine whether the person (if excluded) can be included in the scheme or if a crime free period can be waived or reduced.

Recommendation 13: That there be a legislated mechanism to hear application for waivers or reductions of “crime free” periods and applications for eligibility under the scheme. This mechanism should also hear applications to determine whether subsequent convictions should have any effect on the total “crime free” period across the initial and subsequent convictions.
6. The consequences of a conviction becoming spent

The consequences of a conviction becoming spent are most eloquently stated in the United Kingdom scheme:

“...a person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction.”39

This is mirrored in domestic legislation where persons who have had their conviction spent are not required to disclose information of that spent conviction40; a question of a person’s criminal history refers only to a person’s convictions which are not spent41; and any questions or reference to a person’s character or fitness neither permit nor require account to be taken of any convictions which are spent.42

This is further underlined by the creation of offences for unlawful disclosures of a person’s spent convictions by those who have access to such information43 as well as protections against discrimination for spent convictions or the non-disclosure of spent convictions.44

The United Kingdom scheme further outlines that evidence of a spent conviction is not admissible to prove that the person has committed, been prosecuted, charged or sentenced for any offence subject of a spent conviction45 and that should a person be asked questions relating to their past in proceedings is not required to answer regarding any spent convictions.46

We submit that the Victorian scheme should mirror those mentioned here in that a person who has their conviction spent should be regarded as a person who has not committed, been charged with, prosecuted for, convicted of, nor sentenced for that charge. That a person who has their conviction spent should not be required to disclose that spent conviction, a question of that person’s criminal

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39 Rehabilitation of Offenders Act 1974 (UK) s 4(1).
40 Criminal Records Act 1991 (NSW) s 12(a); Spent Convictions Act 2009 (SA) s 10(b); Spent Convictions Act 1988 (WA) s 27.
41 Criminal Records Act 1991 (NSW) s 12(b); Spent Convictions Act 2009 (SA) s 12(a).
42 Criminal Records Act 1991 (NSW) s 12(c)(ii); Spent Convictions Act 2009 (SA) s 10(c)(ii); Spent Convictions Act 1988 (WA) s 26.
43 Criminal Records Act 1991 (NSW) s 13; Spent Convictions Act 2009 (SA) s 11 and 12; Spent Convictions Act 1988 (WA) s 28.
44 Spent Convictions Act 2009 (SA) s 10(d); Spent Convictions Act 1988 (WA) div 3.
45 Rehabilitation of Offenders Act 1974 (UK) s 4(1)(a).
46 Rehabilitation of Offenders Act 1974 (UK) s 4(1)(b).
history shall not include any spent convictions, and any questions of a person’s character or fitness shall not permit reference to or consideration of a spent conviction.

**Recommendation 14:** That the effect of a spent conviction should be that a person is regarded and treated as though they have not committed, been charged with, prosecuted for, convicted of, nor sentenced for that charge. As such:

- They are not required to disclose that spent conviction;
- Questions of a person’s criminal history shall not include that spent conviction; and
- Questions of character or fitness shall not permit reference or consideration of that spent conviction.

**Recommendation 15:** That similar provision to that in the United Kingdom scheme be enacted to prevent the admissibility of evidence in proceedings regarding that spent conviction and the protection of the person in proceedings from being required to answer questions with reference to that spent conviction.

7. **Disclosure to prospective employers**

7.1 **Discrimination**

In the public hearing on 1 July 2019 we took a question on notice to inform the Committee of applications of anti-discrimination laws regarding criminal history in other jurisdictions. For a comprehensive discussion of some of the most pertinent cases across the country we point the Committee to the Australian Human Rights Commission (“AHRC”) report\(^{47}\) into discrimination in employment on the basis of criminal record regarding *BE v Suncorp Group*.\(^{48}\)

The AHRC quoted the following judgement excerpts concerning criminal record discrimination:

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\(^{48}\) [2018] AusHRC 121.
“A major objective of antidiscrimination legislation is to prevent people being stereotyped; that is, judged not according to their individual merits but by reference to a general or common characteristic of people of their race, gender, age etc, as the case may be.”\(^{49}\)

“Respect for human rights and the ideal of equality – including equality of opportunity in employment – requires that every person be treated according to his or her individual merit ... These considerations must be reflected in any construction of the definition of ‘discrimination’ presently under consideration because, if they are not, and a construction is adopted that enables the ascription of negative stereotypes or the avoidance of individual assessment, the essential object of the Act to promote equality of opportunity in employment will be frustrated.”\(^{50}\)

and

“Where a job applicant or employee has a criminal record, the nature of that record, the context in which it came into existence and relevant aspects of the personal circumstances of the applicant should all be considered before a conclusion is reached as to whether an individual is trustworthy and of good character.”\(^{51}\)

Victorian’s enjoy anti-discrimination protections through the Charter of Human Rights and Responsibilities Act,\(^{52}\) the Equal Opportunity Act 2010 (“EOA”), the Victorian Human Rights and Equal Opportunity Commission (‘the Commission”) and the suite of Federal anti-discrimination acts. Combined, these statues and bodies make it unlawful for a person to be discriminated against on the basis of a protected attribute.

Broadly, the Federal protected attributes cover race, sex, age, disability, religion, political opinion, or sexual orientation or gender identity. In Victoria the EOA expands protected attributes to include personal characteristics of a person’s carer or parental status, employment activity, industrial activity, marital status, physical features, pregnancy and breastfeeding, personal association and expunged homosexual conviction.

VEHREOC describes the reason for including expunged homosexual convictions as a protected attribute as:

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\(^{50}\) Commonwealth v Bradley (1999) 95 FCR 218.


\(^{52}\) 2010 (Vic).
“...to remove the stigma of a criminal record along with the practical impediments created by having a criminal conviction in Victoria such as a person’s right to travel or to find a job.”

This recognition of the impediments that criminal records play in a person’s life should be expanded to touch all criminal records that are irrelevant to the consideration of a particular circumstance.

In regards to spent convictions specifically, as some sectors will be permitted to have spent convictions included on a person’s police check, we recognise the potential therein for spent convictions irrelevant to the purpose for requesting the check - or simply the knowledge of the spent conviction after being hired - to be used negatively and unfairly against that person. Each time this was to occur, it would undermine the very existence and purpose of the Victorian scheme. To leave such potential for discrimination open for abuse would be significant failure.

We recommend, similar to provisions in Anti-Discrimination Acts of the Northern Territory and South Australia, that the protected attribute of “irrelevant criminal record” be included in the Victorian EOA.

An example of how this could be legislated in is as follows:

**Part 2 – What is discrimination?**

6 Attributes –

...  

(r) irrelevant criminal record

**Part 1 – Preliminary**

...

4 Definitions

(1) In this Act –

...

**Irrelevant criminal record means** –

a record relating to arrest, conviction, interrogation or criminal proceedings where –

(a) the record has been spent; or  
(b) the record has been expunged; or  
(c) a record relating to arrest where no further action was taken in relation to the arrest, interrogation or charge of the person; or  
(d) a charge has not been laid; or  
(e) a charge is pending the completion of a diversion program; or  
(f) the charge was dismissed; or  
(g) the prosecution was withdrawn; or  
(h) the person was discharged, whether or not on conviction; or  
(i) the person was found not guilty; or
(j) the person’s finding of guilt was quashed or set aside; or
(k) the person was granted a pardon; or
(l) the circumstances relating to the offence for which the person was found guilty are not directly relevant to the situation in which the discrimination arises.

Recommendation 16: That ‘irrelevant criminal record’ be included as a protected attribute in the Equal Opportunity Act – the definition of which includes the circumstances relating to the offence for which the person was found guilty are not directly relevant to the situation in which the discrimination arises.

7.2 Disclosures to prospective employers

In the public hearing on 1 July 2019 we took a question on notice to expand on the below recommendation. This recommendation concerns both spent and unspent convictions.

Every position of employment intrinsically carries with it elements of trust and responsibility and in turn opportunities for someone to abuse that trust. Good character may be a necessary requirement of some roles, however, as per the AHRC, a criminal record alone cannot be the basis on which that can be judged.53

While we understand that for some professions there will exist a reasonable need to be aware of relevant aspects of a person’s criminal history this is not the case for all sectors. Unfortunately however, it appears from our experience that many employers are taking full advantage of the current unfettered ability to request police checks and are using them as de facto character tests.

Across our centres and most notably through our employment law clinic, many of our clients report they are often applying for entry level positions that don’t require prior education – such as disability support workers, security guards, taxi and bus drivers, nursing home attendants, educational assistants, youth justice support workers etc. – and that it is often these jobs which ask for criminal record checks.

In crucial time periods when a person, after coming into contact with the criminal justice system, is working to create a different life for themselves the opportunities for employment need to remain as open and accessible as possible.

As above, the Northern Territory\textsuperscript{54} and South Australia\textsuperscript{55} both include an “irrelevant criminal record” as a protected attribute against which it is unlawful to discriminate. In defining what makes a criminal record “irrelevant”, both Acts include the consideration of the circumstances surrounding the offence and conviction which make the record irrelevant for the relevant purpose.\textsuperscript{56}

As per case law in other jurisdictions, there must be more than a “logical”\textsuperscript{57} link between the inherent requirements of the position and the exclusion of the applicant based on their criminal record. Rather, there must be a “tight” or “close” connection.\textsuperscript{58}

We submit that Victorian employers should be subject to similar prohibitions in discrimination and be required to obtain exception from the Commission to request a criminal record or police check. An example of how this could be legislated in the EOA is as follows:

\textit{29A. Exception – Criminal records and police checks}

\begin{itemize}
\item[(1)] An employer cannot request employees or job applicants to supply a criminal record or police check unless they have made an application under this Act to the Commission.
\item[(2)] An employer cannot request that a criminal record or police check include convictions that have been spent unless they have made an application under this Act to the Commission.
\item[(3)] A successful application must:
\begin{itemize}
\item[(a)] Specify the categories of offences that are to be shown on the check; and
\item[(b)] Demonstrate the significant connection between a criminal record of those offences and the relevant position.
\end{itemize}
\item[(4)] Employers granted an exception may exercise reasonable discretion of the impact of a person’s criminal record on their position or application.
\end{itemize}

\textsuperscript{54} \textit{Anti-Discrimination Act 1992} (NT) s 19(1)(q).
\textsuperscript{55} \textit{Anti-Discrimination Act 1988} (Tas) s 16(q).
\textsuperscript{56} \textit{Anti-Discrimination Act 1992} (NT) s 4; \textit{Anti-Discrimination Act 1988} (Tas) s 3.
\textsuperscript{57} \textit{Wall v Northern Territory Police} [2005] NTADC No. 1, [5.3.5].
\textsuperscript{58} \textit{Commonwealth v Bradley} (1999) 95 FCR 218, 237 [39]-[40].
(5) A job applicant may appeal to the Commission if they believe the decision to terminate their employment or reject their application turned unreasonably on the existence of an irrelevant criminal record

**Example**

A four year old conviction for shop theft is not a relevant consideration for an application to the role of youth worker. A spent conviction for drug possession is not a relevant consideration for an application to the role of security guard.

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**Recommendation 17:** That employers must apply to the Commission to be able to request police checks and that a close connection between the role and a criminal record must be demonstrated.

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**Recommendation 18:** That people are able to appeal to the Commission if they believe a decision to terminate their employment or reject their application turned unreasonably on the existence of an irrelevant criminal record.

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**7.3 Working with children**

As stated in the Commonwealth scheme:

*The object of [the exclusions relating to work with children are] to help protect children from sexual, physical and emotional harm by permitting criminal history information to be disclosed and taken into account in assessing the suitability of persons for work with children.*[^59]

We recommend a similar objects clause should be included in the Victorian scheme and echo our above recommendation that any decision to reject an application based on a spent conviction should only be reasonable to give effect to this purpose. For example, a spent conviction for shop theft should bear no weight in considering the sexual, physical and emotional protection of children.

[^59]: *Crimes Act 1914 (Cth), s 85ZZGA.*
8. **Women Transforming Justice Project**

The Women Transforming Justice project ("WTJ") is a collaboration between DCLC, the Law and Advocacy Centre for Women (LACW) and Flat Out. WTJ was established in response to the increasing number of women in Victorian prisons and provides an integrated, women-specific and community-based response for women in custody on remand.

The project works to assist women in enhancing their prospects of achieving bail and supporting them to live safely in the community and seeks to keep women out of prison by providing women on remand with skilled, integrated and women-specific legal representation and intensive outreach support so they can obtain bail and address the drivers of their incarceration while living in the community.

Through connections of the WTJ we have had the privilege of speaking with several people continuously experiencing the impact that having a criminal record has on a person’s life. These conversations have resulted in rich case studies that exemplify many of the recommendations we have made in this submission.

8.1. **Bernadette**

**Bernadette (a pseudonym)**

“I’m so concrete in my thinking that my convictions follow me everywhere I go. I feel permanently tainted by being on record as a particular type of person. I have redeemed myself in the past ten years but I feel undermined by my history.”

Bernadette was first convicted three decades ago in another state for various drug charges and was imprisoned. In the late 2000s Bernadette was convicted in Victoria for a trafficking charge and was sentenced to complete community service work.

The shadow of Bernadette’s criminal record has hung over her for three decades she explains that she has long experienced the coloured idiosyncrasies coming from being a criminalised person. These experiences have caused Bernadette to move through life informed by a fear of having to disclose those things that bring her shame and humiliation despite feeling that she has long since redeemed herself.

What a criminal record fails to do, Bernadette explains, is describe the circumstances of a person’s life that underlie a conviction – those understandable and relatable reasons that land people in these positions are not included on a police check. Instead, they box people in to a rigid category and the general population have very concrete ways of thinking around criminalised persons.
Bernadette has avoided any regular job application process for decades. Bernadette not only dreads disclosure in the application process but also a fear of discrimination at the workplace in being a ‘likely suspect’ when anything unexplainable goes wrong. For these reasons, Bernadette’s work over the years has been predominantly voluntary or where paid through word of mouth, friends and family.

The social stigma is so strong that Bernadette hasn’t contemplated what her employment future would look like if her convictions were to become spent. She is clear that she doesn’t solely place blame on the presence of her convictions – Bernadette struggled with drug addiction for decades and she wasn’t able to rectify that part of her life for a long time. Bernadette knows who she is now and the positive changes she has made in her life over the past decade. But her convictions continue to follow her everywhere she goes.

“I feel permanently tainted by being on a record as a particular type of person.”

Bernadette relates the underlying causes of her past convictions strongly to her co-existing mental health issues and addictive substance use. In instances where she was clearly in need of mental health support she was instead pushed through the criminal justice system. Bernadette describes her whole psyche as being affected by her continuing criminalisation. She has become a very secretive person and she has lived a restricted life in order to protect herself. Without these convictions constantly following her around, Bernadette believes she would have been able to live a much freer and more open existence. A spent convictions scheme would be able to support on paper what is already known to be true.

In talking with Bernadette about the bill and this submission together we realised that she was not aware of scheme in the other state which employs an application process to have convictions spent. Bernadette would have been eligible to apply for her inter-State convictions to be spent decades ago.

Bernadette’s fears around workplace discrimination exemplify the need not only for a spent convictions scheme but for strong anti-discrimination laws in Victoria to protect against unfair considerations of irrelevant criminal convictions and unlawful disclosures, or the threat thereof.

The prohibition against consideration of an irrelevant criminal record would free Bernadette, both during and after the completion of the waiting period, to apply for employment and volunteer roles where her record has not justifiable connection with those positions – whether or not they are lawfully permitted to requested police checks.

Additionally, Bernadette is a clear example of the need to install an automatic process for convictions becoming spent. Just as not knowing about the existence of an offence does not preclude someone from being charged with it, not knowing of a spent convictions scheme should not exclude someone from being benefited by it.
8.2. Wendy

Wendy (a pseudonym)

“I don’t want to feel less than anymore. I want to feel like I am equal and have opportunities like everyone else – to be able to have a career, to keep rebuilding my life, to stop feeling like a failure. I don’t want to go backwards, I want to have a future. It’s so hard when you have that barrier. People look at my record and they see me for someone I am not.”

In 2017 Wendy was convicted on two separate occasions for drug related offences, theft and possessing a controlled weapon. Wendy was sentenced to a total of 40 days in prison.

Wendy describes these 40 days in prison as having destroyed so many opportunities. On paper her charges look a lot more serious than their reality. The controlled weapon for example was an arts-and-craft knife that was in her bag and found by a police search as part of her arrest.

Since her short term in prison, Wendy explains that she has turned her whole life around. She has built her life up around her, learnt and grown and is miles apart from the “criminal” described in her police record.

Since completing her sentence, Wendy has undertaken a dual Certificate IV program in Alcohol and Other Drugs and Mental Health. To complete the course, students are required to undergo a practical work placement. After lining up a placement and already beginning some work with an organisation Wendy was told she wouldn’t be able to continue there because of her criminal record. Wendy’s record, especially the weapon charge, misrepresents her as a violent person and it has taken her an extra 6 months to complete the course due to the hurdles in finding an organisation to accept her placement.

Wendy wants to keep studying and building her skills. She enrolled in a child protection course, an area she is deeply passionate in, especially looking forward to the case management aspects. After already enrolling, Wendy was told she wouldn’t be able to take part in the case management aspects because of her criminal record.

“I’m doing all the requirements of study but what is the point if I can’t get anything out of it.”

Wendy has been doing a lot since completing her sentence and has been commended by a Magistrate for her achievements. A spent convictions scheme would give Wendy the chance to be seen for the person she is today and not for the things she has done in the past.

Like Bernadette, Wendy would benefit greatly from ‘irrelevant criminal record’ being included as a Victorian protected attribute – most notably the inclusion of the circumstances of the offence that are not directly relevant to a particular job application.
While it may be reasonable that a person charged with possessing a controlled weapon may be excluded from some types of roles, it is clear that in Wendy’s case that charge does not accurately represent the actual circumstances of her offence. Having an arts-and-craft knife in your bag is not the same as concealing a weapon on your person for the purposes of committing an offence with that weapon.

Wendy is also an excellent example of the need to include flexibility on the waiting or “crime free” period and allow people to apply for waivers or reductions. The longer that Wendy has to wait to be able to put her skills and education into practice the greater the risk she loses those skills, or worse re-enters the criminal justice system.

8.3 Maria

Maria (a pseudonym)

“They want us to be a part of society and work and be normal but at the same time labelling us with this criminal record. It really stops our ability to be part of society and to contribute – if you have changed your life around this is really bad.”

In June 2018 Maria was convicted for several offences occurring years prior including robbery, burglary, theft, dangerous driving and drug offences. Maria was sentenced to a one-year community corrections order. All of Maria’s convictions are inextricably linked to her then drug addiction and related mental health issues.

Maria has recently completed her CCO which included community service work, regular drug screening and consistent counselling. In addition to this Maria has joined Narcotics Anonymous, gotten clean and is working on her recovery all the time.

Maria’s experiences with addiction, the cycles of drug use and crime, and going through the criminal justice system have inspired her to want to reach out and help those in the midst of where she used to be. She has started studying a diploma in criminology and recently applied to volunteer as an independent person assisting young people being interviewed by police when a parent or guardian isn’t available. Maria thought she would be perfect for this role, she knows what the kids are going through and how scary those interviews can be. Maria was turned away because of her criminal record.

Maria described that feeling as confusion:

“What’s the point of trying to get my life on track if I can’t do anything?”

Maria says she has been scared to apply for jobs, that applying would only be setting herself up for judgement and rejection. When she reads the requirement for a police check, she doesn’t even submit an application.
Maria understands the cycle of crime, drug addiction, mental illness and unemployment. Maria is building her skills and knowledge in the hope of being able to give back to those in need.

“I don’t want to be on Centrelink, I want to get my life back together. I want to work in corrections, be a case worker and help someone the way they helped me.”

Maria describes her current work as one that has not only made her feel valued and important but also that by not requiring a criminal record check Maria felt like any “normal person” applying for a job.

Maria is not so optimistic about the future and once her current role comes to an end she fears she will be back to where she was before – unable to go through regular application processes and relying on friends and family to find work.

“I’m trying to push through and persevere. I’ve heard about this [Victorian] scheme and I’m hopeful. I want to change. I don’t want to relapse.”

Maria’s story highlights a key issue in the discussion of spent convictions, criminal records and their impacts on employment and volunteering. Those of us with a past lived experience of the criminal justice system are in a fantastic position to connect with and assist others who are in the midst of it. Just as the peer support worker programs have had substantial positive effects in Alcohol and Other Drug services, so too would criminal justice rehabilitative services and programs benefit if restrictions were relaxed to invite peer workers or simply not exclude lived experience workers.

Only allowing employers to request criminal records in appropriate circumstances would open up a world of prospective employment and volunteer opportunities for Maria and help her to continue on her path of community services and engagement. This comes with the obvious benefits to those accessing or using services to work and be supported by someone who has been in that place before and moved on from it.

8.4. Thomas

Thomas (a pseudonym)

Over a twenty-year period Thomas had been convicted for various drug charges, dangerous driving and had two IVOs placed against him. Thomas’s most recent conviction was three years ago where he was placed on a Community Corrections Order.

After this conviction Thomas made extensive life changes – he moved to a new town, completed 21 months of drug screening tests, attended a men’s behavioural change program, and undertook Alcohol and Other Drug counselling. Thomas has been clean now for three years, is seeing a psychologist, completed a parenting plan, has been reunited with his children and is in mediation.
to be able to spend more time with them. The main thing preventing Thomas from fully moving forward is finding full-time work.

“I’ve done everything I can to get back on track. The only thing holding me back now is full time work.”

Initially when he moved, Thomas was unable to secure a lease and was fortunate to be able to stay short-term at a relative’s house. Thomas was honest with prospective employers and disclosed that he did have criminal convictions on his record. Because of this, one application was refused outright and another initially told him he had gotten the job but then later rescinded the offer. Eventually he was able to get some part-time work and find his own place.

“I was lucky – I had a truck I could sell and get some money that way.”

Because of his personal history with drug use and the criminal justice system Thomas wants to complete a Certificate IV in Community Services and gain employment as a peer support worker. The education provider for the course however has requested police checks to be submitted with the application. Thomas is yet to apply and see what the response is, but the request itself has made him feel deflated about the whole process. He is contemplating whether or not to bother going ahead with his application at all and risk the rejection.

“I’m not proud of my history and the IVOs – but I’ve moved past them. I know I’ve moved on, those close to me know I’ve moved on. Employers don’t. Even for driving jobs they’re asking for criminal records. These aren’t high up jobs – they’re labouring jobs.”

In reflecting on the 10 year crime free period of most other jurisdictions, Thomas was critical of the length:

“10 years is far too long – the quicker someone is able to move on the better. People need to be able to support themselves, put a roof over their heads, avoid going back to jail. A person needs to move on – what are you supposed to do for that 10 years? How does someone get a job during that time?”

Like the other stories here, Thomas demonstrates the need for restrictions to be placed on employers and educational institutions abilities to request police checks, anti-discrimination mechanisms, and avenues to apply for reductions or waivers of imposed of a waiting or “crime free” period.

It is inarguable that Thomas has made great strides in his life over the past years and under other state schemes would be on the right path to having his convictions spent. Ensuring that people like Thomas are impeded as little as possible in eventually achieving this should be a primary focus for a Victorian scheme.
Working together, anti-discrimination protections, restrictions on employer and education institution abilities to request criminal records, and the ability to apply for a reduction or waiver of the “crime free” period would help in ensuring the success of people completing the requirements of a Victorian spent convictions scheme.

These first two elements (anti-discrimination and employer restrictions) would also work to protect Thomas in education and employment once his convictions did indeed become spent.

8.5. Rachael

*Rachael (a pseudonym)*

“My story is a massive one – my conviction has time and time again prevented me from moving forward – I’ve done studies and got certificates under my belt and just constantly hitting brick walls.”

Rachael is the sole parent raising her child. In the late 2000s Rachael was in a car accident and spent a year learning how to walk again.

During high school Rachael was charged on two separate occasions with assault – she received a diversion for both. This was recorded on her criminal record as a ‘no conviction’.

Since finishing high school Rachael has achieved a Certificate III in children services and a Certificate IV in community development. However, due to the ‘no conviction’ on her record Rachael was unable to get a placement or employment in either field. Rachael sought a placement working with people living with disabilities but due to the ‘no conviction’ record they refused her outright.

Rachael tried a different tact – she started seeking work with different community organisations. Many required her to get a WWC. Rachael applied for the check which was denied for the same reasons. Rachael appealed the decision to deny her a WWC and went through a lengthy appeal process with support letters from counsellors, case workers and a lengthy appeal submission. Rachael was eventually granted a WWC but only for voluntary work. That is, she was deemed safe to volunteer with children but not to be in paid employment.

“Several years ago Rachael’s life took another significant turn. Rachael lost her father and another significant family member within the space of 6 months. Rachael turned to drugs and soon after was convicted for trafficking, possessing a weapon (a small knife), and possessing ammunition – a rusty bullet she had found on a farm. Rachael was remanded in custody for 14 days.

When Rachael was charged with the above she was on bail for possession and under the new bail laws could not satisfy the exceptional circumstances requirement – despite being the sole parent of her child. Rachael was remanded into custody and her child went into her mother’s care. Rachael was eventually sentenced to a 12 month Community Corrections Order and when
released from remand she also had to move in with her mother and rent out her house to make ends meet.

Rachael has been actively working on her recovery every day since being released from custody. She is a member of Narcotics Anonymous and has managed to find work advocating for people with lived experiences of criminalisation.

“All these kicks in the face, the labels, the stigmas, they don’t just prevent people from moving forward for the community but stop people from moving forward personally – to change my identity to be proud, to be a survivor, not just a victim.”

Rachael is hopeful about the Victorian spent convictions scheme. She wants to give back to the community, to use her lived experiences to help others build community connection and support, to grow and develop those spaces for people with trauma to heal. Under a 10 year “crime free” period Rachael would have to wait another 6 years before she was able to have her convictions spent and be free to move forward with her life and utilise her training for the betterment of the community.

“I’m a huge believe in giving back to community and supporting people who need support and at the moment I can’t do this.”

Describing her story as a “massive one” is an understatement. Being a single parent, surviving a car accident and extensive rehabilitative process, losing close family members in quick succession, and developing problematic drug use are substantial hurdles to overcome without the addition of criminalisation. Rachael strongly illustrates that criminal offences do not occur in a vacuum – they are influenced and exacerbated by a person’s life circumstances and in turn a person’s life is influenced and exacerbated by criminalisation (including the recent Bail Act amendments).

Rachael underpins our recommendations throughout this submission to build into a Victorian scheme avenues for flexibility and discretion – whether that be for eligibility exclusions, crime free periods, or the consideration of the circumstances of the offence in defining ‘irrelevant criminal record’.

Rachael, Bernadette, Maria, Wendy and Thomas are intelligent, compassionate and dedicated persons. The community sectors they are striving to work in would benefit greatly from having their skills and expertise employed.
Appendix 1

Table comparing domestic and international models

(This table has been adapted from the Australian Human Rights Commission website\(^6\))

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<tbody>
<tr>
<td><strong>Eligibility Cut Off</strong></td>
<td>30 month prison sentence. Pardon for reason other than that a person was wrongfully convicted.</td>
<td>30 month prison sentence.</td>
<td>6 month prison sentence.</td>
<td>6 month prison sentence.</td>
<td>6 month prison sentence.</td>
<td>1 year or an indeterminate period sentence. Fine of over $15,000.</td>
<td>6 month prison sentence.</td>
<td>12 months adults 24 months children</td>
<td>4 year prison sentence. Custodial sentence for public protection.</td>
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<td><strong>Irreparable offences</strong></td>
<td>sexual offence, body corporal and prescribed convictions</td>
<td>sexual offence, body corporal and prescribed convictions</td>
<td>sexual offence, body corporal and prescribed convictions</td>
<td>sexual offence, body corporal and prescribed convictions</td>
<td>sexual offence and prescribed conditions</td>
<td>Sex offences that result in a sentence of imprisonment, body corporal and prescribed convictions</td>
<td>Specified offences.</td>
<td>Schedule one offence (namely offences committed against a child)</td>
<td></td>
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<tr>
<td><strong>Process for becoming spent</strong></td>
<td>Automatic at expiration of waiting period</td>
<td>Automatic at expiration of waiting period</td>
<td>Automatic at expiration of waiting period</td>
<td>Automatic at expiration of waiting period</td>
<td>Tried in adult court, application by police commissioner Juvenile court automatic</td>
<td>By application to district court judge of police commissioner.</td>
<td>Automatic at expiration of waiting period</td>
<td>Application</td>
<td></td>
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<tr>
<td><strong>“crime free period”</strong></td>
<td>10 years (adult), 5 years (child)</td>
<td>10 years (adult), 5 years (child)</td>
<td>10 years (adult), 5 years (child)</td>
<td>10 years (adult), 5 years (child)</td>
<td>10 years (adult), 5 years (child)</td>
<td>10 years (adult), 5 years (child)</td>
<td>2 – 7 years depending on length of prison sentence. 1 year for a fine. 5 years for community rehabilitation. Times halved for children</td>
<td>10 years</td>
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