

Spent Convictions Bill 2020

Introduction Print

EXPLANATORY MEMORANDUM

Clause Notes

Part 1—Preliminary

- Clause 1 sets out the purposes of the Bill, which are to—
- establish a scheme for convictions to become spent automatically or on application;
 - provide for limited collection, use and disclosure of a spent conviction of a person for the purposes of administration of justice or the performance of statutory functions;
 - create offences for unlawfully disclosing or obtaining spent conviction information; and
 - amend the **Equal Opportunity Act 2010** to make a spent conviction an attribute on the basis of which discrimination is prohibited under that Act.
- Clause 2 provides for the commencement of the Bill.
- Subclause (1) provides that, subject to subsections (2) and (3), the Bill comes into operation on a day or days to be proclaimed.
- Subclause (2) provides that, if a provision of the Bill (other than a provision of Division 2 of Part 2) does not come into operation before 1 December 2021, then it comes into operation on that day.

Subclause (3) provides that if a provision of Division 2 of Part 2 (which is a Division relating to convictions spent on application) does not come into operation before 1 July 2022, then it comes into operation on that day.

The default commencement dates in subclauses (2) and (3) are more than 12 months after the Bill is anticipated to be introduced to Parliament. The time before commencement is required in order to allow Corrections Victoria, the Magistrates' Court of Victoria and Victoria Police sufficient time to develop and implement the required systems and programs to support the data collection and information sharing required to operationalise the scheme.

Clause 3 defines various words and expressions used in the Bill.

The key definitions for this Clause are set out below.

child in relation to a person convicted of an offence means a person who was under 18 years old at the time the offence was committed. This definition is consistent with the definition of *child* in section 3 of the **Children, Youth and Families Act 2005**.

criminal record means a document produced by a law enforcement agency that sets out all convictions of the person.

detention means detention in a youth justice centre or youth residential centre. Such detention can be by way of an order made by the Children's Court of Victoria under sections 410 and 412 of the **Children, Youth and Families Act 2005**.

infringement conviction means an infringement notice that takes effect as a conviction for the offence specified in the notice.

Infringement notices that take effect as convictions after a period specified in the notice include some infringements related to drink-driving, drug-driving and excessive speed under the **Road Safety Act 1986** and some infringements related to operation of a boat or other vessel with a specified blood alcohol concentration or involving drugs under the **Marine (Drug, Alcohol and Pollution Control) Act 1988**.

Clause 7 provides that infringement convictions are immediately spent under the Bill, subject to the completion of any conditions.

law enforcement agency means any of the following agencies—

- Victoria Police;
- the police force or police service of another State or Territory;
- the Australian Federal Police;
- the Australian Crime Commission established under section 7 of the Australian Crime Commission Act 2002 of the Commonwealth;
- the Commissioner employed under section 8A of the **Corrections Act 1986**;
- the Director, Fines Victoria employed in accordance with section 4 of the **Fines Reform Act 2014**;
- a commission established under an interstate law with the function of investigating matters relating to criminal activity generally or of a specified class or classes;
- the Chief Examiner and Examiners appointed under Part 3 of the **Major Crime (Investigative Powers) Act 2004**;
- the Independent Broad-based Anti-corruption Commission established under section 12 of the **Independent Broad-based Anti-corruption Commission Act 2011**;
- the sheriff within the meaning of the **Sheriff Act 2009**;
- the Victorian Inspectorate established under section 8 of the **Victorian Inspectorate Act 2011**;
- the Adult Parole Board established under section 61 of the **Corrections Act 1986**;
- the Post Sentence Authority continued in existence under section 290 of the **Serious Offenders Act 2018**;
- the Youth Parole Board within the meaning of the **Children, Youth and Families Act 2005**;
- the Roads Corporation within the meaning of the **Transport Integration Act 2010**;
- the Secretary to the Department of Justice and Community Safety;

- the Secretary to the Department of Transport;
- an agency responsible for the performance of functions or activities directed to any law enforcement function;
- an agency responsible for the execution or implementation of an order or decision made by a court or tribunal;
- an agency that provides correctional services, including a contractor within the meaning of the **Corrections Act 1986**, or a subcontractor of that contractor, but only in relation to a function or duty or the exercise of a power conferred by or under that Act;
- an agency responsible for the protection of the public revenue under a law administered by the agency.

Clauses 21 and 22 provide for exemptions from the prohibition on disclosing a spent conviction for the lawful disclosure of spent conviction information by law enforcement agencies in certain circumstances.

law enforcement function is defined as an exhaustive list.

It means functions associated with prevention, detection, investigation, prosecution or punishment of criminal offences, or breach of a law for which a penalty may be imposed, management of property seized or restrained under laws relating to the proceeds of crime, or the execution or implementation of an order or decision of a court or tribunal.

Clause 21 provides for exemptions from the prohibition on disclosing a spent conviction for the lawful disclosure of spent conviction information for performing a law enforcement function.

serious conviction means a conviction for which a term of imprisonment or detention in a youth residential centre or youth justice centre was imposed that exceeds 30 months in duration. A conviction for a sexual offence and a conviction for a serious violence offence are also serious convictions.

Part 2 Division 2 outlines the process by which a person can apply to the Magistrates' Court for an order that a serious conviction is spent (Clause 19).

sexual offence has the meaning given by section 4 of the **Criminal Procedure Act 2009**.

serious violence offence has the same meaning as in the **Serious Offenders Act 2018**.

spent conviction means a conviction that has been spent under Part 2 of the Act. The definition also includes convictions under laws of other States or Territories or the Commonwealth which have become spent under the spent convictions legislation of the jurisdiction in which the conviction was imposed.

young offender means a person who has been convicted of an offence who is under the age of 21 years at the time of sentencing. This definition is consistent with the definition in section 3 of the **Sentencing Act 1991**.

Clause 4 provides that the Act binds the Crown in right of the State of Victoria and to the extent that Parliament's legislative power permits, in all its other capacities.

Clause 5 sets out the meaning of a *conviction* as—

- a finding of guilt by a court for an offence, whether the conviction is recorded by the court or not, and whether the offence is an indictable offence or summary offence, or
- an infringement conviction for an offence.

The definition of *conviction* in subclause (1) shares commonalities with the definition used in the **Criminal Procedure Act 2009**.

Subclause (2) clarifies that a finding of guilt includes qualified findings of guilt by a court under section 17(1)(c) or 38X(1)(c) of the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**, or a corresponding interstate or foreign law. Qualified findings of guilt may be made under the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997** by a court where it has been determined that a person is not fit to stand trial but found to have committed the offence at a special hearing.

Subclause (3) clarifies that convictions for offences against laws in jurisdictions outside Victoria are included within the definition, if the commission would have constituted an offence against a Victorian law if the offence was committed in Victoria.

Clause 6 ensures that the Bill applies retrospectively to already imposed convictions.

Part 2—Convictions spent by operation of this Act

Division 1—Convictions spent automatically by operation of this Act

Clause 7 provides that certain convictions will be spent immediately. This applies to convictions imposed under a law of Victoria or a foreign law where—

- no conviction is recorded by a court;
- the person is found unfit to stand trial but a court has determined they have committed the offence at a special hearing under section 17(1)(c) or 38X(1)(c) of the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997** or a finding under an equivalent provision has been made by a court outside Australia;
- the person was under 15 years of age at the time they committed the offence, regardless of whether or not the conviction is a serious conviction and including a conviction under a foreign law that, if it had been imposed in Victoria, would have constituted a serious conviction;
- the only penalty was a fine imposed by the Children's Court or an equivalent court outside Australia; or
- the conviction is an infringement conviction, or a conviction under a law of a country other than Australia that corresponds to an infringement conviction.

Subclause (2) provides that a conviction becoming spent under this section is subject to the completion of any conditions that may be attached to the penalty imposed on conviction.

Clause 8 provides for convictions that will be spent automatically on the expiry of a conviction period. This applies to all convictions that are not convictions spent immediately under Clause 7 or serious convictions.

This has the effect of excluding sexual offences and serious violence offences from the categories of offences for which convictions may be immediately spent (Clause 7) or automatically spent on the expiry of a conviction period (other than if the person was under 15 years of age at the time of the offending). Division 2 of Part 2 provides a mechanism for an

application to be made for a serious conviction to be spent by order of the Magistrates' Court.

- Clause 9 sets out the conviction period for convictions eligible to be spent under Clause 8. The conviction period is 5 years for children and young offenders convicted under certain enactments including the **Children's Court Act 1973** and the **Children, Youth and Families Act 2005**. The conviction period is 10 years for persons aged 21 years or above.

The 5 year conviction period for young offenders includes young offenders who are sentenced under the dual track system under the **Sentencing Act 1991**. The dual track system allows Victorian courts trying adult accused persons to sentence offenders under 21 years to serve custodial sentences in youth detention instead of adult prison. For a young offender to qualify for youth detention under the dual track system, the court must be convinced the young offender has reasonable prospects of rehabilitation, or is particularly impressionable, immature, or likely to be subjected to undesirable influences in an adult prison.

Clause (2) clarifies that the conviction period for children and young offenders is 5 years for a foreign law conviction that corresponds to a conviction under a law of Victoria.

- Clause 10 sets out when the conviction period begins and when it restarts if a person commits a further offence.

Subclause (1) provides that a conviction period commences on the day the finding of guilt that constitutes the conviction is made by the court.

Subclause (2) sets out how the conviction period restarts if a person receives a subsequent conviction before the original conviction period ends.

Subclause (3) provides that a conviction period does not restart for a subsequent conviction if the sentencing outcome is a fine of 10 penalty units or less, an order to pay restitution or compensation, or if no penalty is imposed or the conviction is not recorded by the court. This has the effect that a subsequent conviction for relatively minor offending during the conviction period does not restart the conviction period.

Subclause (4) defines *fine* for the purpose of clause 10.

Division 2—Convictions spent on application

Clause 11 sets out the mechanism for applying for a spent conviction order. A person may apply to the Magistrates' Court for a spent conviction order in relation to a serious conviction for an offence against a law of Victoria if—

- the person was a child (under 18 years at the time of offending) or young offender (under 21 years at the time of sentencing), or
- the person was not a child or young offender, and no term of imprisonment was imposed for a serious violence offence or a sexual offence, or a term of no more than 5 years imprisonment was imposed for any other type of offence.

Subclause (2) provides that the conviction period must be completed before an application for a spent conviction order can be made. An application can then be made on and from the day the conviction period for that conviction expires.

Subclause (3) provides that an application can be made in relation to multiple convictions.

Subclause (4) sets out that a person may not apply for a spent conviction order if the Magistrates' Court has refused an application for the conviction to be spent in the previous 2 years and no new information is provided to support the subsequent application.

Subclause (5) provides that an applicant who has a disability, as defined in the **Equal Opportunity Act 2010**, can have their guardian, as defined in the **Guardianship and Administration Act 2019**, make an application on their behalf if they are unable to do so because of their disability.

A guardian under the **Guardianship and Administration Act 2019** is a person appointed under that Act by the Victorian Civil and Administrative Tribunal and who has powers in relation to a personal matter, including the lifestyle affairs, of a person with a disability.

Clause 12 sets out the form and content requirements for applications for a spent conviction order.

Subclause (1) sets out the mandatory information which must be included in a written application. The application must include the applicant's full name, the conviction for which the order is sought, information in support of the rehabilitation of the applicant and any other information that is prescribed by regulations. Clause 19 provides that rehabilitation is one of the factors that the Magistrates' Court must take into account in deciding whether to make a spent conviction order.

Subclause (2) permits the Magistrates' Court to issue a notice to require further information from an applicant in support of an application.

Subclause (3) states an application must be accompanied by any fee prescribed by regulations.

If the requirements in Clause 12 are not complied with, Clause 18 enables the Magistrates' Court to refuse to accept the application.

Clause 13 sets out requirements for service of an application for a spent conviction order. The applicant must serve a copy of the application on the Attorney-General and the Chief Commissioner of Police as soon as practicable after making an application.

Clause 14 sets out how the Attorney-General and the Chief Commissioner of Police may make submissions on applications for a spent conviction order. Subclause (2) requires the Attorney-General and the Chief Commissioner of Police to provide within 28 days of having been served a copy of an application written notification to the Magistrates' Court about whether they intend to make a submission. If the Attorney-General or Chief Commissioner of Police intend to make a submission, then the application must be determined by a hearing under Clause 16.

Clause 15 provides that an application for a spent conviction order can be determined without a hearing.

However, an application for a spent conviction order cannot be determined without a hearing if either the Chief Commissioner of Police or the Attorney-General give written notice that they do intend to make a submission in accordance with Clause 14(2). The Magistrates' Court must wait 28 days from the date the application is served before making a determination.

This coincides with the amount of time by which the Attorney-General and the Chief Commissioner of Police must notify the Magistrates' Court of their intention to make a submission under subclause 14(2).

Clause 16 sets out how the Magistrates' Court may hold a hearing to determine the application for a spent conviction order.

Subclause (2) provides that the hearing must be a closed hearing unless the Court considers the circumstances justify a hearing which is open to the public. This establishes a presumption of a closed hearing.

Subclause (3) sets out the notice requirements if a hearing is held. The applicant, the Attorney-General and the Chief Commissioner of Police must be provided with written notice of the time, date and place of the hearing.

Subclause (4) sets out that, in the event of a closed hearing, the Magistrates' Court must provide directions about which persons are entitled to be present at the hearing in addition to the applicant, the Attorney-General and the Chief Commissioner of Police.

Clause 17 sets out the principles that apply if the Magistrates' Court conducts a hearing to determine an application for a spent conviction order. The Court is not bound by the rules of evidence and may inform itself in any way it sees fit. The Court is not bound by technicalities or legal forms that are not set out under the Act.

Clause 18 provides that the Magistrates' Court may refuse to accept an application for a spent conviction order that the Court considers to be vexatious, misconceived or non-compliant with the form and content requirements set out in Clause 12.

Clause 19 empowers the Magistrates' Court to make an order that a conviction becomes spent (a spent conviction order).

Subclause (2) sets out the factors the Court must consider in determining whether to make an order. The factors are—

- the nature, circumstances and seriousness of the offence to which the application relates;
- the impact on any victim of the offence to which the application relates;

- the personal circumstances of the applicant;
- if the applicant is an Aboriginal or Torres Strait Islander person, the unique factors of background affecting Aboriginal or Torres Strait Islander persons including but not limited to—
 - factors relating to incarceration of Aboriginal and Torres Strait Islander persons; and
 - factors relating to impacts on Aboriginal and Torres Strait Islander persons of disclosure of a criminal record;
- the age and maturity of the applicant when the offence was committed;
- any demonstrated rehabilitation of the applicant;
- any risk to public safety of making a spent conviction order for the conviction; and
- any other matter that the Court considers relevant.

The reference to the unique factors of background of Aboriginal and Torres Strait Islander people acknowledges the over-representation of these communities in the criminal justice system.

Subclause (3) requires the Magistrates' Court to notify the applicant and the Chief Commissioner of Police as soon as practicable of the Court's decision on the application.

Part 3—Spent convictions

Division 1—Effect of conviction being spent

Clause 20 sets out the effect of a conviction becoming spent, being that the spent conviction does not form a part of a person's criminal record, that a person is not required to disclose a spent conviction or information relating to it and that another person must not request information about a spent conviction of a person. Clause 3 defines *criminal record* as a document produced by a law enforcement agency that sets out all convictions of the person. This means that a person's spent convictions will not be included on a Police Record Check, unless the Police Record

Check is under a disclosure in accordance with Division 2 of Part 3.

Subclause (2) provides that once a conviction of a person is spent, it cannot be revived if that person receives another conviction.

Subclauses (3) and (4) stipulate that spent convictions are excluded from the operation of section 44(3) of the **Constitution Act 1975**. That section provides that a person who has been convicted or found guilty of an indictable offence punishable by imprisonment for life or a term of 5 years or more is ineligible to be elected to the Legislative Council or the Legislative Assembly. In effect, subclauses (3) and (4) enable an individual who has a spent conviction to be eligible to become a member of the Victorian Parliament.

Clause 20 is subject to the operation of the remainder of Part 3, including Clauses 21 and 22 which set out circumstances where collection, use and disclosure of a spent conviction is lawful.

Division 2—Disclosable spent convictions

Clause 21 sets out circumstances in which a law enforcement agency or a court or tribunal may collect, use or disclose a spent conviction or spent conviction information.

Subclause (1) authorises a law enforcement agency or court or tribunal to disclose a spent conviction if the disclosure is—

- to another law enforcement agency, court or tribunal for the purposes of performing a function or exercising a power under any Act (whether by the entity disclosing the spent conviction or the receiving entity), or
- for the purposes of performing a law enforcement function. In this case there is no restriction on which entities can receive the spent conviction.

This enables law enforcement agencies and courts and tribunals to disclose a person's full criminal history to allow efficient and effective administration of the justice system and to protect community safety. This does not authorise broader public disclosure of criminal record information.

Subclause (2) provides that disclosure of a spent conviction or information in a person's own criminal record by a law enforcement agency or court or tribunal, at the person's request, is permitted. This enables a person to obtain their own complete criminal record information, including spent convictions.

Subclause (3) provides that courts and tribunals will be able to collect, use and disclose spent convictions and spent conviction information in the course of legal proceedings or the publication or dissemination of their decisions.

Subclause (4) provides that the Commissioner of Corrections Victoria may collect, use or disclose spent conviction records in accordance with Corrections legislation or Corrections-related legislation as defined in the section 104ZX **Corrections Act 1986** or the purposes of performing a function or power under Corrections legislation or Corrections-related legislation.

Subclause (5) provides that subclauses (1), (2) and (3) extend to a person who is a member, employee or contractor of a law enforcement agency, court or tribunal and is acting in the course of their duty.

The disclosure of spent convictions authorised under Clause 21 operates as a lawful disclosure of spent convictions and an exception to the offence set out in Clause 23. Additional lawful disclosures by law enforcement agencies are outlined in Clause 22.

Clause 22 provides that a law enforcement agency may disclose a spent conviction to a person, or body specified in the Table at the foot of the Clause if the person or body is obtaining the information to perform a function specified in the Table and under a law specified in the Table.

The Table at the foot of the Clause sets out a range of disclosures to specified persons or bodies in certain areas of employment, registration or licensing, assessment of a person's suitability for a particular appointment or role, in relation to a person's admission to and treatment at a particular facility, obtaining working with children checks, immigration, specified information sharing schemes and other regulatory and reporting functions.

Subclause (2) states that law enforcement agencies may also disclose a spent conviction to persons or bodies prescribed by the regulations for a prescribed function that is carried out under a prescribed law.

Subclause (3) sets out circumstances in which a person or body who receives spent conviction information may disclose that information. This includes disclosure to a court or tribunal in the course of legal proceedings, pursuant to an order of a court or tribunal, to enable law enforcement or investigation, or to a legal practitioner to obtain legal advice or representation.

Subclause (4) provides that disclosures under subclauses (1), (2) and (3) apply to an employee, contractor or member of a body that discloses spent conviction information under this section who is acting in the course of their duty.

Part 4—Offences

Clause 23 makes it an offence to disclose information relating to a spent conviction without lawful authority or written consent from the person whose conviction is spent. The maximum penalty for this offence is 40 penalty units.

If spent conviction information is authorised to be disclosed under Division 2 of Part 3, this constitutes a lawful disclosure and is not made an offence under this Clause.

Subclause (2) sets out the defence for if the accused person can prove they took all reasonable steps to avoid the unlawful disclosure. It is intended that the legal burden of proof for this defence rests on the accused.

Subclause (3) states that it is not an offence for archives and libraries to disclose information relating to spent convictions in accordance with established procedures and this extends to employees, contractors and volunteers acting in the course of the person's employment or duties.

Clause 24 makes it an offence to fraudulently or dishonestly obtain information relating to a spent conviction. The maximum penalty for this offence is 20 penalty units.

Part 5—General

- Clause 25 provides that the Minister must conduct a review of the Act after the Act has been in operation for 12 months. The Minister must cause a copy of the review report to be laid before each House of the Parliament within 6 months after the first anniversary of the commencement of the Act.
- Clause 26 provides for the Governor in Council to make regulations for or with respect to matters dealt with by the Act. This includes regulations that may be made for or with respect to—
- the form and content of applications to the Magistrates' Court for a spent conviction order (relating to Clause 12), including what is required for different classes of persons or classes of convictions;
 - the process related to applications for a spent conviction order;
 - notices and submissions related to applications for a spent conviction order;
 - fees related to applications for a spent conviction order (including regulations providing for exemptions, reductions or waivers of fees);
 - prescribing persons or bodies to whom spent convictions information may be disclosed to under Part 3, the functions for which and the law under which the disclosure may occur; and
 - any matter or thing required or permitted to be prescribed in order to give effect to the Bill.

Part 6—Amendment of the Equal Opportunity Act 2010

- Clause 27 amends the **Equal Opportunity Act 2010** to insert a definition of a *spent conviction* as being the same as in this Bill.
- Clause 28 amends the **Equal Opportunity Act 2010** to include a spent conviction as a protected attribute on the basis of which discrimination is prohibited under that Act.

Clause 29 provides that this Part that amends the **Equal Opportunity Act 2010** will be repealed on 1 December 2022. This automatic repeal of this Part does not affect the continuing operation of the amendments made by it.