

PARLIAMENT OF VICTORIA

LEGISLATIVE COUNCIL

Legal and Social Issues Committee



Inquiry into a legislated spent convictions scheme

A Controlled Disclosure of Criminal Record Information framework for Victoria

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Legislative Council Legal and Social Issues Committee

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About the committee

Functions

The Legislative Council Legal and Social Issues Committee's functions are to inquire into and report on any proposal, matter or thing concerned with community services, education, gaming, health, and law and justice.

As a Standing Committee, it may inquire into, hold public hearings, consider and report on any Bills or draft Bills, annual reports, estimates of expenditure or other documents laid before the Legislative Council in accordance with an Act, provided these are relevant to its functions.

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This report is available on the Committee's website.

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Terms of reference

Inquiry into a legislated spent convictions scheme

On 2 May 2019, the Legislative Council agreed to the following motion:

That -

1. pursuant to Standing Order 23.02 and Sessional Order 22, this House requires the Legal and Social Issues Committee to inquire into, consider and report, no later than Tuesday, 27 August 2019, on the need for and potential impact of laws in Victoria to govern the disclosure of criminal history records, otherwise known as a legislated spent convictions scheme;
2. the Committee should consider the design of such a scheme that would be appropriate for Victoria, including, but not limited to —
 - a. the types of criminal records that should be capable of becoming spent;
 - b. the mechanism by which convictions become spent;
 - c. 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;
 - d. the effect of subsequent convictions during the crime-free period;
 - e. the consequences of a conviction becoming spent;
 - f. any offences and penalties that should apply for non-compliance with the scheme, including for disclosing or taking into account a spent conviction where this is not permitted;
 - g. interaction between a Victorian scheme and other jurisdictions;
 - h. appropriate exceptions, such as for particular offence categories or specific regulatory schemes; and
 - i. the interaction between any proposed ‘scheme’ and other legislation, such as the *Assisted Reproductive Treatment Act 2008* and the *Working with Children Act 2005*;
3. in considering the need for and design of a legislated spent convictions scheme, the Committee should have regard to the experience of groups in our community who suffer particular disadvantage due to past convictions, such as young people and Aboriginal and Torres Strait Islander people; and
4. the Committee should be guided by the public interest in ensuring that the disclosure of criminal history records in Victoria operates in a fair and transparent

Terms of reference

manner and balances the interests of offender rehabilitation and reintegration with community safety, including the safety of vulnerable Victorians and the safety and wellbeing of victims.

Chair's foreword

I am very pleased to present my first report as Chair of the Legislative Council's Legal and Social Issues Committee.

This report addresses an issue that I believe needs urgent action from government. That is, the lack of legislation in Victoria which controls the availability of information in a person's criminal record to employers and others. At the moment even minor offences from over ten years ago will appear on a police record check when somebody applies for a job. This is beyond what the community and as we learned, even victims of crime would expect in terms of justice.

Protecting community safety through the effective rehabilitation of offenders is our ultimate goal rather than placing a stigma on individuals that follows them for the rest of their lives.

In this report we make it clear that for the purposes of administration of justice, unimpeded access to criminal record information is essential to both the courts and the police. They should always be able to access a person's criminal record history. That is essential for their work.

What is not necessary is ongoing access to outdated and irrelevant criminal record information by employers and other third parties. This can lead to discrimination on the basis of old and irrelevant information which may be seen completely out of context. The consequences of that discrimination can be to erect barriers to employment, education, housing and other opportunities. All of which are important to an individual's journey towards rehabilitation and a crime-free life.

Victoria is the only jurisdiction in Australia that does not have legislation to deal with this issue.

Thank you so much to everybody who contributed to our inquiry. Our work depends on submissions from peak bodies and the interest and contributions of those with expertise. In the case of this report I sincerely thank all those individuals who came forward to tell us about their prior convictions and how they had affected, and in many sad cases, derailed their lives - often just because of a stupid mistake made in their youth. It is a brave move to front a parliamentary committee about an issue that is so personal and the source of immense shame and regret for many.

I particularly want to thank the indigenous community of Winda-Mara Aboriginal Corporation for their generosity in inviting the committee to discuss the concerns of their community and our terms of reference on country, in Heywood. I pay my respects to the elders of that community, particularly Michael Bell, CEO.

Woor-Dungin Criminal Record Discrimination Program provided us with their benchmark report based on extensive consultation and research. The key peak bodies that made submissions to this inquiry wholly endorsed the work of Woor-Dungin and the goal of self- determination.

I want to express my disappointment that the Committee did not receive a contribution from the Department of Justice either through appearing at one of our Hearings or through a submission.

My hope is that the Victorian government implement our proposed Controlled Disclosure of Criminal Record Information Framework and that they do so through an evidence-based approach to reform that doesn't give in to political rhetoric. The Committee's recommended approach would provide redress to those in our community who deserve it through a legislated approach to controlled disclosure of criminal record information, in circumstances where that information really is irrelevant. It would ensure that barriers to employment for the vulnerable are lifted and put in place an important and final step in the rehabilitation of offenders. This is way better and more cost effective than the alternative of higher recidivism and incarceration rates.

When people are desperate to work and to contribute to their communities, have shown remorse and in many cases were never incarcerated, I think they really are worthy of a second chance and I believe the community agrees with me. This scheme should ideally help as many people as possible to move on and in my opinion should allow people who have been sentenced for up to 30 months, at the very least, to be eligible.

Finally I would like to thank my colleagues on the Legislative Council's Legal and Social Issues Committee for their work on this inquiry, and the Secretariat team – Lilian Topic, Matthew Newington and Caitlin Connally, for their excellent work in a very short timeframe. This report was produced in record time because we believe this is an issue that does require urgent attention.

I commend the report to the House.



Fiona Patten
Chair

Recommendation

A framework for Controlled Disclosure of Criminal Record Information for Victoria

The Committee recommends that the Victorian Government introduce legislation for a Controlled Disclosure of Criminal Record Information Framework for Victoria that includes the following elements:

1. Administration of justice exemption

There is no constraint on the use of criminal record information by the police and courts who have access to criminal data information indefinitely.

2. Public Safety Exemptions

Certain employers and other third parties are exempt from the framework, where full disclosure of relevant past convictions is necessary for their risk management. This includes:

- Working with children and vulnerable people
- Registration with a child screening unit and / or Victorian Institute of Teaching
- Registration and accreditation of health professionals
- Employment or contact with prisons or the police force
- Prohibited persons under the *Assisted Reproductive Treatment Act 2008*
- Casino or gaming licences
- Sex Work service providers licence
- Operator Accreditation under the *Bus Safety Act 2009*
- Commercial Passenger Vehicles Victoria (*Commercial Passenger Vehicle Industry Act 2017*)
- Firearms licence (*Firearms Act 1996*)
- Admission to legal profession (*Legal Profession Act 2004*)
- Independent Broad Based Anti-corruption Commission
- Poppy industry (*Drugs, Poisons and Controlled Substance Act 1981*)
- Honorary justice (*Honorary Justices Act 2014*)

- Court services Victoria
- Immigration (*Migration Act 1958*)
- Office of the Victorian information commissioner (*Privacy and Data Protection Act 2014*)
- Elected or appointed public positions, where relevant.

3. Eligibility criteria

A conviction for any type of offence should be considered a conviction under the framework.

Stream 1: Controlled disclosure through an automatic mechanism

The following criminal record information should be eligible for protection from disclosure to employers and other third parties through an automatic mechanism:

- Current investigations and pending charges
- Any findings or orders imposed by Courts that do not result in conviction subject to completion of any conditions in line with sections 5, 7 and 8 of the *Sentencing Act 1991* (Vic). Subject to prescribed exemptions, where a conviction resulted in a maximum prison sentence of 12 to less than 30 months, to be determined by the government on the basis of a full investigation. Sexual and serious violent offences to remain subject to disclosure.
 - For adult offenders after a crime-free period of five to ten years, commencing from the time of conviction.
 - For juvenile offenders after a crime-free period of three to five years, commencing from the time of conviction.
 - Suggested crime-free periods are a guide. Final crime-free periods to be determined by the government on the basis of a full investigation.

Summary offences should not affect the waiting period excluding indictable offences heard summarily.

Once a conviction is eligible for controlled disclosure under the framework, it should not be disclosed later if the person receives another conviction.

Stream 2: Controlled Disclosure through an application process

Those individuals who do not strictly meet the eligibility requirements for Stream 1: Controlled disclosure through an application process, can apply to the court which originally heard their case, once they have served their sentence, for their criminal information to be protected if they can demonstrate:

- rehabilitation

- consideration of the views of victims of their crime
- potential benefit to the offender and the community.

Applications to the court can also be on the basis of:

- applications for a waiver of or reduction in the crime-free period
- applications for minor offences not to reset the crime-free period

4. Protections

Sanctions for the disclosure of irrelevant or protected criminal record information should align with the intentions of the *Data and Privacy Protection Act 2014*.

The controlled disclosure framework should also include penalties for the following:

- unlawful disclosure of a person's protected criminal record
- unlawfully obtaining information in relation to a protected criminal record
- threatening to disclose a person's protected criminal record
- considering a conviction protected from disclosure for an unauthorised purpose.

A 'reasonable awareness' test is to be applied.

The controlled disclosure framework should include an exemption for use of this information in the administration of justice.

5. Amend the *Equal Opportunity Act 2010 (Vic)*

Supplementary to the framework the Government amend the *Equal Opportunity Act 2010* to include non-disclosable criminal record information as a protected attribute to prevent discrimination on the basis of an irrelevant criminal record.

6. Guidelines for the community and employers

The Victorian Government should develop practical Guidelines for the community and employers to clarify rights and responsibilities regarding the use of criminal record information.

7. Existing mechanisms

The proposed framework should not interfere with the following:

- existing oversight and complaints mechanisms, such as complaints to the Office of the Victorian Information Commissioner.

- criminal record checks under current policy and legislation, particularly in relation to irrelevant criminal records.

8. Review process

The Government should review the operation of a controlled disclosure framework, particularly in terms of potential administrative burdens for the courts or police, 4 years after commencement in Victoria.

9. Data collection

More robust data is needed to better understand recidivism and develop successful methods of rehabilitation of offenders. The lack of robust data to provide evidence for an ideal waiting period for example, was astounding. The government should not proceed without ensuring the establishment of measures to better understand outcomes in Victoria as the result of implementation of the Committee's recommended framework.

10. Independent entity responsible for criminal record checks

Given the increase in criminal record checks and the increasing burden this places on Victoria Police, the government should investigate the need for establishment of an independent statutory entity responsible for criminal record checks in Victoria.

1.1 Introduction

Australia's first spent convictions legislation was passed in Queensland in 1986.¹ Since then, all Australian jurisdictions (including the Commonwealth) except Victoria have introduced legislation to allow for convictions for eligible minor offences to be 'spent'. This means that after a period of time free of reoffending a person's convictions will no longer be disclosed on a Police Record Check.

However this does not mean convictions are 'wiped' from a person's criminal record, and certain offences will always be disclosed. Nor are the courts and police have limited in their access to criminal record information.

This Report represents a culmination of the Legal and Social Issue's Committee's Inquiry into what the terms of reference refer to as a legislated spent convictions scheme. The purpose of the inquiry has been to investigate the design of legislation for Victoria that allows certain convictions to be 'spent' and to consider the potential impact of introducing such a scheme.²

Through the evidence it received, the Committee determined there is a need to introduce legislation in Victoria that establishes a framework for Controlled Disclosure of Criminal Record Information, the key aspect of which is to allow for some convictions to be protected from disclosure. This must be done as a matter of urgency.

The Committee makes a recommendation for the introduction of a Controlled Disclosure of Criminal Record Information framework accordingly, and outlines the proposed framework in Chapters Two and Three of this Report.

The Committee believes that sentences should be proportionate to the crime an individual has committed. In particular, a minor offence committed at a young age should not be the lifelong source of shame the Committee heard it has been for many Victorians.

Further, the opportunity for individuals to be rehabilitated and to contribute to the Victorian economy is diminished because of the limits on employment opportunities that an older and irrelevant conviction has had on them.

The increasing use of criminal record checks has had the consequence of adding indirectly to the punishment of offenders.

Moira Paterson and Bronwyn Naylor, 'Australian Spent Convictions Reform: A Contextual Analysis', *UNSW Law Journal*, vol. 34, no. 3, 2011, p. 938.

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

² The Terms of reference in full are listed in the preliminaries of this Report.

A legislated spent convictions scheme for Victoria, or a framework for Controlled Disclosure of Criminal Record Information, will support the goals of justice, offender rehabilitation, and economic development that all Victorians share, without compromising public safety.

1.1.1 Terminology

During the process of this Inquiry the Committee determined that the term ‘spent’ was the wrong term to explain the purpose and operation of the disclosure framework being proposed. Evidence to this Inquiry suggested that the term ‘spent’ gave the implication that an offence would expire after a period of non-offending. The Committee’s proposed framework is more accurately described as a controlled disclosure framework.

Controlled disclosure frameworks do not erase or suspend an offender’s criminal record information, instead they detail when disclosure of convictions is permitted and when it is not, according to eligibility criteria and prescribed exemptions. For example, eligible older convictions which are no longer relevant to an application or to assessing a person’s character may be protected from disclosure to employers or other third parties, but will never be protected from disclosure to the police or courts.

In 2006, the Office of the Victorian Privacy Commissioner published a report which advocated for a culture shift from ‘forgetting’ convictions to controlled disclosure of this information:

Victoria should introduce legislation designed to address criminal record disclosures holistically, rather than rely on the Victoria Police’s administrative scheme. The language of “spent convictions” is nowadays misleading. Convictions are no longer truly “spent”. Old and minor crimes (as well as non-conviction information) may become relevant, depending on context. A shift is required from “selective forgetting” to “precise, relevant remembering”. Instead of the former focus on suppression with multiple exemptions, it would be more transparent to have a statute that specifies the permitted disclosures and provides for discretion by appropriate decision makes to do justice in the circumstances of every case.³

A 2002 report published by the UK Home Office also recommended changing the language of ‘spent convictions’ to ‘disclosure’ because it better promoted public interest in community safety and also rehabilitation of offenders.⁴

This terminology emphasises that relevance is the key determinant in deciding when disclosure is necessary. This promotes the protection of the community, especially to vulnerable groups, by ensuring relevant convictions related to potential risk are still disclosable. This also aids rehabilitation and reintegration of ex-offenders through

³ Privacy Victoria, *Controlled disclosure of criminal record data*, Office of the Victorian Privacy Commissioner Victoria, 2006, p. 15.

⁴ Sentencing and Offences Unit, *Breaking the Circle: A Report of the Review of the Rehabilitation of Offenders Act*, Home Office, London, 2002.

preventing their criminal record becoming a barrier to employment or education which are essential determinants in reducing recidivism.⁵

The Committee agrees that the purpose of a framework should be to control how sensitive information relating to a person's criminal record is disclosed, not to expire those convictions permanently. Controlling the disclosure of older and irrelevant convictions is important for the effective rehabilitation and reintegration of ex-offenders.

Therefore, the term 'controlled disclosure' will be referred to throughout this report interchangeably with the term 'spent convictions'. The term 'spent convictions' is particularly relevant when referring to schemes in other jurisdictions.

The Controlled Disclosure of Criminal Record Information Framework recommended for Victoria does not intend to limit the information available to the courts or to Victoria Police. The proposed disclosure framework exempts both these bodies from compliance in relation to their work towards the administration of justice, for which complete disclosure of information about individuals may be required.

The controlled disclosure framework proposed by the Committee relates to third parties, such as employers. The Committee believes that the effective administration of justice requires the courts and Victoria Police to have access to information about individuals that may not be relevant to third parties but that may inform their work.

We say that there should be a complete ability for police, in the interests of criminal justice going forward, to rely on similar fact evidence that relates to previous convictions irrespective of when they occurred.

They may be insignificant, they may be many, many years between repeat, but if they are relied on, at times they can provide vital evidence that can lead to the future or present convictions of people for quite serious offences.

Sergeant Wayne Gatt,
The Secretary, The Police
Association of Victoria, public
hearing.

1.2 Overview of spent convictions schemes in Australia

The spent convictions schemes in operation throughout Australia allow people with eligible criminal convictions to have them exempt from disclosure during Police Record Checks, after a set crime-free period has lapsed. This is essentially controlling the disclosure of information that is provided on the check. Controlled disclosure of relevant offences ensures sensitive information related to an older conviction is not used as a basis to deny someone access to employment, housing, travel or other opportunities.

As discussed previously, a 'spent' conviction is not erased from a person's criminal record. In certain circumstances, convictions that are normally not disclosed under a spent convictions scheme will be disclosed. This protects the community's interests and safety.

In all Australian jurisdictions apart from Victoria, spent convictions schemes are prescribed in legislation.

⁵ Privacy Victoria, *Controlled disclosure of criminal record data*, p. 15.

In law, a conviction is a formal declaration by a court that someone is guilty of a criminal offence. However in some jurisdictions the definition of ‘conviction’ for the purposes of a spent convictions scheme is broader and can include non-custodial sentences, good-behaviour bonds and findings of guilt without a conviction.

In Victoria, all information about a person’s involvement with the criminal justice system is kept on record on Victoria Police’s Law Enforcement Assistance Program (LEAP) database. This includes all interactions, including when a person is a victim of a crime. LEAP is used to record all crimes reported to police and also information about family incidents and missing persons.⁶

A person’s criminal record includes information about all offences committed, not just criminal convictions. This includes:

- minor infringements, such as traffic offences
- fines
- current investigations
- pending charges
- findings of guilt when a conviction was not recorded (such as diversionary programs and community corrections orders).

For the purposes of a spent convictions scheme, or in the case of the Committee’s proposal a controlled disclosure framework, it is important to understand and include all contact with law enforcement agencies that may appear on a police record and that should be included in a proposed framework.

In Chapter 2 of this Report each section begins with an overview of the approach that each jurisdiction in Australia has in place. This jurisdictional comparison includes details about the Victoria Police Information Release policy.

1.2.1 Police Record Checks

A Police Check discloses a person’s criminal history within the parameters of a ‘spent convictions’ or controlled disclosure approach. Further information about a person’s criminal history will be disclosed if required by specific types of checks or legislation. For example, under Victoria Police’s Information Release Policy, this includes:

- checks under various legislation, including Working With Children Checks
- registration for certain employment such as the Victorian Institute of Teaching or as a marriage celebrant
- employment or voluntary work with children or vulnerable people

⁶ Victoria Legal Aid, *Criminal records*, July 2016, <<https://www.legalaid.vic.gov.au/find-legal-answers/going-to-court-for-criminal-charge/possible-outcomes-for-criminal-offences/criminal-records>> accessed 23 July 2019.

- circumstances where releasing information is considered in the best interests of security, crime prevention or the administration of justice
- traffic offences that resulted in imprisonment or detention.⁷

The exclusions in full under the Victoria Police policy are listed in Chapter 2 of this Report.

Police checks are primarily performed by employers during staff recruitment. Police checks are also used for the purposes of licensing and registration. In the 2017–18 financial year, Victoria Police performed 716,768 police checks.⁸

A police check cannot be obtained by a third-party without the individual's consent. This does not apply to information shared between police forces and other organisations responsible for law enforcement or the administration of justice.⁹

A police check is conducted by the jurisdiction that is making the request. The jurisdiction will then request criminal details from other Australian jurisdictions. When a police record check is conducted over multiple jurisdictions, the relevant policy for each jurisdiction is applied to the request.

1.2.2 Relationship with spent conviction schemes

If a person has prior criminal convictions,¹⁰ these will be disclosed on a National Police Check. A 'spent' conviction is one that is not disclosed on a police check.

Each Australian jurisdiction has its own criteria for how and when a conviction becomes spent from disclosure on a person's National Police Check. Broadly the criteria typically consider:

- the type of offence, as serious offences are generally never able to be spent
- the length of any prison sentence
- an elapsed 'waiting period', where the person has not received any further convictions
- whether the offence was committed as an adult or a juvenile.

The Victoria Police Information Release Policy was first established in 1994 and is discussed in Section 1.3.2 below. Chapter 2 of this report provides a detailed comparison of each jurisdiction's spent convictions scheme. The Victoria Police Information Release Policy is included in the jurisdictional comparison.

⁷ Victoria Police, *National Police Certificates: Information release policy*, Victoria Police, Melbourne, 2019, pp. 1–2.

⁸ Victoria Police, *Annual report: 2018–19*, Docklands, 2018, p. 12.

⁹ Victoria Police, *National Police Certificates: Information release policy*, p. 1.

¹⁰ Note, in Victoria any finding of guilt at a court (even without conviction) is considered a 'conviction' under the Victoria Police Information Release Policy.

1.3 Spent convictions in Victoria

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

In the absence of legislation, Victoria Police have developed an internal administrative policy which contains guidelines for non-disclosure of an individual's past offences in certain circumstances. This is discussed in Section 1.3.2 below.

1.3.1 Background and previous attempts

There have been a number of attempts to introduce a legislated spent convictions scheme in Victoria as well as nationally, however none have eventuated.

In 1987, the Australian Law Reform Commission recommended a model for spent convictions at the federal level. The Commission suggested this should be adopted by all states and territories for national consistency.¹¹ However, the committee of Attorneys-General were unable to agree on the precise details of a model law. As a result, no scheme was adopted.

Since 2004, the Australian Standing Committee of Attorneys-General has considered developing a national uniform model of spent convictions. However the Law Institute of Victoria noted that little progress has been made since 2009 towards establishing a national scheme.¹²

There have been past attempts at introducing a legislative framework in Victoria, however none have eventuated. In 2004, Victoria postponed adopting a spent convictions scheme due to discussions on a national uniform spent convictions Bill.

In 2008, the Council of Australian Governments issued requirements to all state-level jurisdictions to consult on draft legislation, and released a model Spent Convictions Bill in 2009. However all jurisdictions aside from Victoria chose to continue with their existing schemes or introduce new state-based legislation.¹³

In 2009 the Victorian Government released an exposure draft bill based on the national uniform model bill. However, the draft bill did not progress beyond the consultation stage.

In 2017, a Private Members Bill¹⁴ was introduced into the Victorian Legislative Council. However it did not proceed to the second reading stage and subsequently lapsed when the 58th Parliament expired in 2018.

¹¹ Australian Law Reform Commission, *Spent convictions*, Report No. 37, Australian Government Publishing Service, Canberra, 1987.

¹² Law Institute of Victoria, *Submission 8*.

¹³ Rights Advocacy Project, *A legislated spent convictions scheme for Victoria: Recommendations for reform*, report prepared by Criminal justice team, Rights Advocacy Project, report for Liberty Victoria, Liberty Victoria, 2017, p. 13.

¹⁴ Spent Convictions Bill 2017 (Vic).

A second Private Members Bill¹⁵ was introduced into the Legislative Council in 2019 and was read a first and second time. At the time this report was tabled, the Bill was listed on the Notice Paper to begin the second reading debate.

1.3.2 Victoria Police Information Release policy

In the absence of legislation Victoria Police developed an Information Release Policy for police record checks in 1994. The Victoria Police Information Release Policy Information Sheet can be found at Appendix 4 of this report.

The Policy contains general provisions on information Victoria Police will provide during police record checks for employment, occupation-related licensing or registration, and volunteer work.¹⁶

Mr Varuna Weerasekera, Group Manager, Records Services Division at Victoria Police, stated at a public hearing that the Information Release Policy 'is largely based on the commonwealth's spent convictions scheme'.¹⁷

The Victoria Police Information Release Policy has no basis in Victorian legislation but is rather an internal administrative policy.

Under the Policy, Victoria Police will disclose a person's criminal history including any finding of guilt in any court. This includes cases where an individual does not receive a conviction, such as a finding of guilt without conviction or a court order such as a community corrections order. In addition, Victoria Police will also disclose if an individual is under investigation or pending charges, although it is noted on the check that these matters cannot be regarded as a finding of guilt.¹⁸

Under the policy, no details of past offences will be released after 10 years have elapsed if the individual was 18 years or over when last found guilty of an offence. If the individual was under 18 years of age when last found guilty, no details of offences will be released if 5 years have since elapsed.

The policy takes an approach to disclosure, whereby if one's last offence qualifies for release, all findings of guilt will be released, including juvenile offences.¹⁹ Stakeholders such as the Law Institute of Victoria, Liberty Victoria and Woor-Dungin objected to this element of the policy.

¹⁵ Spent Convictions Bill 2019 (Vic).

¹⁶ Victoria Police, *National Police Certificates: Information release policy*, p. 1.

¹⁷ Mr Varuna Weerasekera, Group Manager, Records Services Division, Public Support Services Department, Victoria Police, public hearing, Melbourne, 29 May 2019, *Transcript of evidence*, p. 12; *ibid.*

¹⁸ Victoria Police, *National Police Certificates: Information release policy*, pp. 1-2.

¹⁹ *Ibid.*, p. 2.

1.3.3 Issues with an administrative scheme

As discussed in Section 1.3.2 above, in the absence of a legislated spent convictions scheme Victoria Police developed an Information Release Policy to guide what types of convictions are released during a Police Record Check. Under the policy convictions are no longer disclosed once certain eligibility requirements are met, which are based primarily on the time since conviction, the seriousness of the conviction and the incarceration period.

Victoria Police is responsible for determining what can be released in various contexts, including on a National Police Certificate when they receive an application.

The Committee heard from a number of stakeholders, and individuals, that there are a number of issues with a policy-based scheme implemented by a law enforcement agency.

At a public hearing Ms Julia Kretzenbacher, Vice-President of Liberty Victoria stated that the scheme causes an administrative burden for Victoria Police and in practice, because disclosure is determined on a discretionary basis leading to a lack of transparency. In the experience of Liberty Victoria and other stakeholders this can also lead to a lack of consistency in how convictions become spent:

... last year there were 700,000 Victorian police checks, and each of those checks requires that discretionary judgement of someone in the office. It takes many layers of internal discussion as well, because there will be differing views about whether something is or is not relevant and should be disclosed. So that also goes to senior management of Victoria Police, and the legislation will clarify that process, make it clearer, and also because it is automatic would take that administrative burden off Victoria Police and offer more transparency.²⁰

In its submission to this Inquiry Justice Connect commented on the arbitrary nature of Victoria Police's policy:

The discretion that police currently have over what they decide to release in a criminal record check is opaque and can cause uncertainty, particularly as it may depend on how the assessing officer categorises the purpose of the check.²¹

Liberty Victoria's Rights Action Project also argued that the lack of clarity about what is disclosable under the Information Release Policy hinders the ability of legal services to give their clients meaningful advice:

Currently, disclosure is governed by the Victoria Police's internal Information Release Policy – which is opaque and inconsistent. As a result, lawyers struggle to give their clients meaningful advice about the impact that a minor offence may have on their lives.²²

²⁰ Ms Julia Kretzenbacher, Vice President, Liberty Victoria, public hearing, Melbourne, 1 July 2019, *Transcript of evidence*, pp. 9-10.

²¹ Justice Connect, *Submission 29*, p. 4.

²² Liberty Victoria, *Submission 16*, p. 1; *ibid.*

In the Committee's view this is an important consideration in developing a legislated controlled disclosure framework.

1.4 Why do we need a legislated controlled disclosure framework for Victoria?

In 2017–18 Victoria Police processed 54,753 direct applications for National Police Certificates.²³ This number does not include the number of Victorians whose criminal history was released in relation to a National Police Certificate application.²⁴ Data provided by Victoria Police suggests that approximately 5% of applications for the purposes of employment, occupational licensing or registration or voluntary work have offences spent under the Information Release Policy.²⁵

Currently, there is insufficient data available to measure how many people would be immediately eligible to have their convictions protected from disclosure, with the introduction of a disclosure framework in Victoria. However, data from the Australian Bureau of Statistics provides a conservative estimate of how many Victorians would be eligible under the Committee's proposed Controlled Disclosure framework if the maximum sentence eligible was 30 months.²⁶ The timeframe of 2012–2018 was selected because data is available from that period and to ensure consistency in measuring the number of people who may be eligible for controlled disclosure by factoring in:

- Convictions measured by sentence length²⁷; and
- Capacity to exclude sexual offences from measurement.

From 2012–2018, 519,222 people were found guilty of an offence in a Victorian court and received a non-custodial order (such as a fine or community service order). The total number of people found guilty in the same period who received a custodial order was 33,225. The total number of people eligible for controlled disclosure during 2012–2018 is approximately 552, 447. Under the Committee's proposed eligibility requirements and were the 30 months sentence length chosen, all of these convictions would be eligible for controlled disclosure once the crime free period had lapsed.²⁸

It is a life sentence after the sentence has been served.

Uncle Wenzel Carter,
Aboriginal Cultural Support
Worker, Woor-Dungin, public
hearing.

I think one of the benefits of this spent convictions scheme is that it gives people like me hope, and that is what we all need.

Mr Leigh Simpson, public
hearing.

²³ Ms Sally Harris, Senior Legal Policy Advisor, Inquiry into a Legislated Spent Convictions Scheme hearing, response to questions on notice received 13 June 2019, p. 1.

²⁴ Ibid.

²⁵ Ibid.

²⁶ This data includes findings of guilt in all Criminal Courts (including Children's Court), except for sexual offences.

²⁷ Current statistics from the ABS measure by a mix of months and years for sentence lengths. Therefore, there may be a margin of error in statistics for custodial orders.

²⁸ Australian Bureau of Statistics, *Criminal Courts*, 2018, <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/DSSbyCollectionid/8E2BEC29E3A8CAC9CA256BD00027E527>> accessed 15 August 2019.

1.4.1 The purpose of sentencing and convictions

A key purpose of sentencing is to record an individual's crime. Recording and collecting information about an offence is very important for law enforcement agencies during the investigation process. In particular, data collection is useful in protecting community interests by allowing law enforcement agencies to track potentially harmful recidivists.²⁹ It can also be used to determine the appropriate sentence severity when someone reoffends.³⁰

Accessing a record of an individual's offences is also increasingly used to determine their suitability for employment. This is particularly important for jobs which involve direct contact with vulnerable people, such as the elderly and children.

A number of sentencing principles have been developed which form the basis of sentencing decisions in Victoria and across Australia. These include punishment, encouraging rehabilitation and to deter the offender (specific deterrence) or other people (general deterrence) from committing offences.³¹

Rehabilitation of offenders is reflected in section 8(1) of the *Sentencing Act 1991*.³² This gives courts discretion to determine and take into account if the 'economic and social well-being' of a person may be adversely effected by imposing a criminal conviction. This is achieved through recording a finding of guilt without conviction.

Section 8(1) of the Act is as follows:

8 Conviction or non-conviction

- (1) In exercising its discretion whether or not to record a conviction, a court must have regard to all the circumstances of the case including –
- (a) the nature of the offence; and
 - (b) the character and past history of the offender; and
 - (c) the impact of recording of a convictions on the offender's economic or social well-being or on his or her employment prospects.

The Committee found that the Victoria Police policy may be contrary to the intentions of the courts.

Under the policy, findings of guilt without conviction are disclosable and can appear as part of a person's criminal record. According to the Law Institute of Victoria, this undermines the intentions of section 8(1) of the *Sentencing Act 1991*:

²⁹ Sentencing Advisory Council, *Sentencing Principles, Purposes, Factors*, January 2017, <<https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-process/sentencing-principles-purposes-factors>> accessed 27 June 2019.

³⁰ Ibid.

³¹ Ibid.

³² *Sentencing Act 1991* (Vic) s 8(1).

... a lack of formality and legislative structure has led to inconsistent and confusing outcomes. A spent convictions legislative scheme would be a more appropriate way of consolidating when, and under what terms, a conviction is considered spent or when a conviction/ non-conviction should be disclosed. ... Victoria Police disclosure of a person's convictions currently includes where a court has not recorded a conviction – disclosing findings of guilt where no conviction was recorded and outcomes where a person was placed on a good behaviour bond following a finding of guilt. This frustrates and undermines the intentions of Parliament and the judiciary in providing for findings of guilt without conviction.³³

A number of Inquiry stakeholders considered that this can undermine the 'rehabilitative' intentions of sentencing. For example, the Law Institute of Victoria stated:

... a criminal record does not always reflect, and potentially undermines, processes of rehabilitation, reintegration and personal change since the offending.

...

By limiting the effects of conviction(s), the 'rehabilitation' aim of sentencing is upheld as the relevance of a criminal conviction diminishes over time. Whilst convictions and sentences are imposed in public, they become part of one's private life as time goes on, particularly when there has been no further offending.³⁴

At a public hearing, Mr Leigh Simpson reflected that a benefit of a legislated spent convictions scheme is that it would allow for 'effective rehabilitation':

So when you talk about rehabilitation, and effective rehabilitation of people who have offended, having a conviction against your name and having an employer question your character is not something which is going to help with rehabilitation, and it actually defeats people.³⁵

After a certain period without offending, the importance of rehabilitation can outweigh the risk to the public of not disclosing an old conviction for a minor offence. A controlled disclosure framework recognises that the relevance of a conviction to predicting future behaviour diminishes over time.

Further, a clear spent convictions scheme, or controlled disclosure framework, has the ability to enable rehabilitation and deter from reoffending:

Spent convictions limit the ongoing stigma of a conviction after punishment has been delivered and an appropriate period of time has passed. They enable the rehabilitative and deterrent purposes of punishment to have a real and practical outcome. In this way, offenders are encouraged to rehabilitate themselves in the pursuit of a clean record and they are deterred from reoffending as it would open up disclosure of all their prior offences.³⁶

³³ Law Institute of Victoria, *Introduction of spent conviction legislation in Victoria*, submission to Hon. Martin Pakula MP, Attorney-General, 2015, p. 2.

³⁴ *Ibid.*, p. 5.

³⁵ Mr Leigh Simpson, *Transcript of evidence*, p. 2.

³⁶ Rights Advocacy Project, *A legislated spent convictions scheme for Victoria*, p. 1.

The courts have a primary role to play in determining whether an individual's contact with police should be recorded on their criminal history or whether the goals of rehabilitation would be better served if they were not. The Committee found that a lack of legislation meant there is insufficient certainty for stakeholders, transparency, or relationship to sentencing principles in the current system in Victoria. The Committee believes that the government has a role to play in implementing clear legislation for a Controlled Disclosure of Criminal Record Information Framework in Victoria and should do so as a matter of urgency.

1.4.2 Criminal record stigma

The stigma associated with a criminal record can adversely impact the opportunities for rehabilitation and reintegration for an ex-offender. It can also cause discrimination by employers, peers and wider society.

A 2006 report by Privacy Victoria found that the current disclosure policy governed by Victoria Police may be 'unduly prejudicial':

The current administrative scheme for disclosing police checks appears to allow for the disclosure of information that may no longer be relevant or may be unduly prejudicial. There is no legislative bar against disclosing old, minor offences – despite years of good behaviour. On the contrary, the policy allows for disclosure of old convictions, including those committed as a juvenile when these are revived by an offence committed much later in life – even where the later offence resulted in a finding of guilt without conviction.³⁷

In my experience, victims of crime do not necessarily seek the 'throw away the key' outcome for offenders who have committed criminal offences against them.

What the vast majority of victims of crime want is to prevent what happened to them from happening to anyone else.

Mr Greg Davies, Former Commissioner, Victims of Crime Commission, public hearing.

Several stakeholders also acknowledged the stigma attached to having a criminal record which poses a significant barrier to an individual's rehabilitation and reintegration back into wider society. Former Victims of Crime Commissioner Mr Greg Davies told the Committee that a spent convictions scheme can remove stigma associated with having a criminal record. According to Mr Davies this may allow an individual to pursue 'legitimate activities rather than eventually lapse back into a life of unlawful behaviour'.³⁸

Professor Bronwyn Naylor, Professor of law at RMIT University, believed a criminal record can have a 'credentialling effect' on individuals where it becomes the dominant characteristic that they are associated with.³⁹

³⁷ Privacy Victoria, *Controlled disclosure of criminal record data*, p. 11.

³⁸ Mr Greg Davies, *Transcript of evidence*, p. 23.

³⁹ Bronwyn Naylor, 'Do Not Pass Go: The impact of criminal record checks on employment in Australia', *Alternative Journal*, vol. 30, no. 4, 2005, p. 176.

The stigma associated with this leads to exclusionary practices which effect an ex-offender's rehabilitation and reintegration. Stigma and discrimination associated with a person having a criminal record can create barriers to employment and housing. These are the key factors that contribute to an individual's rehabilitation and that prevent them from re-offending. This is discussed in more detail in Section 1.4.3 below.

In her submission to this Inquiry, Professor Naylor expressed that a criminal record becomes an 'indefinite sentence' for ex-offenders because of the stigma associated with a conviction:

... a person who has committed a crime and served their sentence has carried out the punishment required by society; they have 'done their time'. The court in sentencing decides on the sentence that reflects the appropriate punishment for the offence. The court record should not then become an 'indefinite sentence', continuing to punish the person for life.

Ms Julia Kretzenbacher, Vice President, Liberty Victoria discussed the benefits of a spent convictions scheme in preventing discrimination and promoting rehabilitation:

...we are of the view that there are moral reasons for why it [a spent convictions scheme] is important. There is stigma associated with a conviction, and that can stay with someone indefinitely. It disproportionately affects certain members of our community, like young people and Indigenous people, and we say that the introduction of a spent convictions scheme in Victoria, one that has been carefully drafted with appropriate protective measures to reach a balance between rehabilitation and protection of the community, would help prevent unfair discrimination for many Victorians who are vulnerable.⁴⁰

Convictions have an impact on the individual but also on the community and importantly on families. It impacts on a family in such a way that it almost destroys it.

If someone has been a model prisoner, done the time, educated himself in prison, why can't a person putting in so much good work get their convictions spent? There has to be recognition of being a model prisoner and so on.

This is also about the rehabilitation of the whole family and community.

Mr Will Pickett Sr, site visit, Winda-Mara Aboriginal Corporation, Heywood.

Rehabilitation is a central goal of the criminal justice system. Removal of a criminal record under a spent convictions scheme is therefore an important element: it 'serves to "de-label" a person ... it is about reinstating the person as a law-abiding citizen.'

Bronwyn Naylor, 'Do Not Pass Go: The impact of criminal record checks on employment in Australia', *Alternative Journal*, vol. 30, no. 4, 2005, p. 176.

⁴⁰ Ms Julia Kretzenbacher, *Transcript of evidence*, p. 10.

Case Study: Will

Will was convicted of armed robbery and sentenced to 7 years imprisonment, with a non-parole period of 4.5 years. During his incarceration Will participated in a large number of activities aimed at rehabilitation and developing skills aimed at preventing reoffending and contributing positively to society. Will was personally determined to be a model prisoner, and achieved that through designation as the safest possible category of prisoner.

Since his release, Will has faced public discrimination from community members, and employment and licensing barriers. This is despite his ongoing commitment to giving back to his community and pursuing his own growth and rehabilitation.

During the site visit to Winda-Mara, Will told the Committee that:

You can do all the other things, get employment, but without getting your conviction spent, I see that as the final step, without that final step, you're always a prisoner, you're always still a convicted felon. Having this spent conviction I believe is the last step of rehabilitation.⁴¹

Will was concerned that without community support, the lack of opportunities and prevalent discrimination he was experiencing would cause him to reoffend:

If it wasn't for this community we're in now, my family and I, well I'd be back in prison.⁴²

Will is a respected and valued member of his community.

At the time of writing this report, Will is waiting for the outcome of his WWCC application and is concerned that he will receive a negative notice. This would disrupt his current employment and volunteer opportunities at which he is excelling. Will's dream job is to work with street kids to help them escape their situation and improve their prospects and to give them the benefit of everything he has learnt.

At a public hearing in Shepparton, the Committee heard from the Reverend Chris Parnell, secretary of the Ethnic Council of Shepparton and executive officer of the Shepparton Interfaith Council. He described what he believed to be the Committee's role and the purposes of a 'spent convictions' framework. Rev. Parnell focused on the values of the community and acknowledgement that an offender has worked to meet community standards:

I just want to say one other thing about your role and your task, and that is that when you set a period after which a conviction can be spent, you are giving a message out to the community that these people have learned to manage their minds, they have picked up the values of the community, and with juveniles or with adults, whether it is a five-year or a 10-year, you are saying that they have managed to be crime free in that period and they have managed to engage in self-discipline, self-respect and self-sacrifice and take on the values of the community. What people see in terms of

⁴¹ Mr Will Pickett, site visit, Winda-Mara Aboriginal Corporation, 6 August 2019.

⁴² Ibid.

behaviour is based on choices, and choices are guided by values. So people, in terms of rehabilitating themselves after an offence, can exhibit that behaviour and exhibit that sort of language that expresses what you are looking for in a community in terms of integration, acceptance and self-rehabilitation. So there is a sense there in which you are saying these people meet a community standard. In terms of the objectives of good government you are saying with the spent convictions legislation that you are protecting the community.⁴³

The Committee heard from a number of stakeholders that providing transparency around whether someone's conviction would be eligible for controlled disclosure would provide an important incentive for rehabilitation.

Mr Will Pickett Sr. told the Committee during a visit to the Winda-Mara Aboriginal Corporation in Heywood that a clear expectation of access to a controlled disclosure framework would be a positive a source of encouragement for ex-offenders:

It's good to have a goal to reach through a spent convictions scheme. We're encouraging our kids to do good work and to rehabilitate, but I believe that they have to be working towards something, a recognition and the possibility their conviction can be spent.⁴⁴

Ms Teresa Rogers, an Intake and Engagement/Work for the Dole consultant from WDEA Works also explained that having clear legislation around controlled disclosure would provide clarity and incentive for her clients:

We can work towards employment opportunities with a client knowing that their conviction within a particular timeframe will no longer be relevant.⁴⁵

In an article published by the European Journal of Probation, Professor Bronwyn Naylor explained having a conviction 'spent' can act as a formal acknowledgement of someone's rehabilitation. This provides further incentive not to reoffend in the future. Professor Naylor wishes to highlight:

...the value of having at least an official finding that a conviction has been 'spent'. Whilst this is hardly the formalised positive recognition of a person's desistance and their welcome into full citizenship ... a statement of forgiveness – it would give certainty to offenders that much of their past is now officially 'forgotten'.⁴⁶

The Committee's proposed Controlled Disclosure of Criminal Record Information Framework does not advocate for permanently erasing an individual's record. However, protecting information regarding an older and irrelevant conviction from disclosure is important for encouraging the rehabilitation of offenders. Acknowledging that someone's criminal record information is eligible for protection from disclosure in most circumstances recognises the efforts they have made towards their rehabilitation and

⁴³ Reverend Chris Parnell, Secretary, Ethnic Council of Shepparton, public hearing, Shepparton, 15 July 2019, *Transcript of evidence*, p. 26.

⁴⁴ Mr Will Pickett Sr, site visit.

⁴⁵ Ms Teresa Rogers, WDEA Works, site visit, Winda-Mara Aboriginal Corporation, Heywood, 6 August 2019.

⁴⁶ Bronwyn Naylor, 'Criminal Record and Rehabilitation in Australia', *European Journal of Probation*, vol. 3, no. 1, 2011, p. 91.

reintegration. Most importantly, it is a formal acknowledgment of their sustained and ongoing ability not to reoffend.

1.4.3 Barriers to employment and housing

The Committee found that individuals often carry the stigma or shame of a conviction for their whole life despite how minor the offence was, how far in the past it occurred, and out of proportion to what society would deem necessary.

In its submission to the Inquiry the Law Institute of Victoria stated that a criminal record has a negative impact on an individual's capacity for accessing employment and accommodation. These are the important factors that are connected to reducing recidivism and offending:

Applicable analysis in regard to reducing recidivism would be to refer to the impact that a criminal conviction has on the significant factors that reduce re-offending and being able to access accommodation and employment. Regarding accommodation, there are no laws preventing landlords and real estate agents from requiring applicants to submit a criminal record check upon application to lease a property. Similarly, mortgage lenders often take criminal records into consideration before approving a loan.

The impact employment has on recidivism is also well established. It provides tangible benefits of income and structure. In addition, it provides the intangible benefits of a connection to law abiding society which reinforces norms, aspirations and values, as well as improving an individual's self-esteem.⁴⁷

This was reiterated by Professor Bronwyn Naylor who says that employment opportunities and access to accommodation is an important determinant in reducing rates of recidivism:

Key factors in reducing most types of recidivism are accommodation and employment. Employment brings income and structure, but also a connection to society, self-esteem, and a community of peers reinforcing 'legitimate' norms and values.⁴⁸

At a public hearing Mr Dan Wright from MADEC Australia told the Committee that the clients of their employment agency who adjusted the most quickly were those who gained employment soon after release:

In terms of this subject criminal convictions is probably becoming one of the most prevalent barriers to employment to a lot of our clients. The convictions may vary.

However, in the degree of seriousness there is no bias. As an example, a person may have a minor one-off charge from some time ago and not have committed another crime since.

The issue is their crim check needs to be clean in most case scenarios to obtain suitable employment. It is inhibiting the jobseekers and only costing our state and country more money as the clients will sit and probably be welfare dependent for longer.

Mr Dan Wright, Site Manager, MADEC Australia, public hearing.

⁴⁷ Law Institute of Victoria, *Submission 8*, p. 6.

⁴⁸ Naylor, 'Do Not Pass Go: The impact of criminal record checks on employment in Australia', p. 174.

I have got examples of recently released clients from prison that have been able to adjust to society immediately. They gain suitable employment simply because the employer knows their history and they will give them a go.⁴⁹

Mr Wright explained how a criminal record can be a barrier to employment under the Work for the Dole program:

We have probably got some really good examples around work for the dole. So we have had some clients that could contribute, and whether it is working at St Vincent's or out at Rumbalara, something like that, just in an activity. They have not been able to because of it, and it may have been as simple as drink-driving and they have not been able to contribute.

...

That is what work for the dole is about – getting a chance to live and breathe what it is like to work and getting that opportunity and getting a second chance.⁵⁰

Ms Teresa Rogers from WDEA Works, an employment services provider in the Western District, also told the Committee that criminal records are a significant barrier to accessing activities under the Work for the Dole program. This interrupts the progress towards rehabilitation being made and is a 'roadblock for employment' throughout the program.⁵¹ She recommended a context-based examination of an individual's criminal record based on the relevance of the conviction to the inherent requirements of the job. Ms Rogers also emphasised the need for a consideration of the steps taken towards rehabilitation and other contributions to society made by ex-offenders.

In its submission the Sacred Heart Mission stated that ex-offenders' criminal record exacerbates their social exclusion. The Mission also advised there is a belief that an individual with a criminal record is an 'undesirable' employee even if the convictions are irrelevant to the inherent requirements of the job:

In our work, we are well versed in the risks and impacts for community members who cannot obtain employment and stable housing. The 'undesirability' of business taking on an employee with a criminal record is profound within society. Many organisations, including our own require police checks to hire employees, and many individuals in Victoria would be unsuccessful based on a historical conviction that is not relevant to the role. The severity of the offence itself, or the time since it occurred becomes irrelevant to the employer and individuals are not given the opportunity to explain that they have changed and learnt from their mistake since the offence occurred, particularly for offences as young people.⁵²

The lack of a spent convictions scheme currently exposes those who have transgressed the law at times often long in the past to ongoing adverse impacts, especially in the area of employment.

Goulburn Valley Community Legal Centre, *Submission 3*, p. 1.

⁴⁹ Mr Dan Wright, Site Manager, MADEC Australia, public hearing, Shepparton, 15 July 2019, *Transcript of evidence*, p. 10.

⁵⁰ *Ibid.*, p. 13.

⁵¹ Ms Teresa Rogers, site visit.

⁵² Sacred Heart Mission, *Submission 24*, p. 1.

Case Study: David (pseudonym)

In 1979, at the age of 20, David trespassed onto a local wood yard to steal some timber which he wanted for the purpose of carrying his boat on the roof of his car. He received a finding of guilty, without conviction, for committing offences related to theft and being unlawfully on a premises. He was given, and completed, a good behaviour bond. At the time David received legal advice that his criminal record would be cleared following the completion of his 12 month good behaviour bond.

Approximately 10 years later, David contacted Victorian police to enquire about his criminal record. He was advised that his offence still appeared on his record despite completing a good behaviour bond. At a public hearing for this Inquiry David expressed to the Committee that:

From that day forward I have felt let down by the courts, distrustful of the police reporting system and concerned regarding my future employment prospects. Who could request this information? What information would be disclosed, to whom and under what circumstances? I certainly did not know the rules.⁵³

Following a redundancy in 2015, David applied for multiple positions which required he consent to a National Police History Check. This included a position which required a working with children check which he passed.

In the same year, David applied to become a Victorian bus driver. As part of the application process he consented to a National Police History Check. Whilst waiting for the results of his police check David spent a number of sleepless nights concerned about the response he would receive from his employer if his police check showed his record from 1979.

The check disclosed the offences from 1979, including the court result specifying that all charges were adjourned on a good behaviour bond.

In his submission to this Inquiry Mr Brett Halliwell on behalf of David stated:

Having recently celebrated his 60th birthday, for almost 40 years David has experienced shame unnecessarily in carrying a criminal record.⁵⁴

The Sacred Heart Mission also described how discrimination on the basis of a criminal record occurs when an individual attempts to access housing:

Discrimination in access to housing is more subtle. According to the Office of the Australian Information Commissioner (OAIC), real estate agents can only collect “personal information that is necessary for its functions or the competitive nature of rental applications”, particularly in the current environment of a housing supply shortage, means that applicants with unstable employment or rental histories (such as no fixed address, or gaps in rental history which could include a period of incarceration), or who are in receipt of government benefits simply won’t be considered as desirable

⁵³ Mr David Jones, public hearing, Melbourne, 19 June 2019, *Transcript of evidence*, p. 2.

⁵⁴ Brett Halliwell and David Jones, *Submission 14*, p. 4.

applicants. Ultimately, real estate agents do not have to provide a direct reason as to why applications are unsuccessful, and it is very difficult to prove covert discrimination has occurred.⁵⁵

A legislated framework for controlled disclosure would help address the disadvantage and discrimination ex-offenders face by removing potential barriers to employment, education and housing caused by a criminal record. In particular, such a framework would promote rehabilitative sentencing principles whilst still protecting public safety. This aligns with the rehabilitative aims of the *Sentencing Act 1991*.

A controlled disclosure framework also serves wider societal needs through encouraging greater reintegration into the community of ex-offenders. This gives individuals the opportunity to contribute to their community through work, education or in other ways. This was reflected by Justice Connect in its submission to this Inquiry:

An appropriately drafted spent convictions scheme will allow more people to contribute positively to society; to progress with rehabilitation including by being able to secure work. Paid employment supports gaining and retaining secure housing, among other benefits. Volunteering not only helps to mitigate social isolation (both of those who volunteer and those supported through the efforts of volunteers), it can also be a pathway to paid employment.⁵⁶

The submissions provided to the Committee and evidence received at Hearings outlines the views of many stakeholders who universally believe that a controlled disclosure framework will lead to positive outcomes for offenders, society, and the Victorian economy.

1.4.4 The role of employers

The Committee heard evidence during the course of the Inquiry that employers are more frequently using Police Record Checks to determine the character of potential employees. This is evident in data which indicates a 20,000% increase in criminal record checks between 1993 (approx. 3,500) and 2016/17 (approx. 700,000).⁵⁷

Employers are increasingly asking to see criminal record information. Their goal is to ensure that they can identify individuals that may not be of good character and to mitigate risks to their organisation through that assessment. The Committee believes that this is important. However, as suggested below by Professor Naylor in her submission to the Committee, it should be targeted to actual risk and relevance to the field of employment:

The requirement for a criminal record check is at times used as a routine form of risk management. However it should be recognised that the link between a history of offending (including old and minor offending) and any actual risk cannot be assumed: at the same time a person may pose a risk to a workplace despite having no prior

⁵⁵ Ibid.

⁵⁶ Justice Connect, *Submission 29*, p. 2.

⁵⁷ Woor-Dungin Criminal Record Discrimination Project, submission to Aboriginal Justice Forum 49, 2017, p. 9.

formal criminal justice engagement. Employers need to address risk in appropriate and effective ways, such as carrying out thorough reference and other checks before employment, and putting in place appropriate supervision. Any reliance on a record of past offending should be very specific and targeted to actual risk in relation to the specific job. An effective spent convictions scheme, along with anti-discrimination legislation, will assist in this task.⁵⁸

The employer has an important role in the process of risk management through access to criminal record information. However, employers also have an obligation to use the information where it is relevant to the role being sought. This is reflected in information published online by a provider of criminal record information in relation to criminal record checks in Victoria.

Employers are required under anti-discrimination laws and policies to make sure that employees are not unfairly treated or dismissed because of their criminal history.

Ultimately, criminal records should only equip employers to mitigate risks and assess the character of employees and candidates; it should not have a significant bearing on your employability unless your criminal record is directly related to your job description.⁵⁹

However, this information provided by Intercheck Australia on their website is based on broad principles of criminal record disclosure, and does not acknowledge the lack of legislation in Victoria. For example, in Victorian an irrelevant criminal record is not a protected attribute under the *Equal Opportunity Act 2010*. There is recourse to take complaints to the Australian Human Rights Commissioner for discrimination on the basis of an irrelevant criminal record however these go through a conciliation process. This means that decisions and penalties against employers made by the Commissioner are non-binding and non-enforceable.

The Committee believes that the role of the employer is certainly to mitigate risk at their workplace; however this can be done without compromising opportunities for individuals with irrelevant convictions.

1.4.5 Benefits of a controlled disclosure framework to the Victorian economy

As mentioned in section 1.4.3 above, increased access to employment reduces rates of recidivism by allowing ex-offenders to participate in society through 'legitimate' means. Not only does this have social benefits for the wider community by promoting rehabilitation and reintegration, it can also have wider economic benefits for the Victorian economy.

According to the Sentencing Advisory Council, 43.6% of people released from prison in Victoria during 2014–15 returned within two years (2017–2018). This is comparable

⁵⁸ Naylor, *Submission 25*, p. 8.

⁵⁹ Intercheck Australia website, <<https://policecheckexpress.com.au/resources/a-guide-to-criminal-records-in-victoria>>

to the national average of 44.8% over the same period.⁶⁰ A large number of stakeholders, including the Victorian Aboriginal Child Care Agency,⁶¹ the Law Institute of Victoria⁶² and Fitzroy Legal Service,⁶³ linked recidivism with unemployment rates amongst ex-offenders. This was further connected to perceived discrimination and stigma associated with having a criminal record as discussed above in sections 1.4.2 and 1.4.3.

In 2016 the Council of Australian Governments published the 'Prison to work report' which examined the rates of employment for indigenous and non-indigenous ex-offenders. The report found that in the month prior to imprisonment 60% of indigenous offenders were unemployed compared to 43% of non-indigenous offenders. In the two weeks following release 67% of indigenous ex-offenders were not in paid work compared to 59% of non-indigenous ex-offenders.⁶⁴

The Council noted that criminal records were a significant barrier to individuals seeking employment. Businesses used a person's criminal history to determine whether they posed a risk to the business and were therefore undesirable employees. This led to ex-offenders taking insecure and unsafe work which did not require checks.⁶⁵ Some ex-offenders were 'effectively self-select[ing]' out of positions because of anticipated stigma and discrimination.⁶⁶ This barrier was exacerbated for indigenous people as it compounded other disadvantages they faced, this will be discussed in more detail in section 1.4.5.

In its submission the Brotherhood of St Laurence told the Committee that ex-offenders' exclusion from labour market participation has the broader community consequence of them being increasingly reliant on income and welfare support.⁶⁷

Justice Connect expressed its view that a spent convictions scheme would lead to economic benefits for Victoria through increasing the pool of people available for jobs, and through increased market participation and decreasing risk of homelessness for ex-offenders. It stated in its submission:

...safe housing is an essential first step to successfully reintegrating in to the community. However, housing is only one piece of the reintegration puzzle. In order to sustain housing and successfully reintegrate, access employment, whether paid or voluntary,

It is possible to balance this socially and economically worthwhile outcome – more people in paid or volunteer work, and reduction in the associated health and homelessness risks – without undermining the need for appropriate screening checks for people working with vulnerable cohorts.

Justice Connect,
Submission 29, p. 2.

⁶⁰ Sentencing Advisory Council, *Released Prisoners Returning to Prison*, 1 February 2018, <<https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-statistics/released-prisoners-returning-to-prison>>, last accessed 28 June 2019.

⁶¹ Victorian Aboriginal Child Care Agency, *Submission 28*.

⁶² Law Institute of Victoria, *Submission 8*.

⁶³ Fitzroy Legal Service, *Submission 41*.

⁶⁴ Council of Australian Governments, *Prison to Work report*, Commonwealth of Australia, 2016, p. 17.

⁶⁵ *Ibid.*, p. 44.

⁶⁶ *Ibid.*

⁶⁷ Brotherhood of St Laurence, *Submission 22*, p. 2.

is vital. Given the lack of public and community housing, employment is also essential to enable individuals to sustain private rental properties post-release, which would otherwise be unaffordable.⁶⁸

Justice Connect also highlighted the economic benefit of expanding recruitment pools for volunteer organisations which provide essential community services on behalf of the Victorian government:

...without a sufficient and ongoing pool of volunteers (and paid staff), key services will not be provided to local communities. In economic terms alone, governments rely on these community services being provided. Government regularly contract charities to deliver key social services in the knowledge that their funding leverages greater impact as a result of the volunteer effort these organisations garner.⁶⁹

The Law Institute of Victoria also expressed this view about a legislated framework for controlled disclosure of criminal record information:

...this will open opportunities for volunteering and partaking in activities requiring a Working with Children Check. Typically, such activities benefit both the individual and are largely beneficial to the community. In no longer declaring a prior conviction, this can also result in lower insurance premiums and other expenses, making it easier for individuals to better provide for themselves and their families.⁷⁰

According to the Institute of Public Affairs, Australia spends a total of \$17 billion on justice costs per year.⁷¹ With prisons costing a total of approximately \$4.4 billion each year, with an average national growth of 6.6% annually since 2013-2014.⁷²

According to the Corrections Victoria website, in Victoria the net operating expenditure per prisoner per day during 2017-2018 was \$323.82.⁷³ The net operating expenditure for a Victorian completing a community corrections order was \$32.40 per day.⁷⁴

Increased employment opportunities for individuals allows them to access 'legitimate' means to support themselves and their family, reducing the risks of reoffending. This has an additional economic flow-on effect by potentially decreasing spending on criminal justice, especially prisons.

At the time of writing this report there was no available Australian data related to a cost-benefit analysis of a spent convictions scheme.

However, in 2002 the Home Office in the UK published the 'Breaking the Circle' report which included an example cost-benefit model for their recent changes to criminal

⁶⁸ Justice Connect, *Submission 29*, p. 2.

⁶⁹ *Ibid.*, p. 3.

⁷⁰ Law Institute of Victoria, *Submission 8*, p. 4.

⁷¹ Andrew Bushnell, *Skewed Priorities: Comparing the Growth of Prison Spending with Police Spending*, Institute of Public Affairs, online, 2019, p. 8.

⁷² *Ibid.*, pp. 7-8.

⁷³ Corrections Victoria, *Corrections statistics: quick reference*, 30 June 2018, <<https://www.corrections.vic.gov.au/prison/corrections-statistics-quick-reference>> accessed 29 July 2019.

⁷⁴ *Ibid.*

record disclosure practices. The report is a comparable analysis of potential economic benefits of a controlled disclosure scheme. The Home Office estimated that the benefits to the wider community through expanding the length of sentences eligible for non-disclosure after a prescribed disclosure period lapsed would include:

- savings in welfare costs
- lower reconviction rates due to higher rates of employment for ex-offenders.⁷⁵

The Home Office estimated that employment can reduce reconviction rates by between a half and a third.⁷⁶

The report conservatively estimated £50 million in savings as a result of the changes to disclosure laws. Projected total benefits to the UK economy were approximately £125 million annually, with £68 million available to the public purse.⁷⁷ This was in comparison to a total estimated cost of £11 million, which would come from the public purse.⁷⁸

1.4.6 Impact on indigenous people

The Committee was provided with a copy of a benchmark submission by the Woor-Dungin Criminal Record Discrimination Project endorsed in many other peak body submissions to this Inquiry.⁷⁹ The submission was made to the Aboriginal Justice Forum, and concluded that Aboriginal and Torres Strait Islander people are disproportionately affected by a criminal record.⁸⁰ The negative effects associated with a criminal record are exacerbated in these communities. As well as the effect on individuals, the community itself is effected on a number of levels.

...it is hard to live a life where everyone has respect and admiration for you and then all of a sudden something you did as a teenager is being held against you.

Uncle Larry Walsh, Taungurung Elder, public hearing.

According to Jesuit Social Services Indigenous people made up 9% of the adult prison population in Victoria (as of June 2018) but only account for 0.8% of the Victorian population. In 2016 the unemployment rate in Aboriginal and Torres Strait Islander people (14%) was double that of non-aboriginal Victorians (7%).⁸¹

⁷⁵ Sentencing and Offences Unit, *Breaking the Circle*, p. 89.

⁷⁶ This is based on the Home Office Offenders Index which suggests at the time of writing the report that around 500,000 ex-offenders would fall under the new arrangements.

⁷⁷ Sentencing and Offences Unit, *Breaking the Circle*, p. 91.

⁷⁸ *Ibid.*, p. 93.

⁷⁹ Endorsed by: Goulburn Valley Community Legal Centre, Liberty Victoria, Law Institute of Victoria, Australian Red Cross, Brotherhood of St Laurence, Victoria Legal Aid, Professor Bronwyn Naylor, Jesuit Social Services, Victorian Aboriginal Child Care Agency, Victorian Equal Opportunity and Human Rights Commission, Human Rights Law Centre, Victorian Aboriginal Legal Service and the Federation of Community Legal Centres.

⁸⁰ Woor-Dungin Criminal Record Discrimination Project, p. 51.

⁸¹ Jesuit Social Services, *Submission 26*, p. 2.

Woor-Dungin’s submission to the Aboriginal Justice Forum highlighted that aboriginal people are increasingly disadvantaged by criminal records. It considered the current Victoria Police Information Release Policy as inadequate to support the ongoing and future self-determination of Victorian aboriginals who are disproportionately excluded from employment and other opportunities. However it noted that a legislated framework could address many of the issues raised in their submission:

... changing these laws ... has the potential to address disadvantage on many fronts, including employment and economic participation, self-determination, and health and wellbeing at an individual and community level.⁸²

Woor-Dungin also believed that the absence of a legislated spent convictions scheme in Victoria is a ‘barrier’ to the self-determination of aboriginal Victorians:

Many Aboriginal community-controlled organisations see the absence of spent convictions legislation as a significant barrier to self-determination, because it limits their ability to employ Aboriginal Victorians to meet the growing demand for culturally responsive services to meet the needs of the Aboriginal people, families and communities they support.⁸³

This was reiterated at a public hearing by Mr Stan Winford, Associate Director at the Centre for Innovative Justice at RMIT University. He discussed the problem aboriginal community-controlled organisations can have in employing an aboriginal workforce in the absence of a legislated framework for controlled disclosure of criminal record information:

... Aboriginal community-controlled organisations should be able to employ an Aboriginal workforce to provide culturally appropriate responses ... Constantly all those aspirational policies and programs and all that are undermined by this, and it is just really critical that it gets addressed...⁸⁴

In its submission the Victorian Aboriginal Legal Service stated that an important factor in addressing the overrepresentation of aboriginal people in the criminal justice system, particularly recidivist offenders is to provide employment, education and housing opportunities:

“the barriers to gaining employment and housing are two of the greatest risks to successful reintegration. The barriers to employment for exiting prisoners are serious and include their criminal record, lack of skills, lack of recent work experience and poor education [emphasis in original].” In VALS’ experience, inability to access employment is a key reason why an individual may become trapped in a cycle of reoffending.

We believe that a legislated Spent Conviction Scheme in Victoria presents an opportunity to further the government’s commitment to rehabilitation and reducing recidivism rates for Aboriginal peoples.⁸⁵

⁸² Woor-Dungin Criminal Record Discrimination Project, p. 10.

⁸³ Ibid.

⁸⁴ Mr Stan Winford, Associate Director, Centre for Innovative Justice, RMIT University, public hearing, Melbourne, 1 July 2019, *Transcript of evidence*, p. 54.

⁸⁵ Victorian Aboriginal Legal Service, *Submission 43*, pp. 8-9.

Aboriginal kinship care is provided by relatives or other members of a person's network when that person cannot live with their parents or other primary caregivers. Kinship caring amongst aboriginal communities is important for ensuring people remain connected to their culture and people.

In 2017, the *Working with Children Act 2005* was amended to expand the definition of 'child-related work' to include kinship care arrangements, making it necessary for intended carers to pass a Working With Children Check. In its submission the Victorian Aboriginal Child Care Agency expressed concern that an irrelevant minor conviction can be a barrier to kinship caring and acts as a deterrent to aboriginal community members becoming a kinship carer:

...the safety of our children and young people remains our paramount concern, however where someone has a criminal record for committing an unrelated minor criminal offence, we do not want to further impede their ability to care for their family in a safe and nurturing home. We are aware that someone with a criminal record can become a kinship carer, unless the nature and timing of the criminal offence indicates that there may be a risk to a child's safety. As this must be assessed before a person can be approved as a carer, some Aboriginal people do not feel safe to put themselves forward.⁸⁶

This was echoed by Uncle Larry Walsh, a Taungurung Elder, at a public hearing where he reflected that his own criminal convictions have prevented him from fostering children in his community:

...I have been asked will I foster kids. I have raised my own. I have helped other foster kids that live in our area because they have non-Aboriginal parents. I will not sign the documents because I know I will get a no, because I have criminal convictions. The last time I ever went to court was not in the last 10 years or 15 years – I do not know how long since.

It [shame job] is one of the biggest hidden obstacles of our community: if I know, I sign that document, that organisation knows I cannot foster. Someone will say something, but not to me.⁸⁷

During the site visit to Winda-Mara Aboriginal Corporation, the Committee spoke to Ms Raylene Harradine a member of the Victorian Aboriginal Children and Young People's Alliance. She told the Committee that crimes committed in a person's youth are living with them for the rest of their life, affecting their capacity to engage in kinship caring arrangements.

We have knowledge about the community, about families and individuals, that the government does not. The involvement of workers who know the family should have an influence on where children go. Kids should remain with families otherwise we're looking at another stolen generation. I believe that through kinship care we give kids the

⁸⁶ Victorian Aboriginal Child Care Agency, *Submission 28*, p. 2.

⁸⁷ Uncle Larry Walsh, *Transcript of evidence*, p. 57.

cultural support and community support that they need, to keep them out of the justice system.⁸⁸

Ms Harradine believes that current arrangements interfere with the capacity of aboriginal community-controlled organisations to participate in and develop self-determination in their communities. Ms Harradine acknowledged the unequivocal importance of child safety and wellbeing but was concerned that current practices do not reflect a culturally appropriate way to support the welfare of aboriginal children. She suggested that by removing barriers to kinship caring caused by irrelevant criminal record information aboriginal communities could better deliver culturally appropriate care and guidance to young people.⁸⁹

Ms Harradine recommended more flexibility for aboriginal community-controlled organisations to make discretionary decisions with regard to applications for kinship care. The discretionary decision would be based on an assessment of a person's character references provided by the community, rather than solely determined by a negative WWCC. This would mitigate the lack of contextual consideration in a standard WWCC by acknowledging an individual's contributions and rehabilitation.⁹⁰

Chapter 3 of this Report discusses the interaction of a controlled disclosure framework with Working with Children Checks in more.

Submissions and witnesses from indigenous communities reiterated the view of other stakeholders that any proposed framework should include accepted parameters for determining whether convictions should be spent. For example time spent without reoffending, and limiting spent convictions to certain offences.

Controlled disclosure legislation would assist in fostering the self-determination of Victorian aboriginal people and communities by removing barriers to employment, education and kinship arrangements. Further, by removing hurdles associated with the stigma of having a criminal record the overrepresentation of aboriginal people in the criminal justice system, especially recidivist offenders, can be addressed through providing the opportunities necessary for rehabilitation and reintegration into the community. For example employment opportunities in indigenous (and other) communities and the associated benefits of mentorship by employers and opportunities to contribute to society.

1.4.7 Impact on women

The Committee heard evidence during the course of the Inquiry that the disadvantages caused by a person having a criminal record are experienced differently by women. There was a connection made between female offending and gender-based trauma.

⁸⁸ Ms Raylene Harradine, Victorian Aboriginal Children and Young People's Alliance, site visit, Winda-Mara Aboriginal Corporation, Heywood, 6 August 2019.

⁸⁹ Ibid.

⁹⁰ Ibid.

Research suggests that the significant disadvantage women were already experiencing, particularly in accessing employment and stable housing, was exacerbated by their criminal record.

From June 2008 to June 2018, Victoria's female prison population increased by close to 140%. Victorian Aboriginal women are significantly overrepresented in these figures, with the female Victorian Aboriginal prison population increasing by 400% in the same period.⁹¹ To put these figures in context it is important to note that women's pathway to the criminal justice system is often related to gender-based trauma, such as domestic and family violence.⁹²

At a public hearing Melanie Poole, Founder and Director of See Your Change Consulting, told the Committee that women who receive criminal convictions are often victims of abuse. She also noted that for women the stigma and lowered self-esteem associated with a criminal record can often perpetuate their disadvantage and lead to greater discrimination:

The story of women who are criminalised is often a story of women who were severely abused as kids and who were ultimately criminalised for things like drugs, not actually doing any harm to other people. So for them to spend the rest of their lives being reminded over and over again of that message, 'You're worthless and you're not part of society', we cannot underestimate the level of damage that that does to someone.⁹³

Ms Poole and Ms Hui Zhou, Principal Solicitor for Fitzroy Legal Service, both emphasised the impact the new Victorian bail laws have on the increased number of women in Victorian prisons.⁹⁴ They argued that lengthier periods in remand affect women in particular who are often unable to afford bail or who do not have secure housing.⁹⁵ Ms Zhou told the Committee that time served in remand often accounts for a woman's entire imprisonment sentence:

...corrections stats show that women are in fact serving almost their full time on remand. So they are spending something from about one month and, in some cases, up to 12 months on remand, unsentenced, and then when their matter is finally heard before the courts they are given a disposition of time served, which means that they have on their record an imprisonment record but in fact it is likely that they would never have served time in the first place had it not been that they were on remand.⁹⁶

A controlled disclosure framework can address these issues by ensuring that time in remand for minor convictions does not become a punitive punishment for women. Controlling the disclosure of certain convictions removes barriers to housing, employment and education which are important factors in rehabilitation and preventing reoffending.

⁹¹ Fitzroy Legal Service, *Women Transforming Justice*, supplementary evidence received 1 July 2019, p. 1.

⁹² Ms Hui Zhou, Principal Solicitor, Fitzroy Legal Service, public hearing, Melbourne, 1 July 2019, *Transcript of evidence*, p. 36.

⁹³ Ms Melanie Poole, Director, See Your Change Consulting, public hearing, Melbourne, 1 July 2019, *Transcript of evidence*, p. 76.

⁹⁴ Melanie Poole, *'In Victoria's prisons, women pay for men's violence'*, supplementary evidence received 1 July 2019; Ms Hui Zhou, *Transcript of evidence*, pp. 36-7.

⁹⁵ *Ibid.*, p. 37.

⁹⁶ *Ibid.*

1.5 The recommended controlled disclosure framework

The next chapter of this Report outlines the Committee's proposed framework for the Controlled Disclosure of Criminal Record Information for Victoria. The Framework was determined by examining spent convictions schemes in other Australian jurisdictions, including the Victoria Police's Information Release Policy and evidence provided by stakeholders in submissions and at hearings.

A legislated controlled disclosure framework for Victoria

Aside from Victoria, each Australian jurisdiction (including the Commonwealth) has enacted legislation that limits the disclosure of certain older offences once a period of time passes during which a person has committed no further offences. These are known as spent convictions schemes.

As discussed in Chapter 1 of this report the Committee is recommending a framework for Controlled Disclosure of Criminal Record Information, for Victoria. Broadly, current schemes in Australian jurisdictions include the following provisions:

- the definition and scope of ‘conviction’ for the purposes of the scheme
- eligible and exempted offences
- the crime free ‘waiting period’ that must be completed
- whether a conviction is automatically exempt from disclosure at the end of the waiting period or requires application to a court
- relevant offences for misuse of information; or
- protections against discrimination on the basis of irrelevant convictions under human rights legislation.

This Chapter:

- discusses and compares the approach of Australian jurisdictions to these provisions
- compares them to the relevant provisions under Victoria Police’s Information Release Policy
- recommends the approach that the Committee believes the Victorian Government should take in drafting legislation for an overdue Controlled Disclosure of Criminal Record Information framework
- discusses ‘Stream 1 – Controlled disclosure through an automatic mechanism, of the Committee’s proposed framework as outlined in the Recommendation

Chapter Three outlines Stream 2 of the Committee’s recommended framework.

2.1 Definition and scope of ‘conviction’

Table 2.1 Comparison of jurisdictions: definition of conviction

VICPOL	CTH	NSW	QLD	ACT
A finding of guilt.	Conviction whether summary or on indictment.	Conviction whether summary or on indictment.	Conviction made by any court.	Conviction whether summary or on indictment.
A finding of guilt with no conviction.	A finding of guilt.	A finding of guilt which proves the offence.		Charged proved; but conviction disposed.
Order of good behaviour.	No finding of guilt recorded – however, offence was taken into account for sentencing of another offence.	Order of good behaviour. Order made by the Children’s Court.		
	NT	WA	TAS	SA
	Any conviction.	Any conviction.	Conviction whether summary or on indictment.	Conviction whether summary or on indictment.
	Finding of guilt.	Charged proved; but conviction disposed.	A finding of guilt.	Finding of guilt or offence
	Any other order/proceeding which constitutes a criminal record under Act.	Excludes: Life sentence. Children’s Conviction.		No finding of guilt recorded – however offence was taken into account for sentencing of another offence.

Source: Legislative Council Legal and Social Issues Committee.

Each Australian jurisdiction defines the scope of ‘conviction’ for its spent convictions scheme. Broadly, all jurisdictions include convictions imposed by courts for both summary and indictable offences. However there are differences between jurisdictions in whether non-conviction penalties are considered ‘convictions’ for the purposes of their schemes.

2.1.1 Pending charges

Spent conviction schemes and disclosure frameworks can include pending charges, warrants and matters awaiting trial on a person’s Police Record Check. Under the Victoria Police policy, this includes matters under investigation or when an individual has been charged and is waiting the final court outcome. The check will note that the matter cannot be considered as a finding of guilt.¹

The Committee heard this is an issue for a number of reasons. Inner Melbourne Community Legal noted that criminal matters can take many months to finalise. It also considered that disclosure of pending charges ‘impinges on the presumption of innocence’.²

¹ Victoria Police, *National Police Certificates: Information release policy*, Victoria Police, Melbourne, 2019, p. 2.

² Inner Melbourne Community Legal, *Submission 27*, p. 3.

In the Committee's view, disclosure of pending charges where the Court has yet to make a decision is contrary to the presumption of innocence. Even though Police Record Checks will note these cannot be considered as findings of guilt or convictions, this may still result in discrimination when disclosed out of context.

Current investigations and pending charges should not be disclosed on a Police Record check.

2.1.2 Non-convictions

Other Australian jurisdictions consider other types of findings as convictions under their legislative schemes. Commonwealth,³ South Australian,⁴ and Tasmanian⁵ legislation include 'a finding of guilt' in their definitions of conviction. The New South Wales Act includes a finding of guilt which proves the offence without proceeding to conviction (a finding of guilt without conviction).⁶

Under Victoria Police's Information Release Policy, findings of guilt that were recorded without conviction are still considered 'convictions' under the policy. As a result, these will appear on a Police Record Check if they fall into the specified time frames. In addition, Victoria Police will disclose offences where the result was 'acquitted or not guilty by reason of insanity or mental impairment'.⁷

The Committee heard from several stakeholders that disclosure of such findings was contrary to the intention of the courts that imposed them.

Some stakeholders argued that disclosing this information invited discrimination against an individual, particularly without information about the context of the conviction or knowledge of the sentencing process.

The Law Institute of Victoria stated that disclosure of non-convictions as 'convictions' has created a 'significant level of misunderstanding within the general public'. It strongly considered that non-convictions should not be disclosed on a police record check.⁸

Similarly, in its submission the Federation of Community Legal Centres noted two of its member centres surveyed 63 clients with the question 'If a court says you have been found guilty of a crime but will have no conviction recorded against you, will you still have a criminal record?'. Of the respondents, 57% thought a non-conviction sentence

³ *Crimes Act 1914* (Cth) s 185ZM(1)(b).

⁴ *Spent Convictions Act 2009* (SA) s 3(5)(a).

⁵ *Annulled Convictions Act 2003* (Tas) s 3(2).

⁶ *Criminal Records Act 1991* (NSW) s 5(a).

⁷ Victoria Police, *National Police Certificates: Information release policy*, p. 2.

⁸ Law Institute of Victoria, *Introduction of spent conviction legislation in Victoria*, submission to Hon. Martin Pakula MP, Attorney-General, 2015, p. 7.

would not appear on a criminal record check, 42% thought it would and 2% were not sure.⁹

At a public hearing, Ms Julia Kretzenbacher, Vice President of Liberty Victoria explained the reason Courts choose to impose these penalties instead of convictions:

The courts, when they give that kind of disposition, have carefully considered it and have heard submissions from either a prosecutor from the DPP or a police prosecutor and defence counsel. They have made that decision with all of the relevant information, but that decision in the end does not mean very much, because we have this policy where it is still released. So I think there are some ways that the policy could be restricted. I guess that is the difficulty with not having a scheme. Victoria Police is in a difficult position themselves, because they are trying to do the right thing and find the right balance, and that is a lot of pressure on them too, and they do not want to be the ones making the ultimate decision.¹⁰

Ms Kretzenbacher, a practicing criminal barrister, highlighted the confusion that disclosure of non-convictions can cause. She also considered that the risk of disclosure undermines the courts' purpose in promoting rehabilitation of offenders.¹¹

The Committee found that disclosing non-conviction information also undermined the principles of section 8 of the *Sentencing Act 1991*, as discussed in Chapter 1.

At a public hearing, Mr Brett Halliwell considered that by disclosing findings of non-conviction, Victoria Police's policy was undermining decisions of the judiciary:

If the police are effectively saying, 'We will disclose records'—or findings of guilt, not even convictions—and to my mind that completely undermines the judiciary's power to actually consider someone before the court and to say, 'I don't want to give you a conviction; I want to let you off; I want to give you a second chance'. So the police administrative mechanics are depriving the judiciary of their decision-making.¹²

Mr Campbell Thomson, a barrister at the Victorian Criminal Bar Association, told the Committee that including findings of guilt without conviction in a police check did not align with community attitudes:

... a finding of guilt for a minor offence when no conviction is recorded should be spent, and one can see why, especially for people in deprived economic circumstances who are trying to get a job, for instance, as a lollipop lady on the local school crossing. If a non-conviction bond stops them from getting a job like that, then it is absurd, and the legislation should be mindful of the situations that those sorts of people face. So I think one of the major issues for the legislature to take into account before finalising [a spent convictions scheme] is, 'Okay, what offences are we going to prescribe, and what are we going to say about minor offences and the power of magistrates and judges to declare

⁹ Federation of Community Legal Centres, *Submission 45*, p. 10.

¹⁰ Ms Julia Kretzenbacher, Vice President, Liberty Victoria, public hearing, Melbourne, 1 July 2019, *Transcript of evidence*, p. 15.

¹¹ *Ibid.*, p. 11.

¹² Mr Brett Halliwell, public hearing, Melbourne, 19 June 2019, *Transcript of evidence*, p. 3.

them spent'. If you look at what other states have done, there is a balance that can be struck which the community will accept.¹³

The Committee heard cases where non-conviction findings of guilt released in police checks had affected the ability of individuals to gain employment many years after their conviction. Some of these people had pleaded guilty in court believing that was the correct approach and in retrospect wondered whether this was the best course of action to take. Ms M, below, is one such individual.

Case study: Ms M (a pseudonym)

Ms M applied for part-time employment as a disability support worker with an agency in Regional Victoria. At the time Ms M worked at the Department of Human Services and was considered of good character.

Ms M interviewed for the position and consented to a police record check. She eventually heard from the agency informing her that all positions had been filled. The agency attached a copy of her police record check, which contained three offences from 1987, 1992 (also related to the 1987 offence) and 2004.

All three offences were without conviction. The 2004 offence was for possessing ammunition without a licence. These were two old shotgun shells that were bundled up with other possessions belonging to her step-father that were given to Ms M by her mother. The Police found the shells when searching her house on suspicion that her brother (who was living with her at the time) had been using illegal drugs. Because the 2004 offence could be disclosed under Victoria Police's Information Release Policy, the 1992 and 1987 offences could also be disclosed.

Ms M pleaded guilty to the offence at the time but now wonders whether this was the correct course of action to have taken.¹⁴

Including findings of guilt without conviction is also an issue when considered in the context of the Koori Court.¹⁵ For cases to be heard in the Koori Court an offender must first plead guilty to show they have taken responsibility for their actions.¹⁶

The Committee also considered the inclusion of non-conviction findings of guilt on a Police Record Check as contrary to the intention of non-convictions under the *Sentencing Act 1991*. Section 8 of the Act defines a non-conviction as follows.

¹³ Mr Campbell Thomson, Barrister, Victorian Criminal Bar Association, public hearing, Melbourne, 1 July 2019, *Transcript of evidence*, p. 43.

¹⁴ Law Institute of Victoria, *Introduction of spent conviction legislation in Victoria*, p. 17.

¹⁵ For more information about the Koori Court process in Victoria see: <<https://www.mcv.vic.gov.au/about/koori-court>>

¹⁶ Mr Robert Nicholls, Chairperson, Hume Regional Aboriginal Justice Advisory Committee, public hearing, Shepparton, 15 July 2019, *Transcript of evidence*, p. 18.

8 Conviction or non-conviction

- (2) Except as otherwise provided by this or any other Act, **a finding of guilt without the recording of a conviction must not be taken to be a conviction for any purpose.** [emphasis added]
- (3) A finding of guilt without the recording of a conviction—
- (a) does not prevent a court from making any other order that it is authorised to make in consequence of the finding by this or any other Act;
 - (b) has the same effect as if one had been recorded for the purpose of—
 - (i) appeals against sentence; or
 - (ii) proceedings for variation or contravention of sentence; or
 - (iii) proceedings against the offender for a subsequent offence; or
 - (iv) subsequent proceedings against the offender for the same offence.

In addition, section 76 of the Act empowers courts to dismiss a charge without recording a conviction if they are satisfied of a person's guilt related to an offence.¹⁷

In its submission to the Aboriginal Justice Forum, the Woor-Dungin Criminal Record Discrimination Project recommended that if a non-conviction sentence included conditions,¹⁸ the conviction should no longer be subject to disclosure once the conditions were completed.¹⁹

Similarly, Mr Brett Halliwell and Mr David Jones²⁰ considered a legislated scheme should differentiate between the levels and types of crime. They recommended the following offences should be immediately eligible for non-disclosure:

- findings of guilt without conviction
- proven offences with no conviction
- bonds, adjournments and undertakings (following completion of conditions)
- discharged offences.²¹

Liberty Victoria's Rights Advocacy Project supported a broad definition of a 'conviction' based on the Commonwealth and New South Wales spent convictions schemes to include:

- all convictions, whether summary or on indictment

¹⁷ *Sentencing Act 1991 (Vic)* s 76.

¹⁸ For example, a 12-month good behaviour bond.

¹⁹ Woor-Dungin Criminal Record Discrimination Project, submission to Aboriginal Justice Forum 49, 2017, p. 36.

²⁰ A pseudonym.

²¹ Brett Halliwell and David Jones, *Submission 14*, p. 7.

- findings of guilt
- matters taken into account
- findings that an offence is proven
- Orders of the Children’s Court.²²

Case Study: Casey

Casey is an Aboriginal woman who has experienced discrimination and employment difficulties because of her criminal record.

In 2016-2017, Casey was found guilty of minor property damage and assault. Casey has taken full responsibility for her offending but says her behaviour at the time was influenced by a drug addiction fuelled by existing chronic health issues. Casey received a community corrections order that was aimed at rehabilitation which she successfully completed.

Despite extensive rehabilitation efforts and the completion of her order Casey was told she could no longer work due to the revocation of her WWCC and current criminal record.

Casey appealed her negative notice with WWCC and was able to pass her check as a result of a number of character references provided by her community and colleagues. Despite this, Casey still had difficulty getting employment when her criminal record was revealed.

Casey was able to be re-hired by the employer who originally let her go because of the advocacy of her boss. This was an important step in getting her life back on track and ensuring her rehabilitation process continued.²³

In contrast, former Victims of Crime Commissioner Greg Davies provided a view from an enforcement perspective:

I would think, in my experience, most police officers would say that there should not be a sentencing disposition that says, ‘Yes, the court finds that you’ve committed this offence but we won’t convict you’. You are either guilty or you are not guilty. Even a good behaviour bond says, ‘Yes, you’re convicted. Here’s a good behaviour bond. If you abide by the conditions of that bond, then the conviction will be struck out after a certain amount of time’, and then effectively there is no prior conviction because it has been struck out. But to say, ‘Yes, we’re satisfied that you committed this or these offences, but we won’t record a conviction’, is a little incongruous to me.²⁴

²² Rights Advocacy Project, *A legislated spent convictions scheme for Victoria: Recommendations for reform*, report prepared by Criminal justice team, Rights Advocacy Project, report for Liberty Victoria, Liberty Victoria, 2017, p. 15.

²³ Information provided by Ms Naomi Murphy, site visit, Winda-Mara Aboriginal Corporation, Heywood, 6 August 2019.

²⁴ Mr Greg Davies, Former Commissioner, Victims of Crime Commission, public hearing, Melbourne, 1 July 2019, *Transcript of evidence*, p. 27.

Similarly Sergeant Wayne Gatt, Secretary of the Police Association of Victoria, told the Committee how certain circumstances may warrant disclosure of a non-conviction, such as in police recruitment:

... in certain circumstances it is important. I made the point about police recruitment, for example, and that is one that is useful to us. Whilst somebody may not have a conviction recorded, I will make the point that 'without conviction' it is not necessarily handed out in isolation too. There are plenty of cases where people are given repeatedly a finding of guilt without conviction, rightly or wrongly. It just happens; it occurs. But it also would give, for example, Victoria Police as a prospective employer a fairly good insight into somebody's capability and propensity to reoffend, and potentially their suitability as a member of Victoria Police. So we are saying that is an example where we would know very, very well, but that may have application in other areas as well. Again, it still may have some value in certain settings.²⁵

The Committee agrees that non-conviction findings of guilt should not be disclosed to employers and other third parties on a Police Record Check. The current practice is confusing for the general public and does not align with the purpose of findings of guilt without conviction under the *Sentencing Act 1991*. However, non-conviction findings of guilt should always be disclosed in the administration of justice. Courts and the police will always have access to this information regardless of whether it becomes protected information under a controlled disclosure framework.

In addition, this allows courts to exercise discretion when sentencing in deciding whether to impose other types of penalties which may be more appropriate in the situation.

Any findings or orders imposed by Courts that do not result in conviction should be immediately protected from disclosure, subject to completion of any conditions.

2.1.3 Sentences for summary offences

Broadly, there are two categories of offences:

- **Summary offences:** these are able to be heard by a magistrate without the need for a judge and jury trial. They are generally considered as 'less serious offences', such as traffic offences, minor assaults and offensive behaviour.
- **Indictable offences:** these require the accused to be present at court. They are usually presided over by a magistrate at a committal hearing before being committed to a trial before a judge and jury. They are usually more serious offences, such as drug trafficking offences, aggravated burglary, indecent assault, manslaughter and murder.²⁶

²⁵ Sergeant Wayne Gatt, Secretary, The Police Association of Victoria, public hearing, Melbourne, 1 July 2019, *Transcript of evidence*, p. 71.

²⁶ Victims Support Agency, *Types of offences*, <<https://www.victimsofcrime.vic.gov.au/charges-laid/types-of-offences>> accessed 10 July 2019.

All Australian jurisdictions—including Victoria Police’s Information Release Policy—include summary and indictable offences in the scope of ‘conviction’ in their spent convictions schemes.

In its submission, Goulburn Valley Community Legal Centre recommended that sentences for non-indictable offences should no longer form part of information released under a police check.²⁷

Mr Campbell Thomson also suggested there could be discretion for a court to declare certain summary offences as spent convictions, either immediately or after a period of time.²⁸

In contrast, Sergeant Gatt noted that in some contexts the relevance of a summary offence may be more considerable than the description of the offence as ‘summary’ would suggest. He used aged care as an example:

... if we go back to the aged care and the unlawful assault, unlawful assault is a summary offence in Victoria—it is a minor issue—but in the circumstances of aged care it might be highly relevant, and any of us that have persons in aged care would recognise the importance of that.²⁹

The Committee acknowledges that certain summary offences may reflect very low offending. However the Committee believes that the Court already has discretion in these instances to reflect this, such as through a non-conviction or good behaviour bond. Accordingly, the Committee considers that the controlled disclosure framework as recommended in this report allows flexibility for the courts to address these issues.

A conviction for any type of offence should be considered a conviction under the framework.

²⁷ Goulburn Valley Community Legal Centre, *Submission 3*, p. 2.

²⁸ Thomson, *Transcript of evidence*, pp. 41, 3.

²⁹ Gatt, *Transcript of evidence*, p. 67.

2.2 Eligible offences

Table 2.2 Comparison of jurisdictions: types of convictions eligible for non-disclosure

VICPOL	CTH	NSW	QLD	ACT
Sentence of imprisonment of 30 months or less.	Sentence of imprisonment 30 months or less.	Sentence of imprisonment 6 months or less.	Sentence of imprisonment 30 months or less.	Sentence of imprisonment 6 months or less.
Exceptions: Based on offences and employment purposes (e.g. WWCC).	Pardon for reason other than wrongful conviction.	Exceptions: Sexual Offences.		Exceptions: Sexual Offences.
	NT	WA	TAS	SA
	Sentence of imprisonment 6 months or less.	Sentences less than life imprisonment. Serious offences are capable of being spent upon approved application	Sentence of imprisonment 6 months or less.	(Adult) No prison sentence; or sentence of imprisonment is 12 months or less. (Juvenile) No prison sentence; or imprisonment is 24 months or less. (Sex offences) No prison sentence; is a designated sex offence.
	Exceptions: Sexual Offences.	Exceptions: Juvenile: murder, attempted murder, and manslaughter.	Exceptions: Sexual Offences.	

Source: Legislative Council Legal and Social Issues Committee.

Not all offences are eligible to be spent under any of the spent convictions schemes in Australia. These schemes limit the disclosure and use of older, less-serious and irrelevant convictions and findings of guilt.³⁰ More serious offences, such as violent and sexual offences, are typically always subject to disclosure and will appear on all Police Record Checks.

2.2.1 Maximum length of prison sentences

Each jurisdiction considers the length of a prison sentence to determine whether a conviction qualifies for the scheme. The maximum timeframe varies, ranging from up to 6 months to any sentences that are less than life imprisonment.

In New South Wales,³¹ Australian Capital Territory,³² Northern Territory³³ and Tasmania³⁴ only a sentence of imprisonment of 6 months or less is eligible to be exempt from disclosure.

The Western Australian scheme differs from other jurisdictions as convictions are not automatically exempt from disclosure after a prescribed crime-free 'waiting period' and require an application process. This is discussed further in Section 2.3.

³⁰ Law Institute of Victoria, *Introduction of spent conviction legislation in Victoria*, p. 2.

³¹ *Criminal Records Act 1991* (NSW) s 7(1)(a).

³² *Spent Convictions Act 2000* (ACT) s 11(1)(2)(a).

³³ *Criminal Records (Spent Convictions) Act 1992* (NT) s 6(1).

³⁴ *Annulled Convictions Act 2003* (Tas) ss 6(1), 7.

Under the Western Australian Act, a conviction with a less than life imprisonment sentence is eligible for non-disclosure, subject to some exceptions. The Act further classifies them as either 'serious' or 'lesser' convictions. Serious convictions are defined as any conviction with a sentence of more than 1 year, or a fine of \$15,000 or more.³⁵ Lesser convictions are any sentences which do not fit into the definition of a serious conviction.³⁶

Under Victoria Police's Information Release Policy any conviction with a sentence less than 30 months imprisonment is eligible for non-disclosure, subject to the following exemptions:

- If the record check is for the purpose of:
 - Registration with a child-screening unit and / or Victorian Institute of Teaching
 - *Assisted Reproductive Treatment Act 2008*
 - Registration and accreditation of health professionals
 - Employment or contact with prisons or state or territory police forces
 - Casino or Gaming Licence
 - Prostitution Service Provider's Licence (*Prostitution Control Act 1994*)
 - *Operator Accreditation under the Bus Safety Act 2009*
 - Private Security Licence (*Private Security Amendment Act 2010*)
 - Commercial Passenger Vehicles Victoria (*Commercial Passenger Vehicle Industry Act 2017*)
 - Firearms Licence (*Firearms Act 1996*)
 - Admission to legal profession (*Legal Profession Act 2004*)
 - Independent Broad-based Anti-Corruption Commission
 - Poppy Industry (*Drugs, Poisons and Controlled Substance Act 1981*)
 - Honorary Justice (*Honorary Justices Act 2014*)
 - Marriage Celebrants Registration
 - Court Services Victoria
 - Immigration (*Migration Act 1958*)
 - Office of the Victorian Information Commissioner (*Privacy and Data Protection Act 2014*)

³⁵ *Spent Convictions Act 1988* (WA) s 9.

³⁶ *Ibid.*, s 10.

- Serious offences of violence or a sex offence where the check is for the purposes of employment or voluntary work with children or vulnerable people
- In circumstances where the release of information is considered to be in the interests of security, crime prevention or the administration of justice and / or otherwise necessary for the proper, legal or statutory assessment of an applicant
- Traffic offences where the court outcome was a sentence of imprisonment or detention.³⁷

Many stakeholders to the Committee's Inquiry supported including sentences of up to 30 months in the framework.

Ms Melinda Walker, Co-Chair of the Law Section at the Law Institute of Victoria, told the committee that sentences under 30 months would rarely relate to serious offences:

The most serious offence in the Magistrates Court that can be dealt with would be either an aggravated burglary, person present, or an intentionally causing injury charge. Those would be the highest levels that they could potentially deal with. I could easily say that that would attract 30 months or more. I think it would be unusual—I do not think it would be commonplace—that somebody would get under 30 months for such a serious offence, bearing in mind that the Magistrates Court has a jurisdictional limit of five years.³⁸

She further noted that certain offences—such as home invasion, aggravated carjacking and aggravated injury to emergency workers—would no longer be eligible under a 30-month period due to mandatory sentencing laws.³⁹

Woor-Dungin's submission to the Aboriginal Justice Forum supported a 30-month period to align with other Australian jurisdictions and Victoria Police's existing policy.⁴⁰

In contrast, Mr Campbell Thomas, a barrister at the Victorian Criminal Bar Association, considered the maximum length of sentence should be between 12 and 24 months.⁴¹

Former Victims of Crime Commissioner Greg Davies disagreed with using the length of a sentence to determine eligibility for a spent conviction scheme:

I do not believe it should relate to what time you have served, nor to what length you are incarcerated, because that can change remarkably. There are hundreds of judicial officers in this state. Not all of them will sentence exactly the same way, so if you are unlucky enough to get Judge Roy Bean, the old hanging judge, then you are out of luck on a number of fronts. I think it needs to be a conviction or a finding of guilt for an offence that carries a maximum of whatever it might be that you decide upon, because

³⁷ Victoria Police, *National Police Certificates: Information release policy*, pp. 1–2.

³⁸ Ms Melinda Walker, Co-Chair of Criminal Law Section, Law Institute of Victoria, public hearing, Melbourne, 29 May 2019, *Transcript of evidence*, p. 7.

³⁹ *Ibid.*, p. 8.

⁴⁰ Woor-Dungin Criminal Record Discrimination Project, p. 35.

⁴¹ Thomson, *Transcript of evidence*, p. 43.

as I say, we have seen two convicted murderers in the last five years in Victoria get sentences of less than 10 years when the maximum is the term of your natural life...⁴²

The Committee considered Mr Davies' suggestions. However this would require an approach that would not have parity with any other scheme in Australia. It may also require amendment and change whenever sentencing laws changed.

In the Committee's view, the government should conduct further investigation to determine the maximum length of prison sentences eligible for protection from disclosure under an automatic mechanism. In doing so the government is to consider:

- sentences of 12 months or less as a minimum
- sentences of less than 30 months as a maximum
- serious violent and sexual offences to remain subject to disclosure.

Controlled disclosure should apply, subject to prescribed exemptions, where a conviction resulted in a maximum prison sentence of 12 to less than 30 months, to be determined by the government on the basis of a full investigation. Sexual and serious violent offences to remain subject to disclosure.

2.3 Crime-free period

Table 2.3 Comparison of jurisdictions: waiting periods

VICPOL	CTH	NSW	QLD	ACT
Adult: 10 years. Juvenile: 5 years. From the date of conviction.	Adult: 10 years. Juvenile: 5 years. From the date of conviction.	Adult: 10 years. Juvenile: 5 years. If sentence of imprisonment was imposed, waiting period begins from the end of the period of imprisonment.	Adult: 10 years (indictable); 5 years (summary). Juvenile: 5 years. Any conditions of sentence must be met before waiting period can end.	Adult: 10 years. Juvenile: 5 years. If sentence of imprisonment was imposed, waiting period begins from the end of the period of imprisonment.
	NT	WA	TAS	SA
	Adult: 10 years. Juvenile: 5 years. If sentence of imprisonment was imposed, waiting period begins from the end of the period of imprisonment.	Adult: 10 years, 3 years for prescribed cannabis offences. Juvenile: 2 years. Any conditions of sentence must be met before waiting period can end.	Adult: 10 years. Juvenile: 5 years. From the date of conviction.	Adult: 10 years. Juvenile: 5 years. From the date of conviction. Exceptions: Child Sex Offenders

Source: Legislative Council Legal and Social Issues Committee.

⁴² Mr Greg Davies, *Transcript of evidence*, p. 30.

The ‘waiting period’ or ‘crime-free’ period refers to a timeframe of no subsequent offending required for disclosure of an eligible offence to cease. In all jurisdictions in Australia, this is 10 years for adults.

Similarly, all jurisdictions have in place a shorter waiting period for juvenile convictions. In Western Australia this is 2 years⁴³ and in New South Wales it is 3 years.⁴⁴ All other jurisdictions and Victoria Police’s Information Release Policy have a waiting period of 5 years for juveniles.

In general, each jurisdiction does not differentiate between the type of offence committed and the waiting period.

As an exception, Western Australia imposes a 3-year waiting period for adults convicted of prescribed cannabis offences.⁴⁵ Similarly, in South Australia if the person is a registered sex offender and subject to reporting obligations, the waiting period is extended until the obligations are completed or suspended.⁴⁶ In Queensland there is a 5-year waiting period for convictions made in the Magistrate’s Court (which hears summary offences).⁴⁷

2.3.1 Adult offenders

A number of stakeholders were supportive of implementing a 10-year crime-free period, in line with the Victoria Police administrative policy and other jurisdictions in Australia.⁴⁸ This would provide consistency with other regimes. For example, the Law Institute of Victoria previously recommended a 10-year crime-free period to align with all other Australian jurisdictions.⁴⁹ This was also their recommendation in their evidence to the Committee.

Ms Karen Gurney considered 10 years a reasonable period of time, stating discretionary practices are ‘open to abuse’.⁵⁰

Other inquiry stakeholders were critical of the 10-year waiting period, considering it arbitrary and rigid. The Committee was unable to determine whether the choice of a 10-year waiting period for adults by other jurisdictions was based on research or other policy evidence.

Woor-Dungin’s submission to the Aboriginal Justice Forum, supported by many stakeholders who made submissions or wrote to the Committee, noted that 10 years

⁴³ *Young Offenders Act 1994* (WA) s 189(2).

⁴⁴ *Criminal Records Act 1991* (NSW) s 10(1).

⁴⁵ *Spent Convictions Act 1988* (WA) s 11(6)(a).

⁴⁶ *Spent Convictions Act 2009* (SA) s 7(3)(a).

⁴⁷ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3.

⁴⁸ Mr Lee Joachim, Consultant, Former Chair of Rumbalara Aboriginal Co-operative, Yorta-Yorta Elder, public hearing, Shepparton, 15 July 2019, *Transcript of evidence*, p. 39; Goulburn Valley Community Legal Centre, *Submission 3*, p. 1.

⁴⁹ Law Institute of Victoria, *Introduction of spent conviction legislation in Victoria*, p. 12.

⁵⁰ Ms Karen Gurney, Manager and Principal Solicitor, Goulburn Valley Community Legal Centre, public hearing, Shepparton, 15 July 2019, *Transcript of evidence*, p. 6.

is a long time for an aboriginal person to have employment and other opportunities restricted.⁵¹

The Victorian Aboriginal Legal Service observed that the current crime-free periods are 'arbitrary and are not supported by an evidence base linked to the likelihood of reoffending'.⁵² The submission further explained:

We are also concerned that these periods are too long and do not reflect contemporary approaches to criminal justice and rehabilitation. This is particularly the case for Aboriginal people, given that life expectancy is significantly shorter for both male and female Aboriginal and Torres Strait Islander peoples.⁵³

Woor-Dungin also noted amendments to the United Kingdom's spent convictions legislation made in 2014 where waiting periods differ depending on the length of the sentence. These range from 1 to 7 years.⁵⁴

The arbitrariness of a 10-year waiting period was acknowledged by the Western Australian Parliament (the second jurisdiction in Australia to introduce a scheme) in its debates on the introduction of spent convictions legislation. The Attorney-General, the Honourable Joseph M Berinson, stated in the Legislative Council's second reading debate:

Whichever period is selected will have a certain arbitrary element attached to it. The reason which has led to the Government in this case to establishing a straight 10 year period ... is simply to minimise the possibility of confusion...⁵⁵

The Committee believes that now that information is readily available online more nuanced systems are possible.

Several stakeholders recommended that the crime-free period for adults be considered on a case-by-case basis, rather than prescribing a mandatory time.⁵⁶

Liberty Victoria's Rights Action Project recommended a 10-year crime-free period for adult indictable offences and a 5-year period for summary and other offences⁵⁷

Professor Bronwyn Naylor, an academic in the field of criminal law and justice recommended staggered waiting periods such as those used in the United Kingdom:

51 Submission endorsed by: Goulburn Valley Community Legal Centre, Liberty Victoria, Law Institute of Victoria, Australian Red Cross, Brotherhood of St Laurence, Victoria Legal Aid, Professor Bronwyn Naylor, Jesuit Social Services, Victorian Aboriginal Child Care Agency, Victorian Equal Opportunity and Human Rights Commission, Human Rights Law Centre, Victorian Aboriginal Legal Service and the Federation of Community Legal Centres.

52 Victorian Aboriginal Legal Service, *Submission 43*, p. 15.

53 Ibid.

54 Woor-Dungin Criminal Record Discrimination Project, p. 37.

55 Western Australia, Legislative Council, 1988, *Parliamentary debates*, pp. 3410-1.

56 Victorian Aboriginal Legal Service, *Submission 43*, p. 16; Human Rights Law Centre, *Submission 42*, p. 2; Mr Dan Wright, Site Manager, MADEC Australia, public hearing, Shepparton, 15 July 2019, *Transcript of evidence*, p. 14; Ms Karryn Goode, Chief Executive Officer, Right Information and Advocacy Centre, public hearing, Shepparton, 15 July 2019, *Transcript of evidence*, pp. 36-7.

57 Rights Advocacy Project, *A legislated spent convictions scheme for Victoria*, p. 17.

It is widely recognised that the risk of recidivism declines over time, and that people on the whole ‘age out of crime’, ie on average people are less likely to offend as they become older. US research also indicates that most detected reoffending of any type takes place within three years of arrest, and at the most within five years.

To promote rehabilitation the shortest waiting period should be set which also reflects what is known about population risks of reoffending.

...

The decision about the required waiting period after which a conviction may be spent is a decision about risk and rehabilitation.

...

This [a staggered waiting period scheme] would not place the community at risk, with offences being expunged too quickly, as it will be recalled that Victoria has other schemes requiring indefinite disclosure of a criminal history in relation to work involving vulnerable people or with high levels of risk, particular the WWCC.⁵⁸

Professor Naylor also referenced a US study which suggested that different offences had different risk of recidivism periods.⁵⁹ For example, an adult arrested for burglary reached the equivalent risk of recidivism after 3.8 years as someone who has not offended.⁶⁰

The Committee believes that the prescribed crime-free ‘waiting’ periods in other Australian jurisdictions are for the most part arbitrary and could not determine whether they have any basis in evidence about reoffending. Although other jurisdictions prescribe a 10-year period, this seems to be for consistency rather than based on evidence about the efficacy of that timeframe.

At the time of writing The United Kingdom was considering a shorter crime-free period of four years for adults. As discussed above, the UK has a more nuanced approach which prescribes crime-free periods depending on the seriousness and nature of the crime.

A Working with Children Check is required for Victorians who wish to work with children or vulnerable adults. This checking process considers an applicant’s entire criminal history and is becoming widespread in its use. It provides assurance to those whose concerns relate to these vulnerable groups.

Given that the Controlled Disclosure of Criminal Records Framework that is being recommended in this report will be operating in the context of a WWCC process this may leave room for the government to consider prescribing a crime-free period of between 5 to 10 years. However more information and research is required in this area.

⁵⁸ Bronwyn Naylor, *Submission 25*, pp. 6-7.

⁵⁹ Alfred Blumstein and Kiminori Nakamura, ‘Redemption in the presence of widespread criminal background checks’, *Criminology*, vol. 47, 2009, p. 11.

⁶⁰ *Ibid.*

The Committee believes that there is a significant shortage of data in the area of offending, rehabilitation and recidivism more generally. Dedicated effort is required to redress this situation. The Committee believes that the Government should conduct robust research into determining an appropriate crime-free period for a Controlled Disclosure of Criminal Records Framework for Victoria.

The complete lack of provision of information to this Inquiry either at a hearing or in the form of a submission from the Government meant that the Committee was not able to identify whether any work has been done on this area and can only assume that it has not.

Research should include consultation with other jurisdictions where schemes have been in place for some time. The Committee conducted a broad scan of available research and statistical data but there is very little readily available data. Given the importance to both public safety and the rehabilitation of offenders that the crime-free period relates to, the Committee believes this is of paramount importance.

In determining the crime-free period, the government should consider the following:

- risks to community safety
- likelihood of reoffending
- impact on the rehabilitation of an ex-offender.

The following criminal record information should be eligible for protection from disclosure to employers and other third parties through an automatic mechanism:

- Subject to prescribed exemptions, where a conviction resulted in a maximum prison sentence of 12 to less than 30 months, to be determined by the government on the basis of a full investigation. Sexual and serious violent offences to remain subject to disclosure.
 - For adult offenders after a crime-free period of five to ten years, commencing from the time of conviction.
 - Suggested waiting periods are a guide. Final waiting periods to be determined by the government on the basis of a full investigation.

2.3.2 Juvenile offenders

In the criminal justice system, juvenile offenders are treated separately from the adult system to recognise their inexperience and immaturity.

Rehabilitation for juvenile offenders is particularly important as intervention to reduce the likelihood of reoffending as an adult. Research by the Australian Institute of

Criminology found that for adult male offenders, the most serious and persistent offenders had been detained as a juvenile.⁶¹

In Victoria, criminal law distinguishes between offences committed by adults and juveniles as follows:

- under the age of 10: not criminally culpable⁶²
- age 10 to under 14: criminally responsible, however the prosecution must overcome the presumed defence of *doli incapax*—‘a child can do no evil’⁶³
- age 14 to under 18: eligible for sentencing in the Children’s court, unless tried as an adult
- over 18: sentenced as an adult.

All Australian jurisdictions recognise anyone under 18 years as a juvenile offender.

There was unanimous support amongst stakeholders for retaining a shorter waiting time for crimes committed as a juvenile. Suggestions made in evidence ranged up to 5 years.

Ms Gemma Hazmi from the Law Institute of Victoria considered that the primary aim of a spent convictions scheme or controlled disclosure framework was to allow juvenile and younger offenders to be able to be rehabilitated in adult life for mistakes they made in their youth:

Those are the affected part—like, a graffiti charge when you were 14 and you cannot become a paramedic. That is the target cohort that we are looking at, and they are the vulnerable and the young because everyone makes mistakes when they are younger.⁶⁴

The Victorian Aboriginal Legal Service considered a 3-year crime-free period for juvenile offenders was onerous, noting the difficulties associated with criminal records are exacerbated for young people:

Data indicates that offending behaviour is most likely to occur between the ages of 16 and 17. Waiting three or five years at this age can have a significant impact on future education and/or employment opportunities, as young people are particularly vulnerable to stigma and discrimination in employment settings and are also at a high risk of reoffending and becoming trapped in a cycle of offending behaviour.⁶⁵

I think for us the primary aim for this is really for a lot of juvenile offending. Who this affects the most is those who have made mistakes in their youth and want to grow up to become teachers or paramedics or something like that. Because those are real examples of real clients of our members.

Ms Gemma Hazmi, General Manager, Policy, Advocacy and Professional Standards, Law Institute of Victoria, public hearing.

⁶¹ Andrew Day, Kevin Howells and Debra Rickwood, ‘Current trends in the rehabilitation of juvenile offenders’, *Trends and issues in crime and criminal justice*, Australian Institute of Criminology, no. 284, 2004.

⁶² *Children, Youth and Families Act 2005* (Vic) s 344.

⁶³ In Victoria, this is a common law defence.

⁶⁴ Ms Gemma Hazmi, General Manager, Policy, Advocacy and Professional Standards, Law Institute of Victoria, public hearing, Melbourne, 29 May 2019, *Transcript of evidence*, p. 8.

⁶⁵ Victorian Aboriginal Legal Service, *Submission 43*, p. 15.

The Committee agrees that juvenile offences should incur a shorter crime-free period than adult offences. As recommended above, the Committee believes that more research is required to determine the appropriate length of time for the crime-free period.

The following criminal record information should be eligible for protection from disclosure to employers and other third parties through an automatic mechanism:

- Subject to prescribed exemptions, where a conviction resulted in a maximum prison sentence of 12 to less than 30 months, to be determined by the government on the basis of a full investigation. Sexual and serious violent offences to remain subject to disclosure.
 - For juvenile offenders after a crime-free period of three to five years, commencing from the time of conviction.
 - Suggested crime-free periods are a guide. Final crime-free periods to be determined by the government on the basis of a full investigation.

2.3.3 Commencement date for the crime-free period

The commencement date for the waiting period differs between jurisdictions, beginning either at the date of conviction or on release from prison.

Under the Commonwealth,⁶⁶ Tasmanian⁶⁷ and South Australian⁶⁸ schemes the waiting period begins from the date of conviction. This is also the case under Victoria Police's policy.

In contrast, in New South Wales, the Australian Capital Territory and the Northern Territory the waiting period begins from the end of imprisonment. Where no prison sentence is imposed, the waiting period begins at the date of conviction.

Inquiry stakeholders were supportive of the crime-free period commencing at the date of conviction. The Law Institute of Victoria previously recommended this in its submission to the Attorney-General on spent convictions in 2017.⁶⁹

Ms Kretzenbacher explained Liberty Victoria's position at a public hearing:

There are a couple of arguments. One would be it gives a little bit of certainty. It makes it clearer what the date of conviction is as opposed to the date of release, because people might have different dates of release, depending on whether they get parole or not. So they might not get parole, which puts their date of release further up, but someone who has committed the exact same offence does get parole earlier so the time would start earlier for them, so to speak. The other reason is that although someone

⁶⁶ *Crimes Act 1914* (Cth) s 85ZL(1).

⁶⁷ *Annulled Convictions Act 2003* (Tas) s 6(2).

⁶⁸ *Spent Convictions Act 2009* (SA) s 7(1).

⁶⁹ Law Institute of Victoria, *Introduction of spent conviction legislation in Victoria*, p. 12.

might be spending time in custody they can still commit offences whilst in custody. It could be an offence that is a specific offence against the Corrections Act or it could be an assault, which we know does happen in prison. So it is an incentive to be a model prisoner as well. That is why, in our view, it should start from the date of conviction because somebody could still commit offences while they are in custody and that is that incentive, and also to create that certainty about: we know what date the conviction is definitely; there is a bit more uncertainty about when someone may or may not be released.⁷⁰

The Committee believes certainty is an important factor which should be considered in any proposed framework. Therefore, the crime-free period should begin at the time of conviction. This reflects the purpose of the conviction and subsequent penalty and forms part of the individual's rehabilitation process.

Commencement of the crime-free period should begin from the time of conviction.

2.3.4 Minor offences during the crime-free 'waiting' period

For all jurisdictions – except for the Commonwealth – minor offences committed in the waiting period do not restart the waiting period. Under the Commonwealth Act both minor and serious offences restart the waiting period.

Most jurisdictions define a 'minor offence' as one which is not punishable by a sentence of imprisonment.

Under the Tasmanian, Northern Territory, New South Wales and Australian Capital Territory schemes, prescribed serious traffic offences also do not restart the waiting period for all offences.

Any offence classified as 'serious', except for prescribed exclusions, restart the waiting period from the date of conviction.

A number of stakeholders recommended that 'minor offences' be exempt from the crime-free period. At a public hearing, Ms Julia Kretzenbacher, Vice-President of Liberty Victoria, gave an example of how a minor offence could reset the crime-free period,

... if there is an offence for which, for example, there is a fine of less than \$500, you have got someone, for example, say, Pete, who has his without conviction cannabis trafficking charge and nine years later he has another minor, low-range drink-driving offence and receives a \$200 fine, if that would be taken into account, his 10-year period would start again, so he would have almost 20 years of no serious reoffending and be in that situation of uncertainty of how his record would affect him.⁷¹

⁷⁰ Ms Julia Kretzenbacher, *Transcript of evidence*, p. 17.

⁷¹ *Ibid.*, p. 12.

Liberty Victoria's Rights Advocacy Project previously recommended adopting the following definition of 'minor offence' from the Commonwealth Model Bill 2008:

An offence, where on conviction:

- (a) the defendant is discharged without penalty; or
- (b) the only penalty imposed on the defendant (disregarding any demerit points that may apply) is a fine not exceeding—
 - (i) unless an amount applies under subparagraph (ii)— \$500; or
 - (ii) an amount, greater than \$500, prescribed by the regulations for the purposes of this definition.

This recommendation was also endorsed by the Victorian Aboriginal Child Care Agency, the Human Rights Law Centre and Inner Melbourne Community Legal Centre.⁷²

Ms Kretzenbacher proposed a similar practice to when a person commits minor offences in a bail application process:

... not every offence committed on bail is one where your bail will be revoked, so there is a specific offence of committing an indictable offence whilst on bail, but there is no equivalent for summary offences. If you have someone brought before the court for reoffending and the reoffending is a summary offence, for example, when the court considers whether to revoke the bail they think about: well, would this person receive jail for that minor offence? Usually the answer is no. And if that is the answer, they would not necessarily revoke bail. So there is a similarity between it, but there is also a difference, because even in a bail situation minor offences are viewed differently. So it is all really a matter of fairness and discretion and looking at all of the circumstances.⁷³

Fitzroy Legal Service advocated for flexibility in resetting the crime-free period in order not to marginalise groups such as homeless people. Ms Hui Zhou, Principle Lawyer told the Committee:

... what we are submitting essentially is that if you commit an offence and, for example, if it is a fairly serious offence—say, robbery or something like that—and then in the intervening period you have a less significant offence, maybe something like begging or an offence that is much less serious, you should not be disqualified from having the initial conviction spent within that crime-free period. So there should be some flexibility allowed for the nature of the offending that is subsequent to be taken into account when the scheme is applied.⁷⁴

The Committee agrees that relatively minor infringements should not affect the crime-free 'waiting' period for prior convictions to be protected under the framework. The Committee has used the category of 'summary offences' to determine those that will not reset the crime-free period.

⁷² Victorian Aboriginal Child Care Agency, *Submission 28*; Human Rights Law Centre, *Submission 42*, p. 2.

⁷³ Ms Julia Kretzenbacher, *Transcript of evidence*, p. 14.

⁷⁴ Ms Hui Zhou, Principal Solicitor, Fitzroy Legal Service, public hearing, Melbourne, 1 July 2019, *Transcript of evidence*, p. 35.

Summary offences should not affect the crime-free period for prior convictions, excluding indictable offences heard summarily.

2.3.5 Subsequent disclosure of old convictions

Under Victoria Police's Information Release Policy, if one of a person's previous offences qualifies release, all prior findings of guilt are released, including juvenile offences.⁷⁵

The Committee heard that this undermines the purposes of a spent convictions scheme or controlled disclosure framework.

Liberty Victoria's Rights Advocacy Project recommended that convictions, once eligible to be exempt from disclosure, remain exempt, noting this aligns with several other Australian jurisdictions:

... past convictions should not be capable of haunting a person forever. Once a waiting period has successfully been completed without any subsequent offending, a conviction should be permanently spent. In concordance with the Commonwealth, New South Wales, the Australian Capital Territory, Western Australia, Tasmania and South Australia, a conviction should not be 'revived' by subsequent offending once it has become spent.⁷⁶

In its submission, Inner Melbourne Community Legal Centre gave an example of a man who is at risk of having 15-year-old convictions disclosed due to a current offence.

In the Committee's view, once a conviction is eligible for controlled disclosure under the framework it should be permanently protected from disclosure from Police Record Checks in the future. This aligns with the principles of rehabilitation and provides certainty for ex-offenders. Of course this does not apply to access by the police and courts towards the administration of justice.

The Committee is confident that, if necessary, relevant prior convictions can be dealt with through existing exemptions, such as Working with Children Checks.

Once a conviction is eligible for controlled disclosure under the framework, it should not be disclosed later if the person receives another conviction.

⁷⁵ Victoria Police, *National Police Certificates: Information release policy*, p. 1.

⁷⁶ Rights Advocacy Project, *A legislated spent convictions scheme for Victoria*, p. 22.

Case study: Dwayne⁷⁷

Dwayne is 34 years old and has been diagnosed with bipolar disorder and manic depression. As a juvenile, Dwayne was found guilty in the Children’s Court for minor offences involving drug possession and criminal damage. He did not receive a conviction.

At age 18, Dwayne also was found guilty on a charge of possessing cannabis. He once again did not receive a conviction.

In 2018 Dwayne jumped on a car and caused damage to the bonnet. He was later charged with criminal damage and unlawful assault. Two days prior to the offence he had been released from a psychiatric ward and was sleeping rough due to a family breakdown. It has been 15 years since this conviction and his previous offences.

Dwayne was initially willing to accept a guilty plea. However, due to Victoria Police’s current practice, Dwayne is concerned that this would allow his previous offences to be disclosed as well, affecting his aspirations to become a teacher.

2.4 Mechanism for controlling disclosure**Table 2.4 Comparison of Jurisdictions: how does a conviction become spent?**

VICPOL	CTH	NSW	QLD	ACT
Automatic – subject to no further conviction during the waiting period.	Automatic – subject to no further conviction during the waiting period.	Automatic – subject to no further conviction during the waiting period.	Automatic – subject to no further conviction during the waiting period.	Automatic – subject to no further conviction during the waiting period.
	NT	WA	TAS	SA
	Convictions in the Juvenile Court (adults and juveniles): Automatic – subject to no further conviction during the waiting period. Juvenile Offenders convicted in adult court: Upon application to the Police Commissioner.	Lesser convictions: (<12 months imprisonment) Application to Commissioner of Police Serious convictions: (>12 months imprisonment) Application to District Court Judge	Automatic – subject to no further conviction during the waiting period.	Non-sex offences: Automatic – subject to no further conviction during the waiting period. Sex offences: Upon application – subject to discretion of qualified magistrate

Source: Legislative Council Legal and Social Issues Committee.

In most jurisdictions eligible convictions are automatically eligible for non-disclosure at the end of the prescribed waiting period (including any conditions outlined in the

⁷⁷ Inner Melbourne Community Legal, *Submission 27*, pp. 4–5.

specific Act). This is subject to the individual receiving no further convictions during the waiting period. In contrast some jurisdictions require an individual to apply to have their convictions exempt from disclosure.

2.4.1 How a conviction is protected from disclosure

In all jurisdictions apart from Western Australia, a conviction is automatically eligible to be spent at the end of the waiting period subject to the exemptions discussed below.

In Western Australia, a person convicted of a minor offence (who receives a sentence of less than one year imprisonment or less than \$15,000 fine) must apply to the Commissioner of Police for their conviction to become 'spent' once the waiting period has expired. The Commissioner of Police does not have discretion to determine whether or not to allow non-disclosure of a conviction.⁷⁸ A 'serious conviction' (all sentences up until life imprisonment) are eligible to become spent through application to the Western Australian District Court.⁷⁹

Northern Territory law requires juvenile offenders who were convicted in an adult court to apply to the Police Commissioner to have eligible convictions spent.⁸⁰ Similarly, the South Australian scheme requires application to a magistrate for any eligible sex offences.⁸¹

Under Victoria Police's Information Release Policy, information about a conviction is automatically protected from disclosure after the waiting period. However, there are a number of exceptions to the policy where Victoria Police will exercise discretion in disclosing convictions normally considered undisclosable. At a public hearing, Mr Varuna Weerasekera from Victoria Police's Records Services Division explained the use of discretion:

... if the record includes a serious offence or violence or a sex offence and the record check is for the purpose of employment or voluntary work with children or vulnerable people, there is the exemption under the policy for us to consider the disclosure there. By default we do not disclose that matter that is under 30 months, but that provision gives us the discretion, and again the discretion, in this case, we apply.⁸²

Several legal bodies have raised concerns about requiring an application rather than automatic process under a spent convictions scheme or controlled disclosure framework.

⁷⁸ *Spent Convictions Act 1988* (WA) s 7(3).

⁷⁹ *Ibid.*, s 6(1).

⁸⁰ *Criminal Records (Spent Convictions) Act 1992* (NT) s 6A(3).

⁸¹ *Spent Convictions Act 2009* (SA) s 8A(1).

⁸² Mr Varuna Weerasekera, Group Manager, Records Services Division, Public Support Services Department, Victoria Police, public hearing, Melbourne, 29 May 2019, *Transcript of evidence*, p. 15.

The Law Council of Australia, the NSW Bar Association and the Queensland Law Society observed that the rationale of a scheme—to prevent disclosure of past offences—is undermined by an application process that requires such disclosure.⁸³

Similarly, a 2002 report by the Home Office in the United Kingdom found:

- that the need for an application is unnecessary
- would cause a lack of clarity for individuals
- would be an administrative burden for the courts.

The report instead recommended that upon completion of the disclosure period eligible offences should be automatically protected from disclosure. This included judicial discretion available to forgo the normal disclosure periods in exceptional circumstances, such as based on the seriousness of the offence.⁸⁴

Another issue in relation to an application process for protected convictions is the associated costs and resources required to administer the scheme.

In its 2010 inquiry into spent convictions for juvenile offenders, the New South Wales Parliament's Standing Committee on Law and Justice found that a court application process would be costly and time-consuming and would impose an unreasonable burden on court and police resources.⁸⁵

The NSW inquiry also noted that an application process would create barriers for people from disadvantaged backgrounds with limited financial resources and low literacy levels.

In its submission to the Inquiry, the Law Institute of Victoria recommended that disclosure of convictions should be automatically protected upon the conclusion of the crime-free 'waiting' period.⁸⁶ This was supported by a number of other peak body submissions.⁸⁷

In the Committee's view a controlled disclosure framework accessible only by application would significantly diminish the scope for the process to improve the rehabilitation of former offenders and reduce recidivism.

The Committee also believes that an application process would also disproportionately affect people from marginalised and vulnerable communities. This would further aggravate existing inequities in the criminal justice system.

⁸³ Law Council of Australia, Model Spent Convictions Bill 2008, Standing Committee of Attorneys General, 23 January 2009, p. 8.

⁸⁴ Sentencing and Offences Unit, *Breaking the Circle: A Report of the Review of the Rehabilitation of Offenders Act*, Home Office, London, 2002, pp. 15-7.

⁸⁵ Parliament of NSW, Legislative Council Standing Committee on Law and Justice, *Spent convictions for juvenile offenders*, July 2010, p. 93.

⁸⁶ Law Institute of Victoria, *Introduction of spent conviction legislation in Victoria*, p. 13.

⁸⁷ Woor-Dungin, Law Institute of Victoria, Centre for Excellence in Child and Family Welfare, Liberty Victoria, Victoria Legal Aid, Professor Bronwyn Naylor, Jesuit Social Services, Victorian Aboriginal Child Care Agency, Seppy Pour, Fitzroy Legal Service, Human Rights Law Centre, Victorian Aboriginal Legal Service and Federation of Community Legal Centres.

Accordingly the Committee recommends that eligible convictions are protected from disclosure upon the conclusion of the relevant period of crime-free behaviour through an automatic mechanism.

Eligible convictions should be automatically protected from disclosure upon the conclusion of the relevant crime-free period.

2.5 Consequences of disclosing protected criminal record information

Table 2.5 Comparison of jurisdictions: consequences of disclosing a conviction

VICPOL	CTH	NSW	QLD	ACT
None	Reasonable awareness: should not disclose or take into account a spent conviction. An individual may complain to the Privacy Commissioner about act or practice which may breach this Act.	Cannot take into account. Offence to disclose. Offence to fraudulently obtain.	Offence to contravene any provisions in the Act; including disclosure.	Cannot take into account. Offence to disclose. Offence to fraudulently obtain.
	NT	WA	TAS	SA
	Cannot take into account. Offence to disclose. Reasonable awareness: should not disclose or take into account a spent conviction. Offence to fraudulently obtain.	Cannot take into account. Offence to discriminate against. Offence to disclose. Offence to fraudulently obtain.	Cannot take into account. Unlawful to threaten exposure. Offence to disclose. Offence to fraudulently obtain.	Any person who unlawfully discloses information about a spent conviction can be found guilty of an offence (including for business activities).

Source: Legislative Council Legal and Social Issues Committee.

Excluding Victoria, each Australian spent conviction scheme prescribes offences relating to misuse of information relating to an individual's convictions. This encourages compliance with the scheme and protects the right to privacy of people with older and irrelevant convictions that are no longer subject to disclosure to employers.

These offences protect individuals with an older and irrelevant conviction from unlawful disclosure, obtainment, and use of irrelevant elements of their record as an assessment of character.

The following recommended penalties should be included in any Controlled Disclosure of Criminal Record Information legislation.

2.5.1 Unlawfully disclosing or obtaining information about a conviction

In other jurisdictions in Australia there are penalties for unlawfully disclosing or obtaining information in relation to a non-disclosable conviction.

In South Australia the penalty for disclosing information or fraudulently or dishonestly obtaining information about a spent conviction is a maximum fine of \$10,000.⁸⁸

In New South Wales disclosure of information relating to a spent conviction without lawful authority is punishable by up to 50 penalty units (at the time of writing, \$5,500), and up to 6 months imprisonment.⁸⁹ The same punishment is applicable to the offence of fraudulently or dishonestly obtaining, or attempting to obtain, information about a spent conviction.⁹⁰

Obtaining information about a spent conviction without a lawful reason in Western Australia is punishable by a fine of \$1,000.⁹¹

The Tasmanian scheme prohibits threats to disclose what in that jurisdiction is described as an ‘annulled’ conviction.⁹² Threatening to disclose is punishable by up to 50 penalty units.

The New South Wales, Australian Capital Territory and Northern Territory schemes also provide for the imposition of a maximum penalty of imprisonment for 6 months, either in addition to a fine (NSW), or as an alternative to a fine (the ACT and Northern Territory).

The Commonwealth,⁹³ Northern Territory,⁹⁴ and South Australian⁹⁵ Acts provide a ‘reasonable awareness’ protection. If there is a reasonable expectation that an individual is or could be aware of a person’s spent conviction they should not disclose the information without consent.

The Victoria Police policy on spent convictions does not refer to any need to prevent disclosure of criminal records.

The Committee believes that it is necessary to prohibit unlawfully disclosing or obtaining information protected by a controlled disclosure framework, in order to ensure compliance.

⁸⁸ *Spent Convictions Act 2009* (SA) s 11&4.

⁸⁹ *Criminal Records Act 1991* (NSW) s 13(1).

⁹⁰ *Ibid.*, s 14.

⁹¹ *Spent Convictions Act 1988* (WA) s 28.

⁹² *Annulled Convictions Act 2003* (Tas) s 11(1).

⁹³ *Crimes Act 1914* (Cth) s 85ZW(b)(i).

⁹⁴ *Criminal Records (Spent Convictions) Act 1992* (NT) s 12(2).

⁹⁵ *Spent Convictions Act 2009* (SA) ss 11(1)(a)-(c)&(2)(a).

In its submission, the Federation of Community Legal Centres discussed the importance of penalties for inappropriate disclosure because of the number of third party Police Record Check providers:

Penalties for unlawful disclosure are particularly important because of the number of private and profit-driven, criminal record check companies that provide criminal record checks to individuals, employers, and others.

...

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

...

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

It's beyond the scope of this inquiry to investigate how private providers use criminal record data or other sensitive data. Given that private providers play a big role as intermediaries between police services and employers requesting criminal record checks, it's critical that they don't undermine the intent of a spent convictions scheme.⁹⁶

Prohibiting threats of inappropriate disclosure would also strengthen the framework by limiting the possibility that information will be used for illegal purposes.

However, the Commonwealth⁹⁷ and New South Wales⁹⁸ exempt disclosure in judicial proceedings (both providing evidence for a court case and evidence for a sentencing decision) from offences related to disclosing a protected conviction.

In its submission to this Inquiry the Supreme Court of Victoria reflected that this was an important provision in the Acts of those jurisdictions for ensuring clarity in the operation of the courts. The Court suggested it should be considered in any Victorian legislation. It reflected that there were a number of circumstances where disclosing a conviction that is otherwise protected from release, could be relevant to court proceedings:

Past convictions, or information relating to those past convictions, are potentially relevant in a number of court contexts including sentencing, bail applications, serious offender applications, and trials (witness credibility issues, past events relevant to motive).⁹⁹

The Committee reiterates that the framework being proposed relates to information disclosed on Police Record Checks which is used by certain third parties such as potential employers.

⁹⁶ Federation of Community Legal Centres, *Submission 45*, p. 20.

⁹⁷ *Crimes Act 1914* (Cth) s 85ZZH(c).

⁹⁸ *Criminal Records Act 1991* (NSW) s 16).

⁹⁹ Supreme Court of Victoria, *Submission 21*, pp. 1-2.

The framework should not limit access to information by the Courts for the purpose of sentencing, or to Victoria Police for the purposes of their work and protection of the police force and the community.

A legislated controlled disclosure framework should include penalties for the following:

- unlawful disclosure of a person's protected criminal record
- unlawfully obtaining information in relation to a protected criminal record
- threatening to disclose a person's protected criminal record.

A controlled disclosure framework should include an exemption for use of this information in the administration of justice.

2.5.2 Data Privacy: applying a 'reasonable awareness' test to unauthorised disclosure

Despite the intention of spent conviction schemes, information on a person's criminal record can still exist in the public domain and be available through search engines, databases or online archives. Unlike a Police Record Check which presents a formal record of an individual's contact with the criminal justice system, publically accessible information can be incomplete. The information may not provide the full context of an offence, full court proceedings or acknowledge if a conviction is protected from disclosure.¹⁰⁰

It is extremely difficult to monitor and control information that is accessible publicly, and any proposed framework would be incapable of completely controlling information which is accessible via the public domain. Rather, the purpose of a controlled disclosure framework is to limit the formal disclosure of sensitive information related to criminal record information as it pertains to older and irrelevant prescribed convictions.

There is an expectation that employers and other third parties accessing an individual's criminal record should do so through a formal process. There is also an expectation that they take reasonable steps to determine the accuracy of the data and whether it is protected information.

Some submissions highlighted that disclosure of irrelevant and older convictions is an invasion of privacy which violates a person's basic civil liberties. In its submission Liberty Victoria's Rights Advocacy Project argued that disclosure of an irrelevant criminal record could be a breach of privacy under s 13 of the *Charter of Human Rights and Responsibilities 2006*:

¹⁰⁰ Privacy Victoria, *Controlled disclosure of criminal record data*, Office of the Victorian Privacy Commissioner Victoria, 2006, p. 20.

Victorians also have a right not to have their privacy unlawfully or arbitrarily interfered with pursuant to s 13 of the *Charter*. This right operates as a negative obligation and allows for lawful interference with a person's privacy.¹⁰¹

The Victorian Equal Opportunity and Human Rights Commission argued similarly in its submission:

In Victoria, there has been support for the argument that consideration of a person's *irrelevant* criminal record may constitute an arbitrary interference of a person's right to privacy. In the 2013 case of *ZZ v Secretary, Department of Justice & Department of Transport*, Justice Bell observed that work was an aspect of human dignity with great personal and social importance to individuals. His Honour also noted that employment restrictions, such as those which prevent a person from being able to gain employment because of a criminal record, 'impact sufficiently on the personal relationships of the individual and otherwise upon his or her capacity to experience a private life' [italics in original].¹⁰²

The Committee believes it is important to consider a right to privacy when developing a controlled disclosure framework, and recommends any framework aligns with current privacy laws such as the *Privacy and Data Protection Act 2014*. In schedule 1 of the Act, a criminal record is classified as 'sensitive information' which should only be collected through lawful means as it relates to an inherent requirement of the organisation requesting the information.¹⁰³

The importance of controlled disclosure of criminal record information is supported by the Office of the Victorian Privacy Commissioner. In June 2006, Privacy Victoria published a section 63(3) report into the 'controlled disclosure of criminal record data'. The report stated that:

... government organisations can only collect criminal record information where they are required to do so by law, where consent has been given, or in order to prevent or lessen a serious and imminent threat to an individual's life or health. Criminal record checks should only be done by government agencies where necessary and relevant. The privacy legislation permits criminal record information to be disclosed with consent, and also without consent in a number of other situations (eg, where authorised by law; or where necessary to lessen or prevent serious threats to public health, safety or welfare)...¹⁰⁴

In its submission to this Inquiry, the Supreme Court of Victoria told the Committee that a spent convictions scheme should not interfere with principles of 'open justice'. Further, offence provisions should apply only to individuals reasonably aware a conviction was 'spent':

The Court operates under the principles of open justice. The Supreme Court extensively publishes its reasons for decision, not only to the parties, but to the public via the

¹⁰¹ Rights Advocacy Project, *A legislated spent convictions scheme for Victoria*, p. 10.

¹⁰² Victorian Equal Opportunity and Human Rights Commission, *Submission 40*, p. 14.

¹⁰³ *Privacy and Data Protection Act 2014* (Vic).

¹⁰⁴ Privacy Victoria, *Controlled disclosure of criminal record data*, p. 10.

Austlii website, to a range of commercial legal publishers who maintain legal research databases and through the Law Library of Victoria's catalogue. Significant decisions are compiled and published in the authorised Victorian Reports and other decisions may be published in a range of subject specific law reports utilised by the legal profession.

...

There is therefore a high probability that some of the published decisions of the Court will disclose convictions which could become spent under a spent convictions regime at a later point in time, although the number of judgements may be small.

A key aspect of spent convictions regimes are provisions preventing disclosure of spent convictions. The question arises how those provisions interact with published court reasons which remain publicly available.

It is assumed that provisions of the scheme would not criminalise the actions of the Courts in publishing reasons.

...

Non-disclosure provisions are often drafted to apply only where an individual knows or ought to have known that a conviction is spent.¹⁰⁵

The Committee agrees with the Supreme Court of Victoria that disclosure offences should not be extended to the courts and related third parties. The principle of open justice is important for the proper functioning of the judiciary, and access to court proceedings is a key element in studying and understanding the law.

Rather, the Committee recommends that the offences under the framework related to unlawful disclosure should apply a 'reasonable awareness' test.

In 2014, the New South Wales Ombudsman produced a paper on the meaning of 'reasonable', stating:

... views or opinions about whether a conduct was reasonable necessarily involve a more impersonal (ie objective) assessment, including a consideration of the surrounding facts and circumstances, ie context. In the court context this is commonly referred to as the 'reasonable person' test, ie how the notionally hypothetical reasonable person would view or would have engaged in the conduct in the question.¹⁰⁶

In the context of the Committee's recommendation, 'reasonable awareness' refers to situations when a person should have known that information about a conviction is protected under the framework. If an undisclosed conviction is disclosed by someone who satisfies the 'reasonable awareness' test, they should be subject to penalties under the offence provisions outlined in a controlled disclosure framework.

¹⁰⁵ Supreme Court of Victoria, *Submission 21*, pp. 2-3.

¹⁰⁶ Chris Wheeler, *What is 'fair' and 'reasonable' depends a lot on your perspective*, New South Wales Ombudsman, 2014, p. 6.

This avoids an ongoing and untenable expectation that courts and related third parties proactively review published materials. However, the Committee believes there is merit in courts examining the production of court materials to determine if they can better protect an individual's privacy whilst still honouring open justice principles.

2.5.3 Offence to consider a non-disclosable conviction for an unauthorised purpose

Discrimination against a person on the basis of a conviction that is protected from disclosure restricts the ability of a framework to achieve the outcomes of offender rehabilitation and reduction of recidivism.

Australia's current schemes provide differing levels of protection from discrimination for people with a non-disclosable conviction, as follows:

- considering a conviction protected from disclosure for an unauthorised purpose is prohibited, but no penalties apply
- penalties apply for considering a spent conviction for an unauthorised purpose
- an irrelevant criminal record is a protected attribute in anti-discrimination legislation.

Each spent conviction scheme within Australia prohibits consideration of an individual's non-disclosable conviction for an unauthorised purpose. This includes denying or terminating employment.

In NSW, Queensland, South Australia and the ACT, there is no prescribed penalty for breaching this provision.

It is unlawful to access, disclose or take into account spent convictions of Commonwealth offences.¹⁰⁷

Tasmania and the Northern Territory's schemes provide for the imposition of penalties against those found to have unlawfully discriminated against a person on the grounds of an irrelevant criminal record.¹⁰⁸

The Committee believes that it is necessary to include a penalty for unlawfully discriminating against a person on the grounds of an irrelevant criminal record to strengthen compliance with a legislated controlled disclosure framework in Victoria.

We formed the criminal record discrimination project with the hopes of getting a spent conviction legislation scheme and an amendment to the equal opportunity legislation so employers cannot discriminate if the criminal record is irrelevant to the job.

Ms Naomi Murphy, Central Gippsland client services officer, Victorian Aboriginal Legal Service, public hearing.

...nobody should learn to live with discrimination.

Uncle Larry Walsh, Taungurung Elder, public hearing.

¹⁰⁷ *Crimes Act 1914* (Cth) s 85ZW.

¹⁰⁸ *Annulled Convictions Act 2003* (Tas) s 12(2); *Criminal Records (Spent Convictions) Act 1992* (NT) s 13.

Although it may be difficult to prove that a non-disclosable conviction has been unlawfully considered in assessing a person's character for employment, the possibility of receiving a financial penalty is likely to act as a deterrent from doing so.

Accordingly, the Committee believes that a legislated controlled disclosure framework in Victoria should address the issue of discrimination.

Chapter 3 of this Report discusses an additional protection against discrimination through amending the *Equal Opportunity Act 2010*. This will serve as an additional safeguard against discrimination on the basis of an irrelevant criminal record.

A legislated controlled disclosure framework should include a penalty for considering a conviction protected from disclosure for an unauthorised purpose.

3 Broader framework

Legislation is rigid and even the most effective framework for controlled disclosure of criminal record information may not be able to take individual cases into account. For example mitigating factors are not always appropriately taken into account, and further facts in a criminal case may be discovered many years after a conviction has been registered.

This Chapter of the report:

- outlines Stream 2 of the Committee’s recommended framework – Controlled disclosure through an application process
- recommends a legislative framework for controlled disclosure through an application process
- covers reforms to ensure protection from discrimination on the basis of an irrelevant criminal record
- recommends change to the Equal Opportunity Act
- discusses the injustice of historical cases of convictions from care and protection orders
- discusses criminal record checks under other legislation
 - *Working with Children Check Act 2005*
 - *Assisted Reproductive Treatment Act 2008*
 - *Firearms Act 1996*.

Chapter Two outlined Stream 1 of the Committee’s proposed framework.

3.1 An application process for convictions not covered by Stream 1

During the Inquiry the Committee heard from many people with criminal records and how this had affected their ability to gain employment and limited other parts of their lives such as international travel. What became clear to the Committee is that a legislated controlled disclosure framework may not assist with the rehabilitation of all ex-offenders.

The Committee heard from people whose convictions from a young age have followed them through their lives and affected their ability to move on from their crimes. This

includes the case study of Bill Stevens¹ below, whose low-level sexual offence would no longer be considered a crime.

Case Study: Bill (a pseudonym)

Bill received a conviction for ‘carnal knowledge’ (a low-level sexual offence) at age 17 in 1972. The victim was a girl 1 year and 9 months younger than him, a ‘childhood sweetheart’ whom he later married. Legal advice from his solicitors indicated that the offence would no longer be a crime in today’s law.

Bill was tried as a youth in an adult court and his family was unable to afford legal representation. He received a 12-month good behaviour bond and a \$50 fine with no conviction recorded upon the completion of his good behaviour bond.

In 2015, Bill applied for a police check for a gambling licence. The check returned his conviction for the carnal knowledge offence, which had not been revealed in previous police checks. Bill previously worked as a teacher, and was cleared for Working With Children and other police checks.

Bill has experienced difficulty in gaining employment in Victoria, other Australian states and overseas. He believes this is because sexual offences are conflated into one group. In addition, he states this has been a burden for overseas travel as some countries require disclosure of criminal offences and it is often unclear whether his offence is required to be declared.²

Under Victoria Police’s Information Release Policy sexual offences are always subject to disclosure. This means that Mr Steven’s situation cannot be considered without another avenue for appeal.

Liberty Victoria’s Rights Advocacy Project acknowledged that there is community resistance for allowing sexual offences to be spent. It recommended that:

- certain types of low-level sexual offences be prescribed in a separate schedule
- a system where a person can apply for consideration to have their conviction removed from their record at the end of the required crime-free period.³

Sexual offences and other exemptions included in existing spent convictions schemes will be examined in more detail in sections 3.1.1 and 3.1.2.

The Committee also received evidence from Arthur Bolkas, a consultant criminologist who committed a serious offence 42 years ago.

¹ Mr Bill Stevens, public hearing, Melbourne, 19 June 2019, *Transcript of evidence*, p. 2.

² Ibid.

³ Rights Advocacy Project, *A legislated spent convictions scheme for Victoria: Recommendations for reform*, report prepared by Criminal justice team, Rights Advocacy Project, report for Liberty Victoria, Liberty Victoria, 2017, p. 16.

Case Study: Arthur

At age 22, Arthur committed a serious offence. He pleaded guilty and was sentenced to 11 years in jail, of which he served five and a half years.

During his prison sentence Arthur embraced Christianity and ‘turned [his] life back in a good direction’. He went on to complete a master’s degree in criminology and has worked in the prison and youth justice system to support prisoners. He has designed and implemented pre- and post-release programs to help rehabilitate offenders.

Arthur has not offended in 32 years. Instead, he has made a contribution to society through his work with offender education and rehabilitation.

Arthur’s conviction, according to every scheme in Australia, must be disclosed to employers for the duration of his life.

Arthur believes that acknowledging the contribution to society of individuals in his situation by giving them an avenue to have their historic convictions ‘spent’ would allow them to finally realise full rehabilitation.⁴

Several stakeholders advocated for the introduction of an alternative process to consider these exceptional cases. This would allow people with convictions that are not eligible to be protected under the provisions of a Controlled Disclosure of Criminal Record Information framework to apply to have these considered on a case-by-case basis.

In its submission, Fitzroy Legal Service suggested that such a process could include several types of relief to cover the myriad of situations that may arise, such as:

- a reduction in the waiting period or allowing a conviction to be immediately spent
- application to allow a conviction to be eligible under the framework
- to have a subsequent conviction not be taken into account in the waiting period, such as a minor offence.⁵

In its submission to the Aboriginal Justice Forum, Woor-Dungin recommended an application system for offenders not covered by the framework to apply for their conviction to be spent when

... my question to this committee is: what are you talking about—seriously—when you use that word ‘rehabilitation’?

If you are not prepared to give me a chance as an individual—not put me in some sort of statistical basket with everyone else—if you are not prepared to do that, then you need to reassess what you mean when you are asking people like me to become contributing members of our community.

It is a double standard, it is hypocritical and it is wrong.

Arthur Bolkas, Consultant Criminologist, public hearing.

⁴ Arthur Bolkas, Consultant Criminologist, public hearing, Melbourne, 1 July 2019, *Transcript of evidence*.

⁵ Fitzroy Legal Service, Submission 41, p. 21

the crime-free ‘waiting’ period concluded.⁶ This was also endorsed by the Human Rights Law Centre in its submission to this Inquiry.⁷

In its submission, the Victorian Aboriginal Legal Service considered VCAT as the appropriate forum for this process, rather than the courts. It noted that VCAT:

- is a low-cost and accessible forum where legal representation is not required
- is less formal and staff are trained to assist unrepresented parties
- already has jurisdiction to hear appeals against negative notices issued for Working With Children Checks
- has more discretion than the courts to grant an anonymising order or proceeding suppression orders, to help protect the privacy of applicants with a conviction they wish to be spent.⁸
- Professor Bronwyn Naylor also supported using VCAT for this role for similar reasons.⁹

The Committee acknowledges that the basic parameters of its recommended framework for Controlled Disclosure of Criminal Record Information will not account for some cases. The Committee also believes that justice should be available to all Victorians and that all worthy cases should be considered. Accordingly the Committee recommends a mechanism where a person with a conviction that does not strictly meet the eligibility requirements can apply for relief under the Controlled Disclosure Framework.

In the Committee’s view, this is best placed with the court that imposed the conviction on the person. The Committee acknowledges the views of stakeholders recommending VCAT as the appropriate avenue. However VCAT primarily deals with civil and administrative matters and the Committee does not consider this as appropriate in the context of a framework for Controlled Disclosure of Criminal Record Information.

For this application process, it is important to balance the rehabilitation of an ex-offender with the rights of victims. Therefore the Committee firmly believe that their voices should be heard in this process to consider the impact the crime had on their lives.

3.1.1 Sexual offences

Victoria Police’s exclusion of sexual offences under its Information Release Policy is consistent with other jurisdictions across Australia.

⁶ Woor-Dungin Criminal Record Discrimination Project, submission to Aboriginal Justice Forum 49, 2017, Submission 5, p. 36.

⁷ Human Rights Law Centre, *Submission 42*.

⁸ Victorian Aboriginal Legal Service Submission 43, pp. 12–13

⁹ Bronwyn Naylor, *Submission 25*, p. 5.

Most jurisdictions exclude sexual offences from eligibility in their spent convictions schemes. The exceptions are the South Australian, Queensland and Western Australian schemes. The South Australian Act specifically prescribes designated sexual offences where the individual received no jail time as capable of being spent.¹⁰ In Queensland and Western Australia any convictions which meet eligibility requirements are capable of being spent.

At a public hearing Mr Greg Davies, former Victims of Crime Commissioner, stated that sexual offences should not be included in a spent convictions scheme because of the unique risk they pose to others and the seriousness of the harm they cause victims:

That 13 per cent of the prison population of this state is imprisoned because of sex crimes is a serious indictment of our community and of those given charge of protecting our community. At July 2018 there were 7666 prisoners in Victoria, and 13 per cent of that total means that more than 1000 criminal sex offenders are now in our prison... That data comes from both the Australian Bureau of Statistics and the Sentencing Advisory Council of Victoria. These categories of crime, in my submission, must never be included in a spent convictions scheme. To do so would endanger the innocent even more than they are already endangered.¹¹

At a public hearing, Sergeant Wayne Gatt, Secretary of the Police Association of Victoria, stated that sexual offences should not be included in a spent convictions scheme. He noted evidence suggesting that in these cases there is an increased risk of perpetrators re-offending:

...I think criminologists provide some fairly good research with respect to reoffending and potential reoffending in these areas, and I think they are the people you ought probably be asking those questions of, so areas where offending seems to grow, worsen or develop, or it may be indicative of future offending. ...So I do think it comes to the nature of offences, and that is why at the start I said you cannot take a one-size-fits-all approach and apply it here.¹²

The Law Institute of Victoria also supported exempting sexual offences from a spent convictions scheme.¹³

In contrast, some other stakeholders recommended that there should be some capacity for sexual offences to become spent. These views ranged from legislating a spent-by-judicial-application framework to scheduling low-level sexual offences as distinct from high-level sexual offences.

¹⁰ Refers to sexual offences that have occurred between two otherwise consenting adults including sex work, or for same-sex couples where the actions would not constitute an offence if they were not same sex.

¹¹ Mr Greg Davies, Former Commissioner, Victims of Crime Commission, public hearing, Melbourne, 1 July 2019, *Transcript of evidence*, p. 23.

¹² Sergeant Wayne Gatt, Secretary, The Police Association of Victoria, public hearing, Melbourne, 1 July 2019, *Transcript of evidence*, pp. 72-3.

¹³ Law Institute of Victoria, *Introduction of spent conviction legislation in Victoria*, submission to Hon. Martin Pakula MP, Attorney-General, 2015, p. 11.

Liberty Victoria's Rights Advocacy Project stated that there should not be a blanket ban on all sex offences:

RAP recommends a scheme where serious sexual offences that cannot be automatically spent are defined in a separate schedule. In addition, a person should be able to apply for convictions for scheduled offences to be spent at the end of the relevant waiting period. This would allow for circumstances where a minor indiscretion (such as a one-off conviction for a sexting offence between peers) could either be automatically spent or spent on application after the relevant waiting period.¹⁴

Similarly, at a public hearing Dr Bill Stevens expressed concern about Victoria Police's conflation of all sexual offences:

How do you schedule a low-level offence like sexting or consensual teenage sex with a violent rape? There is this terrible problem with the police release, that they conflate all of those together. Sexting is the same as violent rape. Even tonight we have heard people say, 'Well, my crime wasn't of a sexual nature'. ... it is very easy to conflate the offences into one group.¹⁵

Dr Stevens also considered this undermined sentencing principles and practices which should be proportionate to the crime, including eligibility within a controlled disclosure framework.¹⁶

The Victorian Aboriginal Legal Service, Fitzroy Legal Service, and the Centre for Excellence in Child and Family Welfare also did not support a blanket exemption for sexual offences under a spent convictions scheme.

Woor-Dungin, the Victorian Aboriginal Child Care Agency and Professor Naylor suggested that sexual offences committed by a juvenile should be eligible to be protected from disclosure under a Victorian framework. Woor-Dungin further recommended that exemptions for sexual offences align with the requirement to obtain a Working with Children Check.¹⁷

Throughout the Inquiry the Committee received evidence which emphasised the unique nature of sexual offences. This indicates there is a need for a cautious approach when considering whether to include sexual offences with a controlled disclosure framework. The Committee agrees this approach should have a good balance between the rehabilitative aims of sentencing and protecting community safety.

In the Committee's view it is important to protect victims of sexual offences and acknowledge the seriousness of and unique harm that may be caused by such offences.

The determining basis of any applications to the courts relating to non-convictions of a sexual nature should include a consideration of risk to public safety, public interest

¹⁴ Rights Advocacy Project, *A legislated spent convictions scheme for Victoria*, p. 16.

¹⁵ Mr Bill Stevens, public hearing, Melbourne, 19 June 2019, *Transcript of evidence*, p. 2.

¹⁶ Ibid.

¹⁷ Woor-Dungin Criminal Record Discrimination Project, submission to Aboriginal Justice Forum 49, 2017, Submission 5, p. 36.

in continued disclosure, the impact on any victims of the offence and the extent of rehabilitation.

The Committee considers that the proposed framework as recommended in this report would address these issues by:

- providing the courts with mechanisms to address sexual offences only in exceptional circumstances where they are ‘lower level’ offences that did not receive a conviction
- allowing for individuals who did not receive a conviction for a sexual offence to apply to the Courts to have the findings protected under the framework.

Sexual offences resulting in a conviction should not be eligible for protection from disclosure under the framework.

3.1.2 Other exemptions

Inquiry stakeholders had conflicting views on whether certain other offences should never be included in a controlled disclosure framework.

Ms Jennifer Black, Principle Solicitor at Fitzroy Legal Service explained her organisation’s view that no types of offences should be excluded from a framework:

Each of us is more than the worst thing we have ever done.

Ms Jennifer Black, Principal Solicitor, Fitzroy Legal Service, public hearing.

I guess the first point is a philosophical one. I mean, at Fitzroy Legal Service our work is underpinned by a faith in rehabilitation ... and it is difficult to reconcile that value with excluding categories of offences from a scheme like this. But I think there are also some pragmatic considerations there. One is that, as with the case studies, within every category there is nuance, and within both, I guess, the offence and the individual, there is nuance—and I think the case studies illustrate that. The case study of the young person who filmed themselves having sex with their girlfriend is very different to perhaps some of the more serious sex offences you might hear about in the media, yet under exclusion of all sex offences they would both be excluded from any scheme.

I think the other point is that spent convictions for particular types of checks or particular types of employment—such as, you know, working in a position of trust or in a childcare centre, those sort of things—would be still disclosable under other regimes such as working with children checks, for example.¹⁸

Similarly, Mr Campbell Thomson highlighted that prescribed offences that are ineligible under the framework would not take into account the seriousness of the actual crime.

¹⁸ Ms Jennifer Black, Principal Solicitor, Fitzroy Legal Service, public hearing, Melbourne, 1 July 2019, *Transcript of evidence*, p. 34.

He gave an example of how a sexual offence could affect a person who has recently become an adult.

... one can envisage in the sexual offence category many offences which today would be considered minor—for instance, a young man who has just turned 18 having consensual sex with his longtime girlfriend, who is almost 16, and he gets convicted of sexual penetration of a minor. Most right-thinking people in the Victorian community would think that that is not a conviction that could never be spent, that there should be an opportunity for that to become automatically spent after, say, a five-year period. Now, one can look at all the offences in the Crimes Act or in the Summary Offences Act and probably make the same submission: that for very minor examples there should be discretion, either in the Magistrates Court or the County Court, to declare a matter a spent conviction.¹⁹

In comparison, in their submission Mr Brett Halliwell and Mr David Jones²⁰ recommended that convictions for some indicatable offences such as those cited below should be subject to disclosure for all time:

- intention to cause serious injury or death
- terrorism
- drug trafficking
- offences against children or vulnerable people
- sexual assault.²¹

The Committee agrees that there may be exceptional circumstances which indicate an exemption from disclosure is warranted. However the Committee believes that to effectively uphold community safety sexual and serious violent offences should remain subject to disclosure on a Police Record Check unless otherwise ordered by a magistrate or judge. Furthermore, the Committee is conscious of not recommending a framework that results in a huge administrative burden for the justice system.

Those individuals who do not strictly meet the eligibility requirements for Stream 1: Controlled disclosure through an application process, can apply to the court which originally heard their case, once they have served their sentence, for their criminal record information to be protected if they can demonstrate:

- rehabilitation
- consideration of the views of victims of their crime
- potential benefit to the offender and the community.

¹⁹ Mr Campbell Thomson, Barrister, Victorian Criminal Bar Association, public hearing, Melbourne, 1 July 2019, *Transcript of evidence*, p. 41.

²⁰ A pseudonym.

²¹ Brett Halliwell and David Jones, *Submission 14*, p. 6.

Applications to the court can also be on the basis of:

- applications for a waiver of or reduction in the crime-free period
- applications for minor offences not to reset the crime-free period

3.2 Protection from discrimination

A criminal history is a significant barrier to full participation in the community, particularly in employment. Due to the absence of a legislated spent convictions scheme, Victoria has limited provisions for an individual to address discrimination on the basis of a criminal record.

Proposals to reform anti-discrimination protections typically have included provisions to protect:

- spent convictions
- criminal records
- ‘irrelevant’ criminal records.²²

3.2.1 Legislative framework

Recourse for discrimination on the grounds of a spent conviction is provided for in the Commonwealth, Western Australia, Tasmania and the Northern Territory through anti-discrimination legislation.

In Tasmania and the Northern Territory, irrelevant criminal records (including spent convictions) are a protected attribute in anti-discrimination legislation.²³

Western Australia’s spent convictions legislation allows a person who is discriminated against on the basis of a spent conviction to lodge a complaint with the Equal Opportunity Commission.²⁴

These approaches enable a person who has experienced discrimination on the basis of spent or ‘irrelevant’ criminal convictions in certain circumstances to file a complaint with the relevant anti-discrimination commission. The commissions can make a number of enforceable orders, including:

- orders that an employer not repeat or continue the prohibited conduct
- compensation payments

²² Victorian Equal Opportunity and Human Rights Commissioner, Submission 40, p. 14.

²³ *Anti-Discrimination Act 1998* (Tas) s 3; *Anti-Discrimination Act 1992* (NT) s 3(b).

²⁴ *Spent Convictions Act 1988* (WA) s 24.

- specific action, such as re-employing or promoting a person.²⁵

Victoria's *Equal Opportunity Act 2010* provides protection from discrimination in public life. However neither a criminal record nor a spent conviction are attributes that are currently protected under the Act.²⁶

Victoria relies on the *Australian Human Rights Commission Act 1986* (Cth) to provide redress for Victorians who are wrongfully discriminated against on the basis of a criminal record.

Under the Commonwealth Act there are employment protections against criminal record discrimination. Except if an individual's criminal record means they cannot perform an 'inherent requirement of the job'²⁷. An individual can make a complaint of discrimination to the Australian Human Rights Commission, in writing within 12 months of the alleged discrimination.²⁸

The Commission can conciliate a complaint and make recommendations in relation to discrimination on the basis of an irrelevant criminal record however these are not enforceable. This is in contrast to other areas of discrimination, such as race and gender, where the Commission has the authority to make orders, impose penalties and award compensation.

The Committee believes that this gap in protection for discrimination on the basis of an irrelevant criminal record will remain notwithstanding new legislation being passed in Victoria. Therefore any controlled disclosure framework implemented in Victoria should be accompanied by relevant changes to Equal Opportunity legislation.

3.2.2 Alternative options for redress

Unfair dismissal proceedings are another option for people who have been discriminated against on the basis of a conviction protected from disclosure to seek redress.

The Fair Work Ombudsman hears unfair dismissal proceedings where an employee is dismissed from their job in a harsh, unjust or unreasonable manner.²⁹

This option is not available to independent contractors, to people in their probationary period or to those who experience discriminatory conduct at the recruitment stage.³⁰

²⁵ *Anti-Discrimination Act 1992* (NT), s 88; *Anti-Discrimination Act 1998* (Tas), s 89; *Equal Opportunity Act 1984* (WA) s 127.

²⁶ Victorian Equal Opportunity and Human Rights Commissioner, Submission 40, p. 6

²⁷ *Australian Human Rights Commission Act 1986* (Cth) s 3.

²⁸ *Ibid.*, s 32(3)(c)(i).

²⁹ Fair Work Ombudsman, *Unfair dismissal*, N.D., <<https://www.fairwork.gov.au/ending-employment/unfair-dismissal>> accessed 1 August 2019.

³⁰ <<https://www.fairwork.gov.au/ending-employment/unfair-dismissal>>

3.2.3 Reforms to prohibit discrimination

There has been consistent support over the years to introduce anti-discrimination provisions for criminal convictions.

A 2008 review of the *Equal Opportunity Act 1995* by Julian Gardner AM recommended that the Act be amended to prohibit discrimination on the grounds of an irrelevant criminal record.³¹

The review observed that discrimination on the basis of an irrelevant criminal record can entrench existing disadvantage and may reinforce a person's marginalised status. It stated:

This may be particularly detrimental for Indigenous Australians, people from low socio-economic backgrounds and those with a mental illness who are often over-represented in the criminal justice system.³²

However these reforms were not implemented after the review was completed.

In 1987 the Australian Law Reform Commission published a report into spent convictions. The report recommended amending the *Human Rights and Equal Opportunity Act 1986* (Cth) to include irrelevant criminal record as a protected attribute.³³ However, this recommendation was not implemented.

The Law Council of Australia,³⁴ the Victorian Aboriginal Legal Service,³⁵ the Human Rights Law Centre,³⁶ the Loddon Campaspe Community Legal Centre,³⁷ the Fitzroy Legal Service and JobWatch have all previously recommended that the Victorian Government amend the *Equal Opportunity Act 2010* to provide protection from discrimination on the grounds of an irrelevant criminal record. These stakeholders also made this recommendation in submissions to this Inquiry.

A 2015 submission to the Department of Justice discussion paper on spent convictions by the Law Institute of Victoria, highlighted the concerns that formed the basis of their recommendation stating that:

The impact of criminal record discrimination such as unemployment, under employment, associated harms to general health and wellbeing, and wasted human resources

³¹ Julian Gardner, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report*, report prepared by Equal Opportunity Review, Victoria, 2008, p. 13.

³² *Ibid.*, p. 99.

³³ Australian Law Reform Commission, *Spent convictions*, Report No. 37, Australian Government Publishing Service, Canberra, 1987.

³⁴ Law Council of Australia, *Model Spent Convictions Bill 2008* submission to Standing-Committee of Attorneys-General, Draft Model Spent Convictions Bill, 2009.

³⁵ Victorian Aboriginal Legal Service, submission to Standing-Committee of Attorneys-General, Draft Model Spent Convictions Bill 2008, 2009.

³⁶ Human Rights Law Centre, submission to Standing-Committee of Attorneys-General, Draft Model Spent Convictions Bill 2008, 2009.

³⁷ Fitzroy Legal Service and JobWatch, submission to Standing-Committee of Attorneys-General, Draft Model Spent Convictions Bill 2008, 2009.

will have a flow on effect resulting in significant costs to families and the broader community.³⁸

Similarly, Liberty Victoria's Rights Advocacy Project advocated for irrelevant criminal records to not be taken into account to assist a person's rehabilitation:

... where a person has demonstrated that they can live a life free of offending, then so too should they be free of those convictions from a prior life ... Where a conviction continues to be required to be disclosed, it only makes sense that such a conviction should only be taken into account where it is relevant to the decision being made (and not for an irrelevant purpose).³⁹

3.2.4 Stakeholder views

Many Inquiry stakeholders supported introducing anti-discrimination provisions for spent and irrelevant convictions into legislation.

Woor-Dungin's submission to the Aboriginal Justice Forum stated that Aboriginal people in Victoria are disproportionately effected by the absence of any protection from discrimination on the grounds of an irrelevant criminal record.⁴⁰

Accordingly, Woor-Dungin recommended that the *Equal Opportunity Act 2010* be amended to prohibit discrimination on the basis of an irrelevant criminal record.

This recommendation was also made by the LIV, the Brotherhood of St Laurence,⁴¹ the Australian Red Cross,⁴² Liberty Victoria and individuals Brett Halliwell and David Jones.⁴³

The Victorian Equal Opportunity and Human Rights Commission supported provisions to protect discrimination on the basis of an irrelevant criminal records as opposed to spent convictions generally. It explained this position in its submission to the Inquiry:

... prohibiting discrimination based on an irrelevant criminal record recognises that there may be limited situations where a person's criminal record is relevant to conduct that is covered by the EO Act. However, the use of the term 'irrelevant' means there must be some nexus, or relevance, of any criminal record to the treatment. For instance, it will be necessary to consider how the criminal record is directly relevant to the situation, whether that be employment, provision of services, or accommodation. The Commission considers it preferable to allow the broader definition of 'irrelevant' rather than 'spent' to ensure that criminal record discrimination is not only limited to discrimination based on

³⁸ Law Institute of Victoria, *Introduction of spent conviction legislation in Victoria*, p. 19.

³⁹ Rights Advocacy Project, *A legislated spent convictions scheme for Victoria*, p. 7.

⁴⁰ Woor-Dungin Criminal Record Discrimination Project, submission to Aboriginal Justice Forum 49, 2017, Submission 5, p. 6.

⁴¹ Brotherhood of St Laurence, Submission 22, p. 2.

⁴² Australian Red Cross, Submission 20, p. 1.

⁴³ Mr Brett Halliwell, public hearing, Melbourne, 19 June 2019, *Transcript of evidence*.

an 'old' record, but also discrimination on the basis of a record which does not preclude a person from being able to substantively meet the needs of the position.⁴⁴

The Committee supports amending the *Equal Opportunity Act 2010* to provide protection from discrimination for a non-disclosable criminal record. In the Committee's view, this is necessary not only for the success of a controlled disclosure framework but also to address discrimination within Victoria's criminal justice system.

The Committee also considers including an irrelevant criminal record as a protected attribute in Victoria's anti-discrimination legislation would still allow for consideration of a relevant criminal record.

This would allow for consideration of protected convictions in circumstances where a record check is sought for employment involving care, instruction or supervision of vulnerable persons, including children.⁴⁵ This would ensure that freedom from discrimination could be balanced with public interest in community safety.

To ensure that the community and employers understand the new legislative framework for controlled disclosure in Victoria practical Guidelines should be developed and distributed.

Including an irrelevant criminal record as a protected attribute would also enable people who have experienced discrimination to file a complaint with the Victorian Equal Opportunity and Human Rights Commission. This would allow the Commission to investigate and make a range of enforceable orders aimed at redressing the discrimination.

Supplementary to the framework the Government amend the *Equal Opportunity Act 2010* to include non-disclosable criminal record information as a protected attribute to prevent discrimination on the basis of an irrelevant criminal record.

The Victorian Government should develop of practical Guidelines for the community and employers to clarify rights and responsibilities regarding the use of criminal record information.

3.3 Convictions from care and protection orders

Until about 1989, the Children's Court did not differentiate between criminal sentences and welfare placements. As a result, children who received welfare orders also had a criminal record. This information was often disclosed along with other convictions through a Police Record Check.

⁴⁴ Victorian Equal Opportunity and Human Rights Commission, *Submission 40*, p. 14.

⁴⁵ *Anti-Discrimination Act 1992* (NT) s 37.

The Committee heard stories from a number of Aboriginal people whose lives continue to be affected by the trauma they experienced. They spoke of how protection orders arising in the context of criminal offences brought back horrendous memories of the neglect they experienced. Seeing those records in the context of a record of criminal convictions brought up completely unjustified feelings of shame⁴⁶ These impacts are illustrated in the case study of Uncle Larry Walsh who generously shared his story with the Committee.

Case study: Uncle Larry

Uncle Larry is a member of the Stolen Generation who was taken into State care in 1956. It was not until 2016 that Uncle Larry found out he was given a criminal record as a result of being in care. At age two, his case was heard in the Mooroopna Children's Court and he was given a criminal conviction with the offence listed as 'care/protection application' and a sentence of 'Committed to care of Child Welfare Services'. This is still included in his full police history, which Uncle Larry shared with the Committee.

Uncle Larry believes he was profiled by Police when he was a child, as a result of having this so-called criminal record. He described how as a child this made him angry and resentful and influenced his behaviour in committing minor crimes.

After spending some of his teens and twenties in youth training centres and prisons, Uncle Larry decided to change his course and became an active community leader. Among other things, he has worked for the Aboriginal Legal Service, helped many Aboriginal community, education and health organisations, and advocated on the Stolen Generation and Aboriginal deaths in custody.

Now aged 63, Uncle Larry's most recent offences are a non-criminal conviction for squatting in an empty government-owned property and a cannabis possession charge from over 25 years ago. Despite being nominated several times to sit on Aboriginal advisory panels to government, he has been rejected from membership. Uncle Larry has never been given a reason for the rejection, however he believes this has to do with his historic criminal record.⁴⁷

In 2018, the Victorian Government introduced amendments to prevent historical care and protection orders given to wards of the State from being considered as part of a criminal record.

Under the *Children, Youth and Families Act 2005*, all historical care and protection orders are not to be treated as a conviction or finding of guilt for any purpose.⁴⁸ The

⁴⁶ Woor-Dungin, 'Criminal records' of children on being made wards of state, 2017, <<http://www.woor-dungin.com.au/wp-content/uploads/2017/05/Criminal-records-and-children-in-care.pdf>> accessed 24 July 2019.

⁴⁷ Uncle Larry Walsh, Taungurung Elder, public hearing, 1 July 2019, *Transcript of evidence*.

⁴⁸ *Children, Youth and Families Act 2005* (Vic) s 592E(2).

Act also contains provisions noting that these convictions are not a ground for refusing, revoking or dismissing a person from an appointment, post, status or privilege.⁴⁹

Further, the Act places obligations on responsible agencies and Victoria Police (for information released under Freedom of Information) that:

- address and correct the criminal nature of the order
- states that the order is not a conviction or finding of guilt.⁵⁰

Victoria Police's Information Release Policy has been updated to reflect this, stating 'Court Orders on care/protection applications will not be released regardless of the age of the order'.⁵¹

The Committee acknowledges how recording practices for historical protection and care orders have created a significant burden on people who were already experiencing disadvantage. Although some progress has been made through the amendments to the *Children, Youth and Families Act 2005*, it is important that the intention of these amendments is being adhered to and enforced.

The Committee believes that the operation of provisions of the *Children, Youth and Families Act 2005* relating to historical care and protection orders should ensure that:

- protection from discrimination is provided to these individuals
- Victoria Police and responsible agencies are fulfilling their obligations to address and correct the nature of the orders.

3.4 Criminal record checks under other legislation

A spent convictions scheme operates within a broader legal framework that balances rehabilitation of ex-offenders with community safety. In some instances a more detailed history of a person's criminal record is required by different agencies to properly assess a person's eligibility for employment or licencing.

As discussed previously in this Report, in Victoria there are several exceptions under various legislation and policies to Victoria Police's Information Release Policy. These are listed in full in Appendix 5.

In this Inquiry, some stakeholders highlighted the difficulties they have faced due to disclosure of their criminal history under other frameworks. In particular, many were affected by their inability to gain a Working with Children Check, which is required for employment in many social work fields.

⁴⁹ Ibid., s 592F.

⁵⁰ Ibid., s 592G, H.

⁵¹ Victoria Police, *National Police Certificates: Information release policy*, Victoria Police, Melbourne, 2019, p. 1.

The Government must be aware that these exceptions operate alongside the fundamental goals of the controlled disclosure framework recommended by the Committee. There needs to be broad consistency overall and it is important that only relevant criminal offences should be taken into account. No framework should compromise the protection of the community and in particular vulnerable members.

3.4.1 Working With Children Checks

Working With Children Checks are legislated under the *Working with Children Act 2005*. These are required for individuals who wish to engage in child-related work, whether it is paid or voluntary.

The application process is administered by the Department of Justice and Regulation which makes a request on behalf of the applicant to conduct a Police Record Check.

The purpose of the Working With Children Check is to screen for relevant offences and other information which may contravene section 1A of the Act. This states that 'the protection of children from sexual and physical harm must be the paramount consideration'.⁵²

Under the Act relevant offences include:

- those considered serious sexual, violent or drug offences
- offences which pose an 'unjustifiable' risk to children
- offences against the *Working with Children Act 2005* (for example, s 33 'engaging in child-related work without an assessment notice').⁵³

The Act also allows non-convictions, spent convictions, pending charges, and acquittals because of mental impairment or insanity to be taken into account.⁵⁴

In determining whether to grant a check, the Department can consider reports from other courts and organisations. These include reports from Corrections Victoria and the Department of Health and Human Services' Child Protection Unit.

If the applicant does not pass a Working With Children Check the Department will issue either an interim negative notice or negative notice.

An interim negative notice indicates the Department's intention to reject an application, including an explanation for rejection.. The applicant can make a submission to the Department explaining why they believe the Check should be granted. If an applicant is unsuccessful in challenging their interim negative notice the Department will issue a negative notice.

⁵² *Working With Children Act 2005* (Vic) s 1A.

⁵³ *Ibid.*, s 33.

⁵⁴ *Ibid.*, s 4.

A negative notice is the Department's final decision and stops the applicant from engaging in child-related work. If a negative notice is issued an applicant cannot apply for another Working With Children Check for 5 years. Exceptions include if their circumstances change, such as no longer being subject to reporting under the *Sex Offenders Registration Act 2004*.⁵⁵

An applicant may appeal a negative notice to the Victorian Civil and Administrative Tribunal within 28 days of receiving the notice.⁵⁶

For Working With Children Check applications, Victoria Police will provide a person's complete criminal record to the Department. As a result, the Department will consider all of a person's offences regardless of whether they qualify for non-disclosure under their information release policy.

The Committee heard from many stakeholders how this process had affected people in gaining employment, particularly in social fields. This also included instances where ex-offenders were specifically seeking employment in social sectors to help those in similar circumstances to their own past.

In its submission, Goulburn Valley Community Legal Centre provided a case study of an Aboriginal man who was denied a Working With Children Check to work as a school cleaner.

Case Study (from Goulburn Valley Community Legal Centre)⁵⁷

An Aboriginal man of 55 years of age sought a Working with Children Check for his new job as a school cleaner. His application was classed as Category B because he was convicted in his early twenties of intentionally causing injury and using obscene language. These were the consequence of him fighting with another Aboriginal man and then abusing police who attended.

As a result, the Department issued him with an interim negative notice and invited him to make a submission to explain the offences. However, he was unable to do so because of his poor literacy skills. Subsequently the time lapsed and the application was refused.

Goulburn Valley Community Legal Centre recommended that a controlled disclosure framework in Victoria should limit information released during a Working With Children Check. It stated that prior convictions should only be disclosed if they are relevant to the safety of children and older or vulnerable persons with whom the applicants may work.⁵⁸

⁵⁵ Ibid., s 25(1).

⁵⁶ Ibid., s 26(4)(a).

⁵⁷ Goulburn Valley Community Legal Centre, *Submission 3*, p. 1.

⁵⁸ Ibid., p. 2.

The Victorian Aboriginal Legal Service shared the story of Jessica, who was granted a Working With Children Check but felt great shame in revisiting her offences.

Case study: Jessica

Jessica is an Aboriginal woman from Gippsland. She had a traumatic childhood involving family violence experiences and left school aged 16.

Jessica was later diagnosed with depression and began abusing drugs. At age 18 she began a relationship with a young man who suffered schizophrenia. At one stage her boyfriend was involved in a fight with another person on public transport. Although Jessica was not directly involved, she was implicated and charged. She was not convicted, rather received a good behaviour bond, which she complied with.

Not long after this incident, Jessica's boyfriend committed suicide. Jessica was left traumatised and began drinking heavily. At one stage she was taken to hospital due to intoxication and became aggressive, injuring a staff member. Jessica was charged and pleaded guilty. She was not convicted and received an undertaking which she complied with and the matter was dismissed.

Many years have passed since these incidents and Jessica is now the mother of a young family who acknowledges her behaviour was illegal and immature. She also recognises how her circumstances contributed to the offences, even if they are not an excuse.

Jessica approached the Victorian Aboriginal Legal Service for assistance in gaining a Working With Children Check. Although her previous offences did not involve children and occurred when she was a young person, Jessica was required to explain the circumstances of her offending in order to be granted a check.

Jessica was able to obtain the Check but the process of revisiting her offences was shameful and upsetting. She felt as if she was again being punished for something that occurred years ago and she had truly moved on from.⁵⁹

Woor-Dungin's submission to the Aboriginal Justice Forum discussed the issues faced by Aboriginal people when they are required to discuss irrelevant convictions in applications to become kinship carers.⁶⁰ At a public hearing in Shepparton, Mr Robert Nicholls, Chairperson of the Hume Regional Aboriginal Justice Advisory Committee also discussed these issues:

... if you want to become a carer, whether it be for an extended family member or family members as such, you have to go through a working with children check as well as a national police check, and if there is any form of offending issues that come up there, that could prohibit him or her from becoming a carer. I know of a person in Echuca who raised this at our forums as well as speaking to Victoria Police at the time. He was trying to become a carer for five of his nieces and nephews, and because he could not pass

⁵⁹ Victorian Aboriginal Legal Service, *Submission 43*, p. 7.

⁶⁰ Woor-Dungin Criminal Record Discrimination Project, submission to Aboriginal Justice Forum 49, 2017, Submission 5.

that police check he was not able to. Look, that is just the tip of the iceberg in terms of where families are looking at caring for Aboriginal children, whether that be immediate siblings or whether that be extended family members, so it is a big issue within the Aboriginal community.⁶¹

To address this, some stakeholders questioned whether the Department should have access to all of a person's criminal history for Working With Children Checks. They often considered that some offences should be considered as 'irrelevant' convictions for the purposes of the Check.

Ms Karen Gurney, Manager and Principal Solicitor at Goulburn Valley Community Legal Centre, discussed the impact this had had on her clients:

Most of my working with children clients, for example, would have offending that has seen them spend more than six months in jail. I have to say also that if we go back historically, especially 20, 30 years or more, the courts were perhaps particularly heavy on Aboriginal people offending for whatever justification there may have been at the time, so penalties that were handed out back then are not the levels of penalty that would be applied now. They have already suffered that period of incarceration in many instances where today they might get a community correction order instead. So it is a way of taking that into account, and we are talking about something that is a decade old, for adults, for example,⁶²

The Victorian Aboriginal Legal Service recommended that spent convictions no longer be disclosed to the Department for Working With Children Checks, subject to the following exemptions:

- where an offence was committed or allegedly committed against a child
- where an offence was a sexual offence.⁶³

The Committee acknowledges that the purpose of a Working With Children Check is to ensure that children are protected from sexual and physical harm. However, there is a need to balance this consideration of a person's criminal history, particularly when past convictions are irrelevant to the position sought.

In the Committee's view, a controlled disclosure framework which includes both automatic and 'by application' mechanisms to consider prior convictions as recommended in this report would provide worthy individuals an avenue to address the issues raised here. There are also existing opportunities for these people to appeal decisions of interim negative or negative notices, through VCAT.

Notwithstanding the Committee's position that irrelevant convictions should not affect the possibility of obtaining a Working With Children Check, the Committee agrees that

⁶¹ Mr Robert Nicholls, Chairperson, Hume Regional Aboriginal Justice Advisory Committee, public hearing, Shepparton, 15 July 2019, *Transcript of evidence*, p. 16.

⁶² Ms Karen Gurney, Manager and Principal Solicitor, Goulburn Valley Community Legal Centre, public hearing, Shepparton, 15 July 2019, *Transcript of evidence*, p. 5.

⁶³ Victorian Aboriginal Legal Service, *Submission 43*, p. 25.

the Department should consider all information available on a person's criminal history when determining whether to grant a Check.

3.4.2 ***Assisted Reproductive Treatment Act 2008***

Under s 11(1)(c) of the Assisted Reproductive Treatment Act 2008, a woman and her partner seeking In Vitro Fertilisation (IVF) treatment must undergo a criminal record check. This is then verified by the counsellor providing counselling during the IVF application process.⁶⁴

Section 14(1)(a) of the Act outlines presumptions against treatment if a criminal record check for either the woman or her partner detail 'charges proven' related to prescribed sexual or violent offences.⁶⁵ Decisions under the Act can be reviewed by the Patient Review Panel.

The Law Institute of Victoria previously recommended that sexual offences should continue being a prescribed presumption against treatment under the Act. It also recommended sexual offences should always be subject to disclosure under a proposed Victorian framework.⁶⁶

However, the Law Institute of Victoria and the Victorian Aboriginal Legal Service recommended that violent offences eligible for non-disclosure under a framework should no longer be a prescribed presumption against treatment.⁶⁷

The Victorian Aboriginal Legal Service also recommended that spent convictions not be disclosed for applications made under the Act, except for sexual and violent offences prescribed in s 14(1)(a). It also suggested further amendments to:

- s 15(3) to allow the Patient Review Panel to take into account a conviction has been spent
- s 5(e) to state that persons seeking treatment should not be discriminated against on the basis of an irrelevant criminal record.⁶⁸

3.4.3 ***Firearms Act 1996***

Under Victoria Police's Information Release Policy the *Firearms Act 1996* is a listed exemption for disclosing a spent conviction if it relates to firearms licensing requirements.

⁶⁴ *Assisted Reproductive Treatment Act 2008* (Vic) s 11(1)(c).

⁶⁵ *Ibid.*, s 14(1)(a).

⁶⁶ Law Institute of Victoria, *Introduction of spent conviction legislation in Victoria*, pp. 5-6.

⁶⁷ *Ibid.*; Victorian Aboriginal Legal Service, *Submission 43*, p. 7.

⁶⁸ Victorian Aboriginal Legal Service, *Submission 43*, pp. 20-1.

Under s 5 of the Act, it is an offence for a ‘prohibited person’ to possess, carry or use a firearm.⁶⁹ A ‘prohibited person’ is defined as a person whose time since imprisonment or completion of a community correction order is less than the prescribed waiting period. The definition also includes individuals who have final orders under the *Family Violence Protection Act 2008* or *Personal Safety Intervention Orders Act 2010*.⁷⁰

The Act outlines different waiting periods that individuals with convictions must wait to be removed from the ‘prohibited person’ category for the purpose of firearms licensing. The waiting period varies depending on the type of offence and length of sentence. For example, a person sentenced to 5 years or less imprisonment in any Australian jurisdiction has a time-since-imprisonment waiting period of 5 years before they are no longer a ‘prohibited person’.⁷¹

The Police Association of Victoria recommended that individuals deemed a ‘prohibited person’ because of their offences ‘must be exempt from having their relevant convictions spent until they are no longer on the list’.⁷² The Association argued that a spent convictions scheme should not contradict current licensing regulations and operating registers as it may cause an administrative conflict. The Association also believed that a criminal record should accurately reflect risks to community safety.⁷³

At a public hearing, Sergeant Wayne Gatt, Secretary of the Police Association of Victoria told the Committee:

So let’s just say, for argument’s sake, the waiting period is 10 years for a particular offence and that makes you a prohibited person under a firearms offence. It would be nonsensical for somebody to remain a prohibited person yet not have that conviction recorded all through that period, because if they were then to commit further offence as a prohibited person the court ought to be able to consider convictions that were committed that led to them being made a prohibited person in the first instance.⁷⁴

In the Committee’s view, it is important for a controlled disclosure framework to be consistent with any licensing regulation and operating registers to ensure there is uniformity across legislation and clarity for individuals.

The proposed framework should not interfere with the following:

- existing oversight and complaints mechanisms, such as complaints to the Office of the Victorian Information Commissioner
- criminal record checks under current policy and legislation, particularly in relation to irrelevant criminal records.

⁶⁹ *Firearms Act 1996 (Vic)* s 5(1).

⁷⁰ *Ibid.*, s 3(1).

⁷¹ *Ibid.*

⁷² The Police Association of Victoria, *Submission 30*, p. 2.

⁷³ *Ibid.*

⁷⁴ Gatt, *Transcript of evidence*, p. 70.

Appendix 1

About the inquiry

A1.1 Submissions

1	James Newbury
2	J Chang
3	Goulburn Valley Community Legal Centre
4	CONFIDENTIAL
5	Woor-Dungin Criminal Record Discrimination Project
5a	Criminal Record Discrimination Project Submission to Aboriginal Justice Forum 49
6	Leigh Simpson
7	NAME WITHHELD
8	Law Institute of Victoria
8a	Submission to the Attorney-General on the Introduction of Spent Convictions Legislation in Victoria
9	CONFIDENTIAL
10	NAME WITHHELD
11	CONFIDENTIAL
12	CONFIDENTIAL
13	NAME WITHHELD
14	Brett Halliwell and David Jones
15	The Centre for Excellence in Child and Family Welfare
16	Liberty Victoria
16a	Rights Advocacy Project report on A Legislated Spent Convictions Scheme for Victoria
17	Glen Hibberd
18	NAME WITHHELD
19	Greg Davies
20	Australian Red Cross
21	Supreme Court of Victoria
22	Brotherhood of St Laurence
23	Victoria Legal Aid
24	Sacred Heart Mission
25	Bronwyn Naylor
26	Jesuit Social Services
27	Inner Melbourne Community Legal
28	Victorian Aboriginal Child Care Agency
29	Justice Connect
30	Police Association of Victoria
31	Youth Affairs Council Victoria and Koorie Youth Council
31a	Ngaga-Dji: young voices creating change for justice
32	CONFIDENTIAL

33	Office of the Victorian Information Commissioner
34	NAME WITHHELD
35	CONFIDENTIAL
36	Seppy Pour
37	CONFIDENTIAL
38	CONFIDENTIAL
39	Daryl Sloan
40	Victorian Equal Opportunity and Human Rights Commission
41	Fitzroy Legal Service
42	Human Rights Law Centre
43	Victorian Aboriginal Legal Service
44	NAME WITHHELD
45	Federation of Community Legal Centres

A1.2 Public hearings

Wednesday 29 May 2019

Legislative Council Committee Room, Parliament House, East Melbourne

Name	Title	Organisation
Ms Melinda Walker	Co-Chair of Criminal Law Section	
Ms Kerry O'Shea	Head of Public Affairs	Law Institute of Victoria
Ms Gemma Hazmi	General Manager, Policy, Advocacy and Professional Standards	
Mr Varuna Weerasekera	Group Manager, Records Services Division, Public Support Services Department	Victoria Police

Wednesday 19 June 2019

Knight Kerr Room, Parliament House, East Melbourne (open mic public hearing)

Name
Mr Leigh Simpson
Mr Jack Charles
Mr Jeffrey Newman
NAME WITHHELD
NAME WITHHELD
Dr Bill Stevens
Mr Brett Halliwell and Mr David Jones
Mr Zed
Ms Gillian Clark

Monday 1 July 2019

Legislative Council Committee Room, Parliament House, East Melbourne

Name	Title	Organisation
Mr Arthur Bolkas	Consultant Criminologist	
Ms Julia Kretzenbacher	Vice President	Liberty Victoria
Mr Martin Radzaj	Chair, Criminal Policy Committee	
Ms Sally Parnell	Acting CEO	
Mr Daniel Clements	General Manager, Justice and Crime Prevention	Jesuit Social Services
Mr Greg Davies	Former Victims of Crime Commissioner	
Ms Jennifer Black	Principal Solicitor	Fitzroy Legal Service
Ms Hui Zhou	Principal Solicitor	
Mr Campbell Thomson	Barrister	Victorian Criminal Bar Association
Ms Naomi Murphy	Central Gippsland Client Services Officer, VALS and Aboriginal ex-offender employment program worker	
Mr Stan Winford	Associate Director, Centre for Innovative Justice, RMIT University	Woor-Dungin/ Winda-Mara Aboriginal Corporation
Uncle Wenzel Carter	Ngarrindjeri Elder and Aboriginal Cultural Support worker	
Ms Christa Momot	Community Development Manager	
Uncle Larry Walsh	Taungurung Elder	
Sergeant Wayne Gatt	Secretary	Police Association of Victoria
Ms Melanie Poole	Consultant	See Your Change

Monday 15 July 2019

The Connection Shepparton, 7287 Midland Highway, Shepparton

Name	Title	Organisation
Ms Karen Gurney	Manager and Principal Solicitor	Goulburn Valley Community Legal Centre
Mr Dan Wright	Site Manager – Shepparton and Echuca	MADEC Australia
Mr Robert Nicholls	Chairperson	Regional Aboriginal Justice Advisory Committee, Hume
Mr Chris Hazelman	Manager	Ethnic Council
Reverend Chris Parnell	Secretary	
Mr Darryl Sloane	Aboriginal Advocacy Program Manager	Rights Information Advocacy Centre
Ms Karryn Goode	CEO	
Mr Lee Joachim	Consultant and Former Chair	Rumbalara ACCHO

A1.3 Site visit

Tuesday 6 August 2019

Winda-Mara Aboriginal Corporation, Heywood

Name	Title	Organisation
Mr Michael Bell	CEO	Winda-Mara Aboriginal Corporation
Ms Sherree Chaudhry	Human Resources Manager	
Ms Raylene Harradine	Member	Victorian Aboriginal Children and Young People Alliance
Ms Dana Pyne	Member	
Mr Jason Kanoa	Chair	Barwon South-West RAJAC and Dhelk Dja Action Group
Ms Alicia Mesley		WDEA Works
Ms Teresa Rogers		
Mr Stan Winford	Associate Director, Centre for Innovative Justice, RMIT University	Woor-Dungin/ Winda-Mara Aboriginal Corporation

Appendix 2
**Correspondence (Department of
Justice and Community Safety and
Victoria Police)**

A2

-----Original Message-----

From: [REDACTED]

Sent: Friday, 12 July 2019 2:08 PM

To: Lilian Topic [REDACTED]

Cc: [REDACTED]

Subject: Submission date extension

Hello Lilian

I confirm that the department is continuing to explore making a submission to the Legislated Spent Convictions Inquiry.

Thank you for your agreement to extend the deadline for submission to 19 July.

We will update you on our progress as soon as possible and appreciate your flexibility.

kind regards Annie

Annie Woodger
Acting Director, Criminal Law Reform
Department of Justice and Community Safety

[REDACTED]

Our values: Community - Together - Integrity - Respect - Make it Happen

I work Tuesday to Friday

Be sustainable. Help conserve resources by not printing out this email.

A2



VICTORIA POLICE

Graham Ashton AM
Chief Commissioner of Police

Victoria Police Centre
637 Flinders Street
Docklands Victoria 3008 Australia
Telephone +61 3 9247 6868

P.O. Box 913
Melbourne Victoria 3001 Australia

Our Ref: FF-143698

Committee Secretary
Legal and Social Issues Committee
Department of the Legislative Council
Parliament of Victoria
Spring Street East Melbourne 3002
spentconvictionsinquiry@parliament.vic.gov.au

Dear Committee Secretary

Victorian Legislative Council Legal and Social Issues Committee Inquiry into a Legislated Spent Convictions Scheme

Thank you for the opportunity to appear before the Legal and Social Issues Committee on 29 May 2019 to provide information on the application of our current spent convictions policy.

Since this appearance we have prepared a draft organisational submission to meet the Committee's terms of reference and we thank the Committee for extending the deadline to provide this information. As you will appreciate, Victoria Police is required to abide by the procedure set out in the *Guidelines for Victorian Government Submissions and Responses to Inquiries*. As part of this approval process it has been determined a submission led by the Department of Justice and Community Safety is the preferred method for providing the Committee with information, and we have recently reviewed the Department's submission.

We thank you again for the opportunity to provide information to the Committee. Should you have any further queries, please do not hesitate to contact Louise Jarrett, Acting Director Policy and Legislation Division on [REDACTED]



Graham Ashton AM
Chief Commissioner

9 / 8 / 19

Appendix 3 Jurisdiction comparison table

Features	VIC	CTH	NSW	QLD	ACT	NT	WA	TAS	SA
	Victoria Police Information Release Policy	Crimes Act 1914	Criminal Records Act 1991	Criminal Law (Rehabilitation of Offenders) Act 1986	Spent Convictions Act 2000	Criminal Records (Spent Convictions) Act 1992	Spent Convictions Act 1988	Annulled Convictions Act 2003	Spent Convictions Act 2009
Definition of conviction	<ul style="list-style-type: none"> • Finding of guilt. • A finding of guilt with no conviction • Order of good behaviour. 	<ul style="list-style-type: none"> • Conviction whether summary or on indictment. • A finding of guilt. • No finding of guilt recorded – however, offence was taken into account for sentencing of another offence. 	<ul style="list-style-type: none"> • Conviction whether summary or on indictment. • A finding of guilt which proves the offence. • Order of good behaviour. • Order made by the Children's Court. 	<ul style="list-style-type: none"> • Conviction made by any court. 	<ul style="list-style-type: none"> • Conviction whether summary or on indictment. • Charged proved; but conviction disposed. 	<ul style="list-style-type: none"> • Any conviction. • Finding of guilt. • Any other order/proceeding which constitutes a criminal record under Act. 	<ul style="list-style-type: none"> • Any conviction. • Charged proved; but conviction disposed. <p>Excludes:</p> <ul style="list-style-type: none"> • Life sentence. • Children's conviction 	<ul style="list-style-type: none"> • Conviction whether summary or on indictment. • A finding of guilt. 	<ul style="list-style-type: none"> • Conviction whether summary or on indictment • Finding of guilt or offence • No finding of guilt recorded – however, offence was taken into account for sentencing of another offence

Features	VIC	CTH	NSW	QLD	ACT	NT	WA	TAS	SA
	Victoria Police Information Release Policy	Crimes Act 1914	Criminal Records Act 1991	Criminal Law (Rehabilitation of Offenders) Act 1986	Spent Convictions Act 2000	Criminal Records (Spent Convictions) Act 1992	Spent Convictions Act 1988	Annulled Convictions Act 2003	Spent Convictions Act 2009
Conviction capable of being spent	<ul style="list-style-type: none"> Sentence of imprisonment of 30 months or less <p>Exceptions:</p> <ul style="list-style-type: none"> Based on offences and employment purposes (e.g. WWCC) 	<ul style="list-style-type: none"> Sentence with no imprisonment Sentence of imprisonment 30 months or less Pardon for reason other than wrongful conviction 	<ul style="list-style-type: none"> Sentence of imprisonment 6 months or less <p>Exceptions:</p> <ul style="list-style-type: none"> Sexual offences 	<ul style="list-style-type: none"> Sentence with no imprisonment Sentence of imprisonment 30 months or less 	<ul style="list-style-type: none"> Sentence of imprisonment 6 months or less <p>Exceptions:</p> <ul style="list-style-type: none"> Sexual offences 	<ul style="list-style-type: none"> Sentence of imprisonment 6 months or less <p>Exceptions:</p> <ul style="list-style-type: none"> Sexual offences 	<ul style="list-style-type: none"> Sentences less than life imprisonment Serious offences are capable of being spent upon approved application <p>Exceptions:</p> <ul style="list-style-type: none"> Juvenile: murder, attempted murder, manslaughter 	<ul style="list-style-type: none"> Sentence of imprisonment 6 months or less <p>Exceptions:</p> <ul style="list-style-type: none"> Sexual offences 	<p>Eligible Adult Offence:</p> <ul style="list-style-type: none"> No prison sentence; or sentence of imprisonment is 12 months or less <p>Eligible Juvenile Offence:</p> <ul style="list-style-type: none"> No prison sentence; or imprisonment is 24 months or less <p>Eligible Sex Offence:</p> <ul style="list-style-type: none"> No prison sentence; is a designated sex offence
Waiting period	<ul style="list-style-type: none"> Adult: 10 years Juvenile: 5 years From the date of conviction. 	<ul style="list-style-type: none"> Adult: 10 years Juvenile: 5 years From date of conviction. 	<ul style="list-style-type: none"> Adult: 10 years (indictable offences), 5 years (summary offences) Juvenile: 5 years If sentence of imprisonment was imposed, waiting period begins from the end of the period of imprisonment. 	<ul style="list-style-type: none"> Adult: 10 years Juvenile: 5 years Any conditions of sentence must be met before waiting period can end. 	<ul style="list-style-type: none"> Adult: 10 years Juvenile: 5 years If sentence of imprisonment was imposed, waiting period begins from the end of the period of imprisonment. 	<ul style="list-style-type: none"> Adult: 10 years Juvenile: 5 years If sentence of imprisonment was imposed, waiting period begins from the end of the period of imprisonment. 	<ul style="list-style-type: none"> Adult: 10 years, 3 years for prescribed cannabis offences. Juvenile: 2 years. Any conditions of sentence must be met before waiting period can end. 	<ul style="list-style-type: none"> Adult: 10 years Juvenile: 5 years From the date of conviction. <p>Exceptions:</p> <ul style="list-style-type: none"> Child sex offenders 	<ul style="list-style-type: none"> Adult: 10 years Juvenile: 5 years From the date of conviction. <p>Exceptions:</p> <ul style="list-style-type: none"> Child sex offenders

Features	VIC	CTH	NSW	QLD	ACT	NT	WA	TAS	SA
	Victoria Police Information Release Policy	Crimes Act 1914	Criminal Records Act 1991	Criminal Law (Rehabilitation of Offenders) Act 1986	Spent Convictions Act 2000	Criminal Records (Spent Convictions) Act 1992	Spent Convictions Act 1988	Annulled Convictions Act 2003	Spent Convictions Act 2009
How does the conviction become spent?	Automatic – subject to no further conviction during waiting period	Automatic – subject to no further conviction during waiting period	Automatic – subject to no further conviction during waiting period	Automatic – subject to no further conviction during waiting period	Automatic – subject to no further conviction during waiting period	Convictions in the Juvenile Court (adults and juveniles): Automatic – subject to no further conviction during waiting period Juvenile offenders convicted in adult court: Upon application to the Police Commissioner	Lesser convictions: (< 12months imprisonment) Application to Commissioner of Police Serious convictions: (> 12months imprisonment) Application to District Court judge	Automatic – subject to no further conviction during waiting period	Non-sex offences: Automatic – subject to no further conviction during waiting period. Sex offences: upon application – subject to discretion of qualified magistrate
Consequence of a conviction becoming spent	Information relating to the spent conviction will not be released with criminal history record.	Individual is not required to disclose information regarding a spent conviction.	Individual is not required to disclose information regarding a spent conviction. Criminal record is taken to mean only convictions which are not spent.	Individual is not required to disclose information regarding a spent conviction.	Individual is not required to disclose information regarding a spent conviction. Criminal record is taken to mean only convictions which are not spent.	Individual is not required to disclose information regarding a spent conviction. Criminal record is taken to mean only convictions which are not spent.	Individual is not required to disclose information regarding a spent conviction. Reference to any law does not include a spent conviction.	Individual is not required to disclose any other person of information concerning spent conviction. Reference to conviction under law does not include a spent conviction.	Individual is not required to disclose any other person of information concerning spent conviction. Reference to conviction under law does not include a spent conviction. Act does not authorise destruction of records.

Features	VIC	CTH	NSW	QLD	ACT	NT	WA	TAS	SA
	Victoria Police Information Release Policy	Crimes Act 1914	Criminal Records Act 1991	Criminal Law (Rehabilitation of Offenders) Act 1986	Spent Convictions Act 2000	Criminal Records (Spent Convictions) Act 1992	Spent Convictions Act 1988	Annulled Convictions Act 2003	Spent Convictions Act 2009
Consequences of disclosing a spent conviction	N/A	An individual aware, or reasonably expected to be aware, of another's spent conviction should not disclose the fact to any person without consent; and should not take spent conviction into account.	No person should take into account a spent conviction. It is an offence to disclose a person's spent conviction, without lawful authority. It is an offence to fraudulently obtain spent conviction information.	It is an offence to contravene any provisions in this Act; including disclosing a spent conviction – unless by permit or authority.	No person should take into account a spent conviction. It is an offence to disclose a person's spent conviction, without lawful authority. It is an offence to fraudulently obtain spent conviction information.	No person should take into account a spent conviction. It is an offence to disclose a person's spent conviction, without lawful authority. An individual aware, or reasonably expected to be aware, of another's spent conviction should not disclose the fact to any person other than in accordance with Act. It is an offence to fraudulently obtain spent conviction information.	No person should take into account a spent conviction. It is an offence to discriminate against an individual on the basis of a spent conviction. It is an offence to disclose a person's spent conviction, without lawful authority. It is an offence to fraudulently obtain spent conviction information.	No person should take into account a spent conviction. It is unlawful to threaten to expose a spent conviction. It is an offence to disclose a person's spent conviction, without lawful authority. It is an offence to fraudulently obtain spent conviction information.	A person who unlawfully discloses information about a spent conviction can be found guilty of an offence (including for business activities).

Features	VIC	CTH	NSW	QLD	ACT	NT	WA	TAS	SA
	Victoria Police Information Release Policy	Crimes Act 1914	Criminal Records Act 1991	Criminal Law (Rehabilitation of Offenders) Act 1986	Spent Convictions Act 2000	Criminal Records (Spent Convictions) Act 1992	Spent Convictions Act 1988	Annulled Convictions Act 2003	Spent Convictions Act 2009
Protections Against Discrimination - criminal record	N/A	Protections against discrimination for: employment. Exceptions: If an individual's criminal record means they cannot perform an 'inherent requirement of the job'.	N/A	N/A	N/A	Protections against discrimination for: employment, education/training, housing, purchasing, access to services and public places, and being a member of a club/association, and government programs (state only).	N/A	Protections against discrimination for: employment, education/training, housing, purchasing, access to services and public places, being a member of a club/association, and government programs (state only).	N/A
						Exceptions: If an individual's criminal record means they cannot perform an 'inherent requirement of the job'. Or if an individual is working with vulnerable people (i.e. children, elderly or disabled persons).		Exceptions: If an individual's criminal record means they cannot perform an 'inherent requirement of the job'. Or working with children.	

Features	VIC	CTH	NSW	QLD	ACT	NT	WA	TAS	SA
	Victoria Police Information Release Policy	Crimes Act 1914	Criminal Records Act 1991	Criminal Law (Rehabilitation of Offenders) Act 1986	Spent Convictions Act 2000	Criminal Records (Spent Convictions) Act 1992	Spent Convictions Act 1988	Annulled Convictions Act 2003	Spent Convictions Act 2009
Protections Against Discrimination - spent conviction	N/A	N/A	N/A	N/A	Protections against discrimination for: employment, education/training, housing, purchasing, access to services and public places, and being a member of a club/association. Exceptions: If an individual is working with children in residential care.	N/A	Protections against discrimination for: employment. Exceptions: If an individual is working with children in residential care.	N/A	N/A
Protections Against Discrimination - making complaints	N/A	An individual can make a complaint of discrimination on the basis of an irrelevant criminal record to the Australian Human Rights Commission, in writing within 12 months of alleged discrimination.	N/A	N/A	An individual can make a complaint of discrimination on the basis of a spent conviction to the Disability Commissioner, in writing within 12 months of alleged discrimination.	An individual can make a complaint of discrimination on the basis of an irrelevant criminal record to the Anti-Discrimination Commissioner NT, in writing within 12 months of alleged discrimination.	An individual can make a complaint of discrimination on the basis of a spent conviction to the Equal Opportunity Commissioner, in writing within 12 months of alleged discrimination.	An individual can make a complaint of discrimination on the basis of an irrelevant criminal record to the Anti-Discrimination Commissioner TAS, in writing within 12 months of alleged discrimination.	N/A

Appendix 4
**Victoria Police Information Release
Policy (May 2019)**

A4

PUBLIC DOMAIN



VICTORIA POLICE

Information Release Policy

Revised 22 May 2019

Introduction

Victoria Police applies strict guidelines to the release of criminal history information to individuals and organisations outside Victoria Police. This information sheet sets out the general provisions of the release policy that Victoria Police applies when police records checks are conducted for the purposes of employment, occupation related licensing or registration and for voluntary work. This policy does not apply to release of information by Victoria Police to other police forces and organisations with responsibility for law enforcement or the administration of justices.

Consent

Victoria Police does not release criminal history information to any organisation outside the sphere of law enforcement and/or the administration of justice without the individual's written consent. In order to obtain a national police certificate an individual must complete the appropriate application form, called 'Consent to Check and Release National Police Record' and pay a fee.

What will be released

Victoria Police release criminal history information on the basis of findings of guilt at court, and will also release details of matters currently under investigation or awaiting court hearing. It is important to note that a finding of guilt without conviction is still a finding of guilt and will be released according to the information release policy. Victoria Police release police records in accordance with any or all of the following guidelines:

- If the individual was an adult (eighteen years* or over) when last found guilty of an offence and ten years have since elapsed, subject to exceptions listed below, no details of previous offences will be released.
- If the individual was a child (under eighteen years*) when last found guilty of an offence and five years have since elapsed, subject to exceptions listed below, no details of previous offences will be released. (Note: Court Orders on care/protection applications will not be released regardless of the age of the order).
- If the last finding of guilt resulted in a non-custodial sentence or custodial sentence of 30 months or less, the ten or five year period commences from the day the individual was found guilty.
- If the last finding of guilt is an appeal or re-hearing, the ten or five year period will be calculated from the original court date.
- If the last offence qualifies to be released, then all findings of guilt will be released, including juvenile offences.

PUBLIC DOMAIN

VICTORIA POLICE

- If the record contains an offence that resulted in a custodial sentence of longer than 30 months the offence will always be released.
- If 10 years have elapsed since the last finding of guilt, then only the offence(s) that resulted in a custodial sentence of longer than 30 months will be released.
- Relevant offences where the result was 'Acquitted by reason of insanity/mental impairment' or 'Not guilty by reason of insanity/mental impairment' may be released.
- If the individual is currently under investigation or has been charged with an offence and is awaiting the final court outcome the pending matters/charges are released. It is noted on the certificate that the matter/charge cannot be regarded as a finding of guilt as either the matter is currently under investigation or the charge has not yet been determined by a court.

Please Note: Findings of guilt without conviction and findings of guilt resulting in a good behaviour bond are findings of guilt and will be released under this policy.

Exceptions

There are some other circumstances where a record that is over ten years old will be released, these are:

1. If the record check is for the purpose of :-
 - Registration with a child-screening unit and/or Victorian Institute of Teaching
 - Assisted Reproductive Treatment (Act 2008)
 - Registration and accreditation of health professionals
 - Employment or contact with prisons or state or territory police forces
 - Casino or Gaming Licence
 - Prostitution Service Provider's Licence (Prostitution Control Act 1994)
 - Operator Accreditation under the Bus Safety Act (2009)
 - Private Security Licence (Private Security Amendment Act 2010)
 - Commercial Passenger Vehicles Victoria (Commercial Passenger Vehicle Industry Act 2017)
 - Firearms Licence (Firearms Act 1996)
 - Admission to legal profession (Legal Profession Act 2004)
 - Independent Broad-based Anti-Corruption Commission (IBAC)
 - Poppy Industry (Drugs, Poisons and Controlled Substance Act 1981)
 - Honorary Justice (The Honorary Justices Act 2014)
 - Marriage Celebrants Registration
 - Court Services Victoria
 - Immigration (Migration Act 1958)
 - Office of the Victorian Information Commissioner (Privacy and Data Protection Act 2014)

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A4

2. If the record includes a serious offence of violence or a sex offence and the records check is for the purposes of employment or voluntary work with children or vulnerable people.
3. In circumstances where the release of information is considered to be in the interests of security, crime prevention or the administration of justice and/or otherwise necessary for the proper, legal or statutory assessment of an applicant.
4. Victoria Police will release traffic offences where the court outcome was a sentence of imprisonment or detention.

Police Records Obtained in Other Australian Police Jurisdictions

Victoria Police conducts national police record checks. If information is obtained from other police jurisdictions the relevant legislation/policy is applied by that jurisdiction before it is released. In relation to legislation/policy applied by states or territories other than Victoria, please refer to the relevant police jurisdiction's website for more information.

Information on a National Police Certificate

The use and retention of the information contained on the National Police Certificate may be subject to State or Commonwealth legislation. The recipient is therefore urged to make their own enquiries with respect to any applicable legislative obligations or requirements.

Applicants who dispute information recorded on the National Police Certificate should write to:

The Manager
Public Enquiry Service
Victoria Police
GPO Box 919
Melbourne VIC 3001

Applicants should be prepared to provide comparison fingerprints. No fee will be charged for taking comparison fingerprints. Fingerprints will be destroyed by Public Enquiry Service, Victoria Police upon resolution of the dispute.

Transgender Applicants

People in the community that require further information in relation to the policy for processing applications for transgender applicants should contact our information line on 1300 881 596.

PUBLIC DOMAIN



Privacy Statement

Public Enquiry Service is committed to maintaining the privacy of the personal information that it collects, stores, uses and discloses, and adheres to strict privacy and confidentiality policies. Personal information is treated in accordance with the Privacy and Data Protection Act 2014. An individual may gain access to their information by making an application through the Victoria Police, Freedom of Information Unit. For further information go to www.foi.vic.gov.au

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* The age jurisdiction of Criminal Division of the Children's Court was increased on the 1st of July 2005 in accordance with the Children and Young Persons (Age Jurisdiction) Act 2004. This amendment is not retrospective and offences committed prior to this date will be released in accordance with the previous age jurisdiction of 17 years (revised 02/06).

PUBLIC ENQUIRY SERVICE

Victoria Police Centre
637 Flinders Street
Docklands VIC 3008

Victoria Police
GPO BOX 919
Melbourne VIC 3001

policecheckvic@police.vic.gov.au
1300 881 596
www.police.vic.gov.au

Extract of proceedings

Legislative Council Standing Order 23.27(5) requires the Committee to include in its report all divisions on a question relating to the adoption of the draft report. All Members have a deliberative vote. In the event of an equality of votes, the Chair also has a casting vote.

The Committee divided on the following question during consideration of this report. Questions agreed to without division are not recorded in these extracts.

Committee meeting – 14 August 2019

Recommendation 1

The Deputy Chair moved, That Recommendation 1, as amended, stand part of the Report.

The Committee divided.

Ayes	Noes
Ms Garrett	Mr O'Donohue
Dr Kieu	Mr Ondarchie
Ms Maxwell	
Ms Patten	
Ms Vaghela	

Motion agreed to.

Minority report

**LEGISLATIVE COUNCIL
LEGAL AND SOCIAL ISSUES COMMITTEE**

**INQUIRY INTO A LEGISLATED SPENT
CONVICTIONS SCHEME**

MINORITY REPORT

AUGUST 2019

On 2 May 2019, the Legislative Council agreed to the following motion:

That -

1. pursuant to Standing Order 23.02 and Sessional Order 22, this House requires the Legal and Social Issues Committee to inquire into, consider and report, no later than Tuesday, 27 August 2019, on the need for and potential impact of laws in Victoria to govern the disclosure of criminal history records, otherwise known as a legislated spent convictions scheme;
2. the Committee should consider the design of such a scheme that would be appropriate for Victoria, including, but not limited to —
 - a. the types of criminal records that should be capable of becoming spent;
 - b. the mechanism by which convictions become spent;
 - c. 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;
 - d. the effect of subsequent convictions during the crime-free period;
 - e. the consequences of a conviction becoming spent;
 - f. any offences and penalties that should apply for non-compliance with the scheme, including for disclosing or taking into account a spent conviction where this is not permitted;
 - g. interaction between a Victorian scheme and other jurisdictions;
 - h. appropriate exceptions, such as for particular offence categories or specific regulatory schemes; and
 - i. the interaction between any proposed ‘scheme’ and other legislation, such as the *Assisted Reproductive Treatment Act 2008* and the *Working with Children Act 2005*;
3. in considering the need for and design of a legislated spent convictions scheme, the Committee should have regard to the experience of groups in our community who suffer particular disadvantage due to past convictions, such as young people and Aboriginal and Torres Strait Islander people; and
4. the Committee should be guided by the public interest in ensuring that the disclosure of criminal history records in Victoria operates in a fair and transparent manner and balances the interests of offender rehabilitation and reintegration with community safety, including the safety of vulnerable Victorians and the safety and wellbeing of victims.

We the undersigned members of the Legal and Social Issues Committee (LSIC) submit this following minority report pursuant to Standing Order 23.28 for the consideration of the House.

We wish to thank all those who made submissions to the Committee, including those who suffer particular disadvantage due to past convictions, such as young people and Aboriginal and Torres Strait Islander people.

We note the failure of both Victoria Police and the Victorian Government to make submissions, which given the information they hold, has adversely impacted in the Committee’s ability to obtain appropriate data to support the personal submissions received.

While we support the introduction of a controlled disclosure/spent convictions scheme, for the reasons outlined in the majority report, we believe the majority has erred in its recommendation.

The controlled disclosure/spent convictions scheme model as proposed, without the support of a necessary evidential base of robust data and back-up, does not strike the right balance between the distinct but not mutually exclusive objectives of, protecting community safety and giving offenders the ability to get on with their lives without the weight of previous wrongdoings forever adversely affecting them.

Concerns regarding the need for such a balance, as raised in submissions received from both The Police Association Victoria (TPAV) and Mr Greg Davies, former Victims of Crime Commissioner, have not been given sufficient weight by the majority.

The TPAV, in its submission, highlight that, *“while the Association appreciates the rehabilitative imperative of a Scheme, any benefit of this legislation must be balanced with interests of public safety and justice”*.

Further, the TPAV suggests that not only is the expiration of a crime-free period post-conviction important, there must also be weight given to *“evidence of good character”*, particularly in the context of the disclosure of conviction history for employment and licensing purposes.

The eligibility criteria, as proposed, currently do not take into account ‘good character’. Further consideration of this important point should be examined, consistent with terms of reference 2(a).

Mr Davies, in his submission, while cautiously supportive of a scheme, makes the pertinent points that there are *“categories of crime that “must never be included in a spent convictions scheme”* and that *“statistics show that 47% of Victoria’s prison population was incarcerated for the worst of crimes, without factoring murder into the crimes of ‘violence category’”*.

While we agree with the majority that serious sex and violence offenders should be excluded from the scheme, more work is required to evaluate whether other serious offences such as certain dishonesty offences, should also be excluded from the Scheme.

Noting the lack of objective data available, it is our view that the eligibility for a Victorian scheme should be limited to offenders who are sentenced to six months or less in jail (consistent with New South Wales, the ACT, the Northern Territory and Tasmania), not the ill-defined 12-30 months recommended by the majority. We agree with the majority that serious violent and sex offenders should be excluded from the Scheme.

Further, we believe the waiting period before an eligible offender qualifies for the Scheme should be 10 years for adults (consistent with New South Wales, South Australia, Tasmania, Queensland, Northern Territory, the ACT, Western Australia, the Commonwealth and the Victoria Police policy) and 5 years for juveniles (consistent with the Commonwealth, Queensland, the ACT, Northern Territory, Tasmania and South Australia).

The majority recommendation of 5-10 years for adults and 3-5 years for minors is both ill-defined and not consistent with other jurisdictions.

We agree with the majority report that there should be improved justice data collection to allow improved operation and assessment of a Scheme, including more robust offender recidivism data and to this end, we propose that consideration be given to expanding the current functions of the Crime Statistics Agency to collect such data.

The New South Wales Bureau of Crime Statistics and Research (BOCSAR), which as well as publishing crime statistics, collects data across the NSW justice system.

We believe that once robust justice data is available, this data should be used objectively to undertake a review of any legislated Scheme.

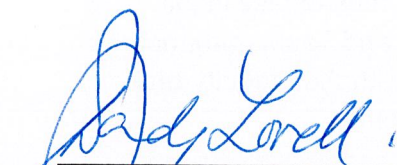
In contrast to the majority, we reject the recommendation to consider the establishment of an independent statutory authority to undertake responsibility for police records checks. We do not need another bureaucracy. This is a primary policing/public safety function, if Victoria Police requires additional resources, consideration could be given to this task be undertaken, with sworn police oversight, by an expanded Department of Justice and Community Safety (DoJCS) unit that already processes Working with Children's Checks.

We reject the recommendation to establish a Stream 2 application process for controlled disclosure as this could become a significant loophole open to excessive use and create a significant additional administrative burden.


Whilst we support the need for unlawful disclosure provisions, there must be clearly defined exemptions for the legitimate sharing of information between law enforcement and other agencies.

We acknowledge the importance of introducing a legislated non-disclosure/spent convictions scheme to Victoria at a time of rising recidivism and that such a scheme could enable many to obtain employment and fulfilling lives without the burden of a historical criminal history.

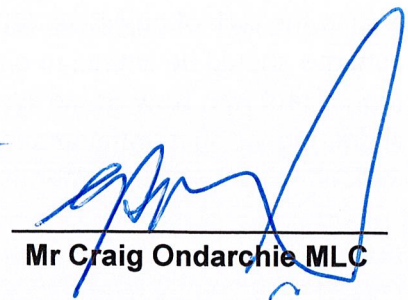
Our difference with the majority is only where to draw the line between disclosure and community safety on the one hand and the offenders right to move on from their past, on the other.



Ms Wendy Lovell MLC



Mr Edward O'Donohue MLC



Mr Craig Ondarchie MLC

Date: 16 August 2019

