I have young children and I have seen this. I saw it when I was at Pinewood as a president. I saw it come into practice and I saw the benefits. Anyone with kids—and I think most of us have kids in this house—can see those formative years and the amount of knowledge that our children just soak up like a sponge. So to have that extra structured curriculum around them with the quality frameworks, the pedagogies and the educators who are dedicated professionals working with our children—it is very hard to describe the benefits that we will see. But I know my children will benefit, and I know all of our children will benefit.

Of course our budget did not stop with early childhood. In my local area we have seen in that budget a significant commitment to the education of the Mount Waverley district—in infrastructure, in training and in staff, with a maintenance boost of $1.8 million. Now, this is leaps and bounds, as Paul Kelly would say, above what we have seen from previous governments. The VCE students at the Brentwood senior school that I mentioned last night in this house had their valedictory dinner last night. I wish them all well, as with Mount Waverley Secondary, Glen Waverley Secondary, Avila, Huntingtower and Glenallen—and I do not think I have forgotten anyone, so that is good. Those kids have had a hard year, but I know they are up to it, and I want to reassure them and their parents, both in Mount Waverley and all of Victoria, that this government is up to it. We are going to see a budget very, very soon that will just show our commitment to education, because we are the Education State.

Bills

SPENT CONVICTIONS BILL 2020

Statement of compatibility

Ms HENNESSY (Altona—Attorney-General, Minister for the Coordination of Justice and Community Safety: COVID-19) (11:08): In accordance with the Charter of Human Rights and Responsibilities Act 2006 I table the statement of compatibility in relation to the Spent Convictions Bill 2020.

In accordance with section 28 of the *Charter of Human Rights and Responsibilities Act 2006*, (the Charter), I make this Statement of Compatibility with respect to the Spent Convictions Bill 2020 (the Bill).

In my opinion, the Bill, as introduced to the Legislative Assembly, is compatible with human rights as set out in the Charter. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

This Bill provides for a new spent convictions scheme that:

- automatically limits the disclosure of a person's conviction for certain offences, either immediately or once the person has completed a period of crime-free behaviour;
- allows a person who is ineligible to have their conviction automatically spent to apply to the Magistrate's Court of Victoria, in certain circumstances, to limit the disclosure of a conviction;
- provides for limited disclosure of a spent conviction of a person for the purposes of administration of justice or performance of statutory functions; and
- creates offences for unlawfully obtaining or unlawfully disclosing information about a spent conviction.

The Bill also provides for amendments to the *Equal Opportunity Act 2010*, to make a spent conviction an attribute on the basis of which discrimination is prohibited.

Human Rights Issues

Human rights protected by the Charter that are relevant to this Bill are:

- the right to equality (section 8);
- the right to privacy and reputation (section 13);
- the right to freedom of expression (section 15);
- protection of families and children (section 17);
- taking part in public life (section 18);
- cultural rights including Aboriginal cultural rights (section 19);

- children's rights in the criminal process (section 23);
- the right to a fair hearing (section 24)

For the reasons set out below, I am satisfied that the Bill is compatible with the Charter and, if any rights are limited, those limitations are reasonable and justified.

Disclosure of convictions for certain offences and sentences are limited under the Bill

The Bill provides for a Spent Convictions Scheme (the Scheme) that will limit the disclosure of a person's conviction for certain offences and sentences through specific mechanisms of disclosure.

Generally speaking, convictions can be spent automatically or immediately under the Bill, or by succeeding in an application made to the Magistrates' Court. Once this occurs, the conviction is no longer disclosed on a Police Record Check (or any other document by a law enforcement agency that outlines a person's convictions). It also allows the person to lawfully and honestly answer in the negative when asked if they have a conviction. These provisions are strengthened by making clear in the Bill that a person must not ask another person to disclose a spent conviction. Further, once spent, a conviction cannot be 'revived', even by further offending.

Disclosure of a person's criminal record, for example through a Police Record Check, engages the rights to equality under the law and protection against discrimination (section 8) and the right to privacy and reputation (section 13). To the extent that Aboriginal people are overrepresented in the criminal justice system, it also engages the protection of Aboriginal cultural rights (section 19(2)) given the impact that disclosure can have on enjoyment of those rights. The restrictions on disclosure of a person's spent convictions uphold those rights by minimising the negative effects associated with having a criminal record, including discrimination.

Where the Bill provides for exemptions and circumstances where disclosure of spent conviction information on a person's criminal record is permitted, for the following reasons I consider that they are reasonable and proportionate limitations on those rights. Such disclosures include by law enforcement agencies for a law enforcement purpose or to agencies to fulfil a statutory function and prescribed purpose, and disclosure between law enforcement agencies and courts and tribunals.

Limiting disclosure of certain 'spent' convictions upholds the right to equality and non-discrimination under section 8

Criminal records can limit people's ability to access education, employment and housing, and therefore limit people's ability to effectively rehabilitate and reintegrate with the community. Individuals often carry the stigma of a conviction for their whole life despite how minor the offence was, how far in the past it occurred or the degree to which they are rehabilitated. Disclosure of convictions on a criminal record therefore limits the right to equality before the law (section 8) to the extent that the document is frequently requested by employers, real estate agents, volunteer organisations, education providers and others which can result in loss of opportunity and discrimination on the basis of a person's criminal history.

In general, people in contact with the justice system are more likely to have worse outcomes over a range of metrics, including access to housing, employment, education, health and connection to community. A criminal record can also compound existing challenges and result in entrenchment of poverty and disadvantage. These issues also disproportionately impact some groups, in particular Aboriginal people, women and other cohorts such as people with an intellectual disability or who experience homelessness, which represents a further, albeit indirect, limitation on a person's right to equality and non-discrimination on the basis of Aboriginality, gender and disability (section 8).

By limiting the disclosure of a person's spent convictions the Bill removes barriers to accessing opportunities that are crucial for effective rehabilitation and reintegration with the community. In doing so it significantly reduces the possibility of discrimination occurring on the basis of an irrelevant spent conviction and provides more effective protection of the right to equality before the law and effective protection from discrimination, whether on the basis of that record or, indirectly, on the grounds of Aboriginality and/or disability.

Limiting disclosure also upholds the right to privacy and reputation under section 13

Disclosure of a person's criminal record also engages a person's right not to have their privacy unlawfully or arbitrarily interfered with, and not to have their reputation unlawfully attacked (Section 13).

Protecting the privacy and reputation of people who have a historic conviction in areas such employment, housing and education is one of the key purposes of the Bill.

A criminal record can have a significant and ongoing impact on a person's reputation. It can affect a person's reputation socially within the community, as well as professionally. A criminal record will considerably limit a person's access to employment as most employers want to hire people with unblemished backgrounds, to reduce risk and protect the integrity of their business. Similarly, a criminal record is likely to be a deciding factor for landlords when making a choice between rental applicants, thus substantially limiting housing

options. These barriers exist regardless of the degree of seriousness of the offence or whether it is relevant to an application or assessing a person's character.

By enabling certain convictions to be spent and placing limits on their disclosure, the Bill allows people to lawfully keep a conviction private. To the extent the Bill places limits on such disclosure, the Bill strengthens the rights in section 13, thereby enabling a person to more effectively reintegrate with the community.

Limiting disclosure also strengthens Aboriginal cultural rights

Criminal history information has a disproportionate impact on Aboriginal people who are over-represented in the criminal justice system. A past conviction, regardless of its seriousness, creates an extra barrier for Aboriginal people seeking employment or education, or to provide kinship care or be involved in organisations and structures to exercise Aboriginal self-determination.

Introduction of the scheme under the Bill therefore removes a barrier to exercise and enjoyment of distinct Aboriginal cultural rights under section 19(2) of the Charter, including maintaining kinship ties and connection to land, identity and culture. As outlined in detail below, the Bill also mandates consideration of the unique cultural circumstances for an Aboriginal or Torres Strait Islander applicant for a spent conviction order by a court, consistent with this right.

Limiting disclosure is a lawful exception to freedom of expression

To the extent that the prohibitions on collection, use and disclosure of spent conviction also engage and limit the right to freedom of expression (section 15) including the freedom to seek, receive and impart information, I do not consider that it amounts to a limitation of the right per se, since subsection (3) recognises that the right may be subject to lawful restrictions. I consider such prohibitions and the prescribed exceptions for use, disclosure and collection (discussed further below) are indeed lawful restrictions which are reasonably necessary to respect the rights and reputation of the person with the spent conviction.

Convictions automatically spent under the Act

The Bill makes a distinction between two categories of convictions that are automatically spent by operation of the Act—those which become immediately spent, and those which become spent after a defined period of crime-free behaviour.

The Bill enables any findings or orders imposed by courts that do not result in a conviction being recorded by the court to be immediately spent and protected from disclosure, subject to the completion of any conditions that may be attached to the penalty imposed.

Shorter conviction periods (crime-free periods) for children and young people are consistent with Charter rights under sections 17 and 23

For certain other categories of convictions, the Bill provides that, after a period of crime-free behaviour (referred to as conviction period in the Bill), they will automatically become 'spent.' This applies to convictions with sentencing outcomes of 30 months or less imprisonment or detention and to convictions which result in non-custodial sentences, such as an adjournment with undertaking, community corrections order or a fine. The conviction period for a person who was a child or young offender (under 21 years of age at the time they were sentenced) is 5 years from the date the conviction is entered into judgment by the court and, for any other person, 10 years from that date. A shorter conviction period for children and young offenders is consistent with the increased likelihood of rehabilitation for young offenders, and therefore earlier access to the protection of one's privacy and from discrimination upon a conviction being spent is consistent with the right to protection of the best interests of a child, without discrimination (section 17(2)) and with the right to age-appropriate treatment under section 23(3).

Recommencement of conviction periods when a person commits a subsequent serious offence is a reasonable limitation on the rights under section 8 and section 13

Subsequent offending will not restart the conviction period under the Bill if the conviction involves minor offending, being a fine of equal or less than 10 penalty units (or the equivalent value if imposed outside of Victoria), or where no penalty is imposed (or the only penalty is an amount in restitution or compensation) or the conviction is not recorded by the court. By restarting the conviction period and effectively delaying access to the protections from disclosure of certain convictions in other cases, including where a term of imprisonment is imposed, the Bill sets a reasonable and justifiable limit on the rights to equality and non-discrimination (section 8) and prescribes lawful exceptions to rights to privacy and reputation (section 13), consistent with community safety.

The exclusion of sexual offences and serious violent offences from being automatically protected from disclosure is a reasonable and justified restriction on section 8 and section 13 rights

Under the Bill, sexual offences and serious violence offences are not able to be automatically spent (other than for a person who was 15 years or younger at the time of offending). This represents a limitation to the

rights to non-discrimination based on the person's age at the time of offending (section 8), and a limit to the right to privacy and reputation of individuals (section 13) to the extent these convictions do not attract the same automatic protections from disclosure. It would undermine community perception of risk and punishment and the ability to appropriately consider risk if sexual offences and serious violent offences were automatically capable of being kept private. This limitation is therefore a reasonable and justified restriction in the interests of public safety.

Convictions spent by order of the Magistrates' Court

The Bill provides for other serious convictions (which cannot be automatically spent), to be spent by application to and determination by the Magistrates' Court. Unless the person was under 15 years at the time of offending (in which case their convictions are immediately spent), a person may apply for the conviction to be spent by order of the court, where they can demonstrate rehabilitation. Making a distinction in the Bill for some convictions to be spent in this way, rather than automatically, is for the purpose of promoting and maintaining community safety in respect of more serious offending and acknowledges the long-lasting harm caused to victims of these offences.

The Bill also distinguishes between children and young offenders, and adults 21 years of age or older at the time of sentencing, whereby more serious offending is excluded from the application process in the case of older offenders. For those older offenders, an application can be made for a serious violence offence or sexual offence, provided no term of imprisonment was imposed, and for any other convictions, where the term of imprisonment imposed was no more than 5 years.

Narrow circumstances in which sexual offences and serious violent offences can be spent is a proportionate limitation on section 8 and section 13, having regard to public safety and community expectations

Serious violence offence is defined in the Bill by reference to the definition in schedule 2 of the *Serious Offenders Act 2018* and includes manslaughter. The definition of 'sexual offence' in the Bill adopts that of section 4 of the *Criminal Procedure Act 2009* and includes offences which involve child abuse material. Prescribing only very narrow circumstances in which such convictions are eligible to be spent for a person who was 21 years or older at the time of sentencing limits the rights to equality and non-discrimination (section 8) in a way which is proportionate having regard to the need to maintain public safety in the case of more serious offending. For children and young offenders (people under 21 at the time of offending) this means in effect there are no restrictions on convictions eligible to be spent under the Bill (even for serious violence offences or sexual offences). This is in recognition of the more substantial impact that a conviction has on a young person's ability to rehabilitate, including obtaining employment and their social and community participation.

Articulating the limits to eligible convictions for older offenders by reference to the sentence imposed including the length of the term of imprisonment, rather than the offence itself, reflects the court's holistic assessment of risk in sentencing and is therefore proportionate to the public safety purpose of the restriction. In so doing, the Bill also prescribes a lawful, rather than arbitrary restriction on the right to privacy and reputation (section 13). I am satisfied that the limitations are reasonable and proportionate having regard to the overarching public safety purpose of the restrictions.

Features of the application and determination process are consistent with Charter rights or, where restricted, involve reasonable limitations

The application process under Division 2 of Part 2 of the Bill is tightly construed in order to limit impost on court resources, including supporting documentation requirements and appropriate costs for applications. This is reflected in the process under the Bill for making an application, for submissions to be made, the factors to be considered and principles to be applied by the Court in deciding the application and the Court's ability to refuse an application in certain circumstances, which, to some extent all engage the right to a fair hearing under section 24(1) of the Charter.

The Bill provides that an application can be made for an order that more than one conviction be spent, however the relevant conviction period for each conviction in the application must have already expired or will expire on the day the application is made. To the extent this limits access to determination by a court in timely way—a component of the right to a fair hearing (section 24)—it is justified having regard to the public safety considerations underlying the tiered nature of the spent convictions scheme. Where a person is unable to apply to the Magistrates' Court because of their disability, then the Bill ensures a guardian under the *Guardianship and Administration Act 2019* can make that application on their behalf. This provides explicit protection from discrimination and ensures equality before the law by removing a barrier for persons with disabilities, consistent with section 8 of the Charter.

The Bill also enables the court to refuse to accept an application where it is vexatious, misconceived or does not comply with the prescribed form and contents under the Bill including the applicant's full name, the

conviction for which an order is sought and information in support of the applicant's rehabilitation, or if the prescribed fee is not paid. These provisions limit the right of timely access to a court for the matter to be determined—a key aspect of the right to a fair hearing (section 24(1)). Having regard to the imperative of an efficient and effective administration of the application scheme in the context of the impact on resourcing for the Magistrates' Court more broadly, I consider this to be a reasonable limitation which does not unfairly prevent access to justice.

Where a person's application has been refused or not been accepted by the court, under the Bill they are prohibited from reapplying for another 2 years unless they provide new information in support of their application. The fact a person can still make an application within the 2-year exclusion period if they have new information means the exclusion period under the Bill is a reasonable and proportionate limitation on the right to timely access to a fair hearing and procedural fairness (section 24(1)).

Submissions by the Attorney-General and the Chief Commissioner of Police and guiding principles at a hearing are consistent with rights to a fair hearing under section 24

The Bill provides the Attorney-General and the Chief Commissioner of Police with the opportunity to make submissions to the Court should they wish to do so. In that case, the decision must be determined at a hearing although, in other cases, where the court determines it to be appropriate, the Bill provides for a determination to be made without a hearing and on the basis of written material alone. Requiring a hearing in the case of submissions from either the Attorney-General or the Chief Commissioner of Police enables the applicant the opportunity to respond to adverse material put by those agencies. Although this has the potential to limit the right to a fair hearing (section 24(1)) if the court decides to determine the matter without a hearing, I consider the Bill strikes the appropriate balance by providing the Magistrates' Court with the flexibility it needs to efficiently manage applications, with appropriate safeguards for procedural fairness.

The Bill also provides that, where a hearing is conducted, the Court is not bound by rules of evidence and may inform itself in any way it sees fit. It must also act with regard to the substance of the application, irrespective of technicalities or forms outside those in the Bill. These provisions enable the court to determine the most efficient means to administer applications. Although the Bill does not provide an explicit reference to procedural fairness, in deciding certain cases courts must nonetheless act in accordance with procedural fairness, a key component of the right to fair hearing (section 24 of the Charter) by virtue of section 6(2)(b) of the Charter. This will ensure that the rights of individuals to a fair hearing under sections 24 of the Charter are not unreasonably limited.

Factors the court must consider help to strengthen Aboriginal cultural rights under section 19(2)

The Bill provides a mechanism for the Magistrates Court to order an eligible conviction be spent after considering a range of (mandatory) factors including the nature, circumstances and seriousness of the offence, the applicant's personal circumstances, their age and maturity when the offence was committed and any demonstrated rehabilitation, the impact on any victim and any risk to public safety in making an order for the conviction to be spent.

In addition, in recognition of the disproportionate impact of incarceration discrimination and other adverse effects related to disclosure of a criminal record on Aboriginal and Torres Strait Islander people, the Magistrate's Court must have regard to the unique background in the case of an Aboriginal or Torres Strait Islander applicant, which strengthens the Aboriginal cultural rights under section 19(2) of the Charter.

Presumption of closed hearings is consistent with the right to a fair hearing at section 24 and upholds other Charter rights

The Bill provides that a hearing to determine a spent conviction application must be closed to the public, unless the Court considers that the circumstances of the case justify the hearing being open. The very purpose of applying for a conviction to be spent is to limit its disclosure and protect a person's privacy, subject to lawful exceptions articulated in the Bill, consistent with section 13 of the Charter. As such, requiring a public hearing by default would undermine this right. Specifying the presumption of a closed hearing in the Bill is also therefore consistent with the fair hearing right under section 24 of the Charter and specifically subsection (2), which provides that a court may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do by law.

Furthermore, people may be deterred from making an application to have their conviction spent if the matter is heard in a public setting. This would limit the effectiveness of the Bill in achieving its objectives, even if the court ultimately decided to make the spent conviction order. To the extent that hearings are closed by default and are only held in public by way of exception, this strengthens the rights to equality before the law (section 8) and protection against arbitrary interference with a person's privacy and reputation (section 13).

Children and young people

An important objective of the Bill is to protect young people, who are particularly vulnerable to discrimination and disadvantage on the basis of historic convictions.

Children and young people are susceptible to offending due to their ongoing brain development and lack of full maturity in their ability to exercise judgement and decision making. Most children who come into contact with the justice system have experienced childhood trauma and have complex and intersecting issues such as socioeconomic disadvantage, disrupted education and unstable housing.

A criminal record can further inhibit a young person's ability to access education, employment and housing, all of which are extremely important for reducing the risk of recidivism. Even a minor offence committed as a child can prevent a positive trajectory towards adulthood and lead to cycle of disadvantage and entrenchment in the justice system.

The Bill allows a young offender who has grown out of offending behaviour to put their criminal record behind them. This is in their best interests, as it enables them to engage with education and employment opportunities that will support their development and connection to community, and reduce their likelihood of reoffending.

The Bill provides discrete provisions and considerations for children in terms of those convictions which can be immediately spent, and the prescribed conviction period after which other offences become automatically spent.

Protection of families and children (section 17) and children's rights in the criminal process (section 23) are upheld by the Bill

Section 17 of the Charter provides that every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child. In addition, section 23 provides that a child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.

The Bill enables offences committed by a person under the age of 15 years to be automatically spent. This recognises the considerably young age of children under 15, and their inability to fully understand the consequences of their actions.

Convictions are also automatically spent when the only penalty imposed is a fine by the Children's Court. This is in recognition that a fine is a low-level response by the court that should not carry the ongoing consequence of a criminal record.

In addition, the Bill contains differentiated conviction periods (crime-free periods) before a conviction can be spent. The conviction period for a person who was a child or young offender (under 21 years of age at the time they were sentenced) is five years, whereas for all other offenders it is ten years. This reflects the disparity in cognitive development between younger and older people, and the particularly damaging impact a criminal record can have on a young person as they move into adulthood. It also acknowledges the capacity for children to rehabilitate more quickly due to their still-developing brains.

Research demonstrates that longer conviction periods can have a significant impact on future education and/or employment opportunities. A shorter conviction period also recognises that young people and Aboriginal people are particularly vulnerable to stigma and discrimination in employment settings.

The Bill has taken into account the nature of youth offending and the increased adverse impact that barriers to opportunity have in younger people, and in doing so I am satisfied that it upholds the rights contained in section 17 of the Charter.

Additionally, I am satisfied that the Bill treats children who have been convicted of an offence in a way that is appropriate for their age, as is required by section 23 of the Charter. I am therefore satisfied that the Bill upholds the rights of children that are contained in the Charter.

Mutual Recognition of interstate Spent Convictions Schemes

The Bill provides for automatic recognition of a conviction which is spent by virtue of another state or territory's scheme, to be deemed as spent in Victoria. This enables an efficient administration of the Scheme, rather than requiring law enforcement agencies like Victoria Police to expend the time, effort and resources to re-assess an interstate conviction under the Victorian scheme, including obtaining offending information to which they do not necessarily have ready access. The Bill in this way limits the right to equality and non-discrimination (section 8) since interstate offences may be dealt with slightly differently than in Victoria. To the extent this may result in an unfair outcome for interstate convictions compared with Victoria, there is likely to be only minimal impact since, despite the variations, the framework for spent convictions in each state and territory is largely consistent. For this reason, the mutual recognition provisions are a justified restriction on equality before the law (section 8) given the need for an efficient administration of justice in Victoria.

Permitted disclosures of spent conviction information

Disclosure, use and collection of spent conviction information by courts and tribunals

The Bill contains exceptions for the disclosure, use and collection of spent conviction information by courts and tribunals in legal proceedings and in the making and publishing of decisions. These exceptions will allow courts and tribunals to receive spent conviction information as part of the giving of evidence and to use spent conviction information for the purposes of sentencing.

Additionally, these exemptions will allow courts and tribunals to continue to publish decisions (which may contain spent conviction information) consistent with the principles of open justice. I am satisfied that this aspect of the exemption is consistent with Section 24 of the Charter, specifically subsection (2) which provides that all judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires, or a law other than this Charter otherwise permits.

Disclosure of spent conviction information by law enforcement agencies for law enforcement or corrections functions

Spent conviction information is also available to state and federal law enforcement agencies, as this is necessary to protect community safety and to allow efficient and effective administration of the justice system. This exemption provides law enforcement agencies like Victoria Police, and the Independent Broad-based Anti-corruption Commission with the ability to disclose spent conviction information to other law enforcement agencies, courts and tribunals for the performance of statutory powers or functions. Additionally, these agencies can disclose spent conviction information to other non-law enforcement agencies providing it is for a law enforcement function.

The Bill also allows Corrections Victoria to use, collect and disclose spent convictions information for the purposes of performing a function or exercising a power under, Corrections legislation or Corrections-related legislation. Corrections Victoria will therefore be able to use and disclose spent conviction in order to, among other things, manage, assess, treat, and rehabilitate prisoners (and ex-prisoners) and to reduce safety risks in correctional facilities.

Disclosure of spent conviction information to government agencies and bodies

In addition, full criminal records can be released to certain government agencies and bodies for the purpose of exercising their prescribed functions as well as maintaining public safety. This is where the disclosure is required to make a holistic assessment of risk and determine a person's suitability for employment, licencing or to hold a position such as a marriage celebrant or honorary justice. This is referred to as the 'public safety' exemption. The Bill also provides a regulation-making power for additional agencies to be granted such an exception for a prescribed function under a prescribed statute, in recognition that such an exception may be required for limited additional circumstances where disclosure is necessary for other agencies with the appropriate risk assessment expertise.

Exemptions to disclosure are reasonable and justified imitations on section 8 and section 13 rights, having regard to the need for the efficient administration of justice and protection of public safety

Disclosure of a full criminal record is clearly required in certain circumstances for the management of risk, administration of justice and protection of community safety. Similarly, use of a person's full criminal record, including spent conviction information, by the receiving agency or body, may also be necessary. The Bill provides the above exemptions to allow police, courts and corrections to continue to use spent conviction information to carry out their existing functions.

Discrimination on the basis of a disclosed spent conviction will still prohibited, and the vast majority of employers will not be subject to an exemption. Thus there will still be adequate opportunities for gaining employment and reintegrating with the community which minimises the impact such disclosure and use will have on rights under the Charter. Where prescribed entities and agencies have received spent conviction information, the Bill provides that its use by that agency will be lawful provided that it is for the stated prescribed statutory purpose.

Having regard to the purposes of the limitation on a person's right to privacy, reputation and non-discrimination—whether to fulfil law enforcement functions, administration of justice or for holistic risk assessment by prescribed agencies under prescribed laws, I consider these exemptions to be reasonable and proportionate limitations on the rights under section 8 of the Charter.

Likewise, prescribing lawful exemptions for disclosure supports a person's right not to have their privacy or reputation unlawfully or arbitrarily interfered with, consistent with section 13 of the Charter.

Given this protection I consider that the Bill strikes an appropriate balance between the need to support the rehabilitation of individuals and public safety and the administration of justice, and remains compatible with sections 8 and 13 of the Charter.

Offences for unlawful disclosure of spent conviction information

The Bill creates an offence for disclosing information about a person's conviction in circumstances where the person knows, or ought reasonably know it relates to a spent conviction without lawful authority or written consent by the convicted person. The penalty for such disclosure is 40 penalty units. Where the Bill authorises disclosure, for example by law enforcement agencies, courts, tribunals or to other prescribed agencies in limited circumstances, this operates as an exception to the offence provision.

A defence to such disclosure is also articulated in the Bill, which places the obligation on the person accused of that offence to prove that they took all reasonable steps to avoid the unlawful disclosure. The defence provides an explicit legal onus on the accused person in that instance.

In addition, the Bill makes it an offence to fraudulently or dishonestly obtain information relating to a spent conviction, the penalty for which is 20 penalty units.

Any limitations on Charter rights imposed by the offence provisions are reasonable and justified

The offence provisions in the Bill are consistent with schemes in other states and territories, most of which establish offences for both unlawful disclosure and obtaining by fraud or dishonesty.

The penalty provisions in the Bill reflect the significant impact that disclosure of a person's criminal record has on their rehabilitation and community and economic participation and the public interest in protecting dishonest or fraudulent conduct. In this way, the Bill strengthens the rights to both non-discrimination on the basis of an irrelevant criminal record (section 8), and the right not to have their privacy unlawfully or arbitrarily interfered with (section 13). The reverse onus for the defence to unlawful disclosure is reasonable and justified having regard to the need to maintain integrity in the operation of the scheme.

To the extent that the offence provisions also engage and limit the right to freedom of expression (section 15) including the freedom to impart information by, for example reporting by the media a person's spent conviction, I do not consider that it amount to a limitation of the right per se, since subsection (3) recognises that the right may be subject to lawful restrictions. I consider the offence provisions are indeed lawful restrictions which are reasonably necessary to respect the rights and reputation of other persons, having regard to the integrity and purpose of the scheme established by the Bill.

Amendment to the Equal Opportunity Act 2010

In addition to the provisions which limit disclosure of a person's spent convictions as outlined above, the Bill goes one step further by making it unlawful to discriminate on the basis of a spent conviction. It does this in Part 6 by providing for amendments to the *Equal Opportunity Act 2010* (Vic) to include a spent conviction as a protected attribute, on the basis of which discrimination is prohibited. This amendment strengthens the rights to equality before the law and privacy and reputation under sections 8 and 13 (respectively) of the Charter by providing further protection for people who have convictions that are spent.

Eligibility for election to the Victorian Parliament

The Bill makes an amendment to section 44(3) of the *Constitution Act 1975* to clarify a person's electoral eligibility to the Victorian Parliament.

Division 7 of the *Constitution Act 1975* contains provisions applicable to both the Legislative Council and the Legislative Assembly within Victorian Parliament. Section 44 deals with membership of the Council and the Assembly. Currently under section 44(3), 'an elector who has been convicted or found guilty of an indictable offence which by virtue of any enactment is punishable upon first conviction by imprisonment for life or for a term of five years or more…shall not be qualified to be elected a member of the Council or the Assembly'. Under the Bill, convictions that become spent will not be capable of triggering the section 44(3) disqualification provision.

Whilst the Bill in this respect engages section 18 (participation in public life), I consider that it does not limit this right but rather strengthens this right by reducing barriers to public office for a person whose conviction is spent under the scheme, who would previously have been ineligible. In doing so, the Bill is consistent with the right and opportunity for a person to have access to public office without discrimination, consistent with section 18(2)(b) of the Charter.

Hon Jill Hennessey MP

Attorney-General

Second reading

Ms HENNESSY (Altona—Attorney-General, Minister for the Coordination of Justice and Community Safety: COVID-19) (11:08): I move:

That this bill be now read a second time.

I ask that my second-reading speech be incorporated into *Hansard*.

Incorporated speech as follows:

The Spent Convictions Bill 2020 embodies a simple idea: people who have worked hard to turn their lives around deserve the opportunity to move on from minor historical offending.

Having a criminal record can affect a person's life in many ways. It is a barrier to gaining and seeking employment. It rules out many professions and industries which impose a test of "good character". It can exclude a person from university or TAFE, or from accessing practical training essential to those qualifications. It is a black mark on an application for housing. More fundamentally, it can mean a lack of hope, a lack of belonging and a feeling of being marked as an outsider.

While for a period of time, and for serious offending, those effects are justified and a part of the punishment imposed, there are circumstances where an enduring criminal record imposes a penalty out of all proportion to the original crime. For example, if the offence was minor and the offender has not offended for a lengthy period of time, the lasting effects of a criminal record are difficult to justify. Indeed, to exclude such a person from fully participating in society, despite having demonstrably turned their life around, actively discourages rehabilitation. It can trap people in a cycle of offending, closing the door to them building an education, a career and a home.

Without some scheme to allow old, minor convictions to be protected, people who have offended can never move on from their crimes. No matter how much time has elapsed and how much the person has turned their life around, they are still marked as an offender. For the foolish mistake, the impulsive decision, lifelong they must answer in the affirmative to the question "have you ever been found guilty of an offence". Without laws to address this, no amount of rehabilitation can take that shame away.

In light of this, the Spent Convictions Bill 2020 will establish a scheme for eligible convictions to become protected from disclosure on a person's criminal record after a period without re-offending. This Bill will correct the fact that Victoria is the only jurisdiction in Australia without a legislated spent convictions scheme.

A person's interaction with the criminal justice system appears on their criminal record, usually in the form of a conviction. Where criminal record information is protected from disclosure, it is referred to as 'spent'. In the absence of a legislated scheme in Victoria, Victoria Police currently discloses criminal history information in accordance with an Information Release Policy. This non-legislative approach, while allowing for a degree of flexibility, creates inconsistency and uncertainty for people who consent to their records being released. A legislated spent convictions scheme will provide a clear and consistent framework for the disclosure of a person's criminal record information to employers and other relevant agencies.

In May 2019, the Government asked the Legal and Social Issues Committee of the Legislative Council to report on the need for a legislated spent convictions scheme in Victoria. The Committee tabled its report of their Inquiry into a Legislated Spent Convictions Scheme in August 2019 and made 10 recommendations, including an overarching recommendation that the Government should introduce a legislated spent convictions scheme. I would like to thank Ms Fiona Patten MLC for her courageous advocacy and thoughtful stewardship of the Committee's work. The Committee's report and its thorough, compassionate approach to consultation laid an invaluable foundation for the design of the Bill.

In February 2020, the Government responded to the Committee's report, supporting all its recommendations in full or in principle. This Bill will give effect to the Government response and bring this scheme into existence. I acknowledge that in doing so, the Bill realises the efforts and aspirations of many advocates, including the Woor-Dungin Criminal Record Discrimination Project, Victoria's Aboriginal Justice Caucus, the Law Institute of Victoria, Victorian community legal centres and Liberty Victoria's Rights Advocacy Project.

Introducing this Bill recognises that historical convictions for eligible crimes should not stop people from accessing jobs, training and housing. In too many instances, the stigma of a minor historic conviction has had unjustifiably significant and ongoing impacts, sometimes lasting a lifetime. This stigma is often carried regardless of how minor the offence was or how long ago it occurred. Such impacts of a historical conviction can be out of proportion to what society would consider justified. They can result in a cycle of disadvantage and entrenchment in the justice system and even encourage further reoffending.

This Bill will help people with criminal records to rehabilitate, make a new start and fully contribute to society, once they have completed a period of crime-free behaviour. The protections against discrimination created by the Bill will allow more people to seek and maintain better employment opportunities, in turn contributing to reduced recidivism and improved community safety. These measures are even more important at a time when many Victorians have lost employment due to the global COVID-19 pandemic.

Aboriginal people are more likely to be impacted by criminal records than non-Aboriginal Victorians for a range of reasons, including increased contact with the criminal justice system. This Bill will help reduce the over-representation of Aboriginal people in the criminal justice system by removing barriers to self-determination, removing stigma associated with criminal records and increasing employment and educational opportunities.

Children and young people will also benefit from these reforms. The Bill will ensure that convictions that adults may have received as young people will not impact their ability to rehabilitate and re-integrate into society as an adult. Barriers created by minor convictions have a greater impact on young people, because education, employment and housing are crucial for their development. Being excluded from accessing opportunities as a young person due to a minor offence committed as a child can place them on an irreversible offending trajectory into adulthood.

The Bill will, at the same time, recognise that disclosure of historic convictions is an important practice to manage risk. It will ensure that children and other vulnerable persons remain protected from harm by codifying public safety exemptions, so that for trusted professions decisions can be made based on a complete picture of a person's history.

This proposal will also address issues of disadvantage linked with gender-based trauma such as domestic and family violence. The Bill will remedy disadvantage suffered by women, particularly Aboriginal women, statistically over-represented in the justice system, for whom barriers to accessing employment and housing are exacerbated by having a criminal record.

Bill details

Turning to its structure:

- Part 1 of the Bill sets out its purposes and definitions.
- Part 2 provides for convictions that are spent immediately, convictions that are spent on completion of a conviction period (often referred to as a crime-free period), and convictions that can be spent only by court order.
- Part 3 provides for the effect of a conviction becoming spent. It also creates an exemption for law enforcement agencies in the administration of justice and for certain employers to make informed risk assessments on the basis of public safety.
- Part 4 creates offences for unlawfully obtaining or unlawfully disclosing information about a spent conviction.
- Part 5 sets out the power to make Regulations, particularly with respect to applications for a court order.
- Part 6 amends the *Equal Opportunity Act 2010* to include a spent conviction as an attribute on the basis of which discrimination is prohibited under that Act.

Legislative framework

The disclosure of convictions will be governed by an automatic stream and an application process. Under the automatic stream, the majority of eligible convictions will be spent at the completion of a period of no serious re-offending, (referred to as a conviction period in the Bill), while those convictions which require decision making or risk assessment in order to become spent may be considered through an application process.

Convictions with sentencing outcomes of 30 months imprisonment or less will be eligible to become spent after the completion of the conviction period

Convictions for most offences for which a term of imprisonment or detention of less than 30 months has been imposed will be eligible to become spent automatically after the completion of the relevant conviction period. This sentencing threshold matches that applied in the current administrative policy used by Victoria Police and recommendations from key stakeholders during consultation, such as the Aboriginal Justice Caucus and the Law Institute of Victoria. It also aligns with spent convictions laws in Queensland and the Commonwealth.

Sexual offences and serious violent offences cannot be automatically spent

Convictions which are defined as 'serious convictions' will not be eligible to be automatically spent under the Bill. This policy recognises the need for the spent convictions scheme to balance the need for rehabilitation

of offenders with the inherent risk to the community posed by serious sexual offences and serious violent offences, and an acknowledgement of the severe and lasting harm caused to victims of these offences.

Under the Bill, serious convictions will be defined as:

- 'sexual offences' using the definition from the *Criminal Procedure Act 2009*;
- 'serious violence offences' using the definition from the *Serious Offenders Act 2018*, a definition which includes offences such as murder, manslaughter, serious injury offences and kidnapping; and
- convictions for any other type of offence, for which a term of imprisonment or detention of more than 30 months has been imposed.

Using existing definitions in legislation provides certainty about the offences excluded from the automatic stream.

The conviction period is ten years for adults, and five years for children and young offenders

Under the Bill, in order for convictions to become eligible to be spent automatically, a specified timeframe with no serious re-offending must be completed by the individual. This period will be 10 years for adults, and 5 years for children and young offenders, including those sentenced in adult courts under the dual track provisions within the *Sentencing Act 1991*.

The chosen thresholds are consistent with the current Victoria Police Information Release Policy and with the overwhelming majority of spent convictions schemes in other Australian jurisdictions. In doing so Victoria will match all other jurisdictions by specifying a shorter waiting period for children and young offenders. Research tells us that young people are particularly vulnerable to discrimination and stigma on the basis of historic offending, which may affect their ability to seek employment or education opportunities, known to reduce recidivism rates.

The Government recognises that many submissions to the Committee's Inquiry advocated for shorter waiting periods to apply to both children and adults. The Committee itself concluded that the waiting periods should be set from within a recommended range. The Government has given the matter careful consideration and the Bill proposes a cautious approach, with waiting periods set at the outer point of the range recommended by the Committee but in line with waiting periods applying in almost all other Australian jurisdictions.

Reflecting the approach in most Australian jurisdictions, the Bill provides that convictions for anything more than minor offending during the conviction period will re-commence the conviction period. Minor offending is defined in the Bill as a conviction where the penalty imposed is a fine not exceeding 10 penalty units, or for which no conviction is recorded by a court. Sentencing outcomes of terms of imprisonment, drug treatment orders and Community Correction Orders would however re-commence the conviction period if a conviction was recorded. A definition of minor re-offending based on the court outcome is preferred to a definition based on whether the offence was summary or indictable. This distinction is not as strong a basis for assessing risk or seriousness, noting that some low-risk and low-harm offending is classified as indictable while summary offences can capture offending which may be considered relatively serious.

In addition, offences where the conviction is discharged without penalty, convictions that are quashed or where the person is pardoned will not re-commence the conviction period. This policy is consistent with the view that the threshold of disclosure of criminal wrongdoing should be that the prosecution has proved the guilt of the offender.

These conviction periods will commence from the date that an individual is convicted. This reflects the fact that an individual can begin to demonstrate rehabilitation from the time they are sentenced.

Non-conviction outcomes, and convictions recorded against children under 15 years old, will be spent immediately

The Bill provides for certain convictions to be spent immediately.

Under the *Sentencing Act 1991*, a sentencing court can choose not to record a conviction when sentencing an offender for a minor offence. In doing so, the court must take into account the impact recording a conviction will have on the offender's economic or social wellbeing, and their employment prospects. Where the court decides not to record a conviction, the Sentencing Act states that the finding of guilt must not be taken to be a conviction for any purpose. In line with the policy embedded in that discretion, the Bill provides that any findings or orders imposed by courts without conviction are immediately spent, subject to completion of any conditions that may be attached to the penalty attached (for example, completion of a good behaviour bond). This removes the current inconsistency that arises where a person is told by the sentencing judge that they will "not record a conviction", only to find the outcome nonetheless appears on their criminal record.

Additionally, a conviction for an offence committed when a person is under the age of 15, and any fines issued with conviction by the Children's Court, regardless of the child's age, will be spent immediately. These provisions help mitigate the stigmatising impact of recording convictions against very young children. They also recognise that a fine is a low-level response by the court, that should not carry the ongoing consequence of a criminal record where the offender is a child.

Infringement convictions, which relate to certain specific offences for drivers of cars and marine vessels, are also able to be spent immediately.

Going forward, current investigations and pending charges will no longer be disclosed on a police record check. This aligns with the presumption of innocence, a fundamental principle of Victoria's legal system. It will not, however, prevent the disclosure of pending charges where this is otherwise required, for example in connection with a Working With Children Check.

Some individuals who do not meet the eligibility criteria to have their conviction automatically spent will be able to apply to the Magistrates' Court for a spent conviction order

In limited circumstances, where an offender with a conviction ineligible to be automatically spent has completed the relevant conviction period without re-offending and is able to demonstrate their rehabilitation, the offender will be able to apply to the Magistrates' Court of Victoria for a spent convictions order.

Under the Bill, the individuals able to apply for a spent conviction order are those who were sentenced as a child or young offender, and adult offenders who committed a serious violence offence or sexual offence where no term of imprisonment was imposed for the conviction, or other types of convictions where the term of imprisonment imposed was less than 5 years. Other strict eligibility criteria will also need to be followed before a court will consider an application. The circumstances where an application is allowed will be deliberately limited to ensure the court is not overburdened with applications, and to reflect community expectations about the types of offences that should continue to be disclosed on criminal records.

In evaluating an application, the court will need to consider a number of criteria to determine whether a spent conviction order should be granted. Primarily, the court will consider the personal circumstances of the person, including any demonstrated rehabilitation, against any risk to public safety, which warrant the conviction being ordered spent or continuing to be disclosable. The court must also act with regard to the substance of the application under without regard to technicalities or legal forms that are not set out under the Bill.

In relation to Aboriginal or Torres Strait Islander applicants, the court must consider the unique systemic and background factors affecting people from those communities. This acknowledges the over-representation of Aboriginal and Torres Strait Islander people within the criminal justice system. Additionally, to reflect the current scientific understanding of behaviours of children and young people, the court can also consider the age and maturity of the person when the offence was committed.

The court will be able to make their decision either on the papers, which it is anticipated will be sufficient in most cases, or by holding a hearing in open court. A hearing for a spent convictions order must be held in private, given the highly sensitive and personal nature of the information disclosed, unless the court considers the circumstances of the case require that the hearing should be in public. In acknowledgement of the long-lasting effect that offending has on victims, the court has discretion to invite a victim to attend the hearing and must take into account any views expressed by victims.

Spent convictions legislation in other Australian jurisdictions is to be applied to interstate criminal record history

The Bill provides that where a conviction occurred in another Australian jurisdiction, the legislation for that jurisdiction will be applied. Consequently, interstate criminal record history will be either disclosable or not disclosable in accordance with the spent convictions legislation of the respective interstate jurisdiction. This process, referred to as mutual recognition, will allow the Bill and its framework to be efficiently and effectively administered.

Overseas convictions that correspond to Victorian convictions are to be spent in accordance with the parameters of the Bill, save for the application process

The Bill proposes that overseas convictions are to be spent immediately or automatically if the overseas offence corresponds to an offence against the laws of Victoria, which itself would be spent immediately or automatically under the Bill. This is in line with spent convictions laws in all other Australian jurisdictions, except the Northern Territory.

However, due to the complexity of determining whether an overseas offence has an equivalent in Victorian law, a person cannot apply to have an overseas conviction spent, where the offence cannot be spent immediately or automatically.

Incorporating overseas convictions into the Bill will further the objectives of a spent convictions scheme and provide certainty for persons who may have committed offences overseas, particularly recent and long-term migrants to Victoria.

Once a conviction becomes spent, a person will not be required to disclose it to any person for any purpose

Once a conviction becomes spent, it will no longer form part of the person's criminal record and the individual will not be required to disclose the conviction for any purpose. Furthermore, once a conviction is eligible for controlled disclosure under the Bill (that is, it becomes spent), it cannot be revived later if the person receives another conviction.

The Bill also provides that convictions which become spent will not be capable of triggering the disqualification provision within the *Constitution Act 1975*. Currently, under section 44(3) of the *Constitution Act 1975*, 'an elector who has been convicted or found guilty of an indictable offence which by virtue of any enactment is punishable upon first conviction by imprisonment for life or for a term of five years or more…shall not be qualified to be elected a member of the Council or the Assembly'. Under the Bill, convictions that become spent will not be capable of triggering the section 44(3) disqualification provision.

A person who has their conviction spent, and would ordinarily have been ineligible, will therefore be eligible for election as a member of the Legislative Council or the Legislative Assembly.

To ensure the disclosure of spent convictions is prohibited effectively, the Bill also proposes offences for unlawful disclosure of spent conviction information, and for obtaining spent conviction information by fraud or dishonesty.

There will be no constraint on the use of criminal record information by courts and agencies with corrections or law enforcement functions, or government agencies for the purpose of exercising existing functions

Under the Bill, spent conviction information can be disclosed where necessary to allow efficient and effective administration of the justice system and protect community safety. For example, it is proposed that courts and agencies with corrections or law enforcement functions will be able to share criminal history records. Additionally, exemptions from the scheme are provided for certain agencies with specific functions to have access to complete criminal record history, to make well-informed risk assessments. This includes licensing for trusted professions, checks for working with children, and employment in sensitive government roles.

These exemptions acknowledge that there will be circumstances that require the disclosure of a person's full criminal record to make a holistic assessment of risk. However, employers or agencies who are under the list of exemptions will still need to consider how a spent conviction is relevant to the given situation or requirement of a position.

Circumstances in which an exemption is provided under the Bill include the following:

- law enforcement agencies, such as Victoria Police, the Independent Broad-Based Anti-corruption Commission and the Adult Parole Board
- courts and tribunals
- Corrections Victoria
- Working With Children Checks
- accreditation of transport workers, such as taxi drivers and bus drivers
- occupational licensing, such as for health professionals, teachers and lawyers
- licences for business activities, such as gambling operations and licensed premises
- employment or contracting of persons to provide care to children or people with a disability
- employment in government, such as in prisons and courts
- family violence and child safety information-sharing programs, and
- immigration decision making.

This is a non-exhaustive list, with the full set of exemptions set out in the Bill. The agencies provided with an exemption have been carefully assessed based on their need to protect vulnerable persons from harm, perform sensitive public functions or maintain the integrity of government programs and licensing frameworks.

Where relevant, authorities in other states and territories or the Commonwealth are provided with corresponding exemptions.

The Equal Opportunity Act 2010 will be amended to prohibit discrimination based on a spent conviction

The Bill will amend the *Equal Opportunity Act 2010* to include a spent conviction as a protected attribute, to prevent discrimination based on a spent conviction. This will enable people who have experienced

discrimination to file a complaint with the Victorian Equal Opportunity and Human Rights Commission and seek redress. This amendment is an important measure to ensure that the protections against disclosure in this Bill are given meaningful effect.

The Government will undertake further detailed consultation, particularly with employer groups and unions, to consider whether discrimination on the basis of an irrelevant criminal record should also be prohibited, given that many stakeholders advocated for this change during consultations. This change, if pursued, would affect a larger group of stakeholders than is affected by the Bill, and requires further consideration.

Statutory review of the Scheme will occur after 12 months

The Bill proposes for a statutory review of the Scheme after 12 months, in order to consider the administration and operation of the Scheme and any continuing funding or resourcing implications. This timeframe will allow all major stakeholders to be in a position to better understand these implications, following commencement. It also provides an opportunity to assess the benefit of the scheme to persons with a criminal record.

Conclusion

Introducing this Bill recognises that historical convictions for eligible crimes should not exclude people from accessing jobs, training and housing for their whole lives. Having a pathway to a conviction becoming spent can help break the cycle of recidivism, thereby enhancing community safety. The fair and sensible scheme contained in this Bill will protect public safety while enhancing the ability of this oft-overlooked cohort of Victorians to lead a positive, productive life.

I commend the Bill to the house.

Ms BRITNELL (South-West Coast) (11:08): I move:

That the debate be now adjourned.

Motion agreed to and debate adjourned.

Ordered that debate be adjourned for two weeks. Debate adjourned until Wednesday, 11 November.

ENERGY LEGISLATION AMENDMENT (LICENCE CONDITIONS) BILL 2020

Statement of compatibility

Ms D'AMBROSIO (Mill Park—Minister for Energy, Environment and Climate Change, Minister for Solar Homes) (11:10): In accordance with the Charter of Human Rights and Responsibilities Act 2006 I table a statement of compatibility in relation to the Energy Legislation Amendment (Licence Conditions) Bill 2020:

Opening paragraphs

In accordance with section 28 of the *Charter of Human Rights and Responsibilities Act 2006*, (the 'Charter'), I make this Statement of Compatibility with respect to the Energy Legislation Amendment (Licence Conditions) Bill 2020 (the Bill).

In my opinion, the Bill, as introduced to the Legislative Assembly, is compatible with human rights as set out in the Charter. I base my opinion on the reasons outlined in this statement.

Overview

The Bill amends the *Electricity Industry Act 2000* (EIA) and the *Gas Industry Act 2001* (GIA) to enable the Minister for Energy, Environment and Climate Change to make Orders specifying conditions applying to licences issued under those Acts. Before making an Order, the Minister must: consult affected licensees; consult the Premier, the Treasurer and the Minister administering the *Essential Services Commission Act 2001*; and have regard to any significant costs and benefits the Minister considers are likely to arise out of the making of the Order.

Human Rights Issues

Human rights protected by the Charter Act that are relevant to the Bill

The Bill does not engage any human rights protected by the Charter.

The Charter sets out the rights, freedoms and responsibilities of people in Victoria. Whilst the Bill enables an Order to be made specifying conditions applying to licences under the EIA and GIA, licensees include retail,