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Submission to the
Standing Committee of Attorneys-General

Draft Model Spent Convictions Bill

21 January 2009



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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre (**Centre**) is an independent community legal centre that is a joint initiative of the Public Interest Law Clearing House (Vic) Inc and the Victorian Council for Civil Liberties Inc.

The Centre provides and supports human rights litigation, education, training, research and advocacy services to:

- a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;
- b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
- c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

The four 'thematic priorities' for the work of the Centre are:

- d) the development, operation and entrenchment of Charters of Rights at a national, state and territory level;
- e) the treatment and conditions of detained persons, including prisoners, involuntary patients and persons deprived of liberty by operation of counter-terrorism laws and measures;
- f) the promotion, protection and entrenchment of economic, social and cultural rights, particularly the right to adequate health care; and
- g) the promotion of equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples.

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1. Executive Summary

1. This submission is made by the Human Rights Law Resource Centre Ltd (**Centre**) in relation to the Draft Model Spent Convictions Bill (**Bill**) proposed by the Standing Committee of Attorneys-General (**SCAG**) and the Victorian Department of Justice (**DoJ**).
2. Human rights belong to all people by virtue of their humanity. The Centre applauds the DoJ and SCAG for conducting a consultation into a nationally-consistent spent convictions scheme. The Centre considers a spent convictions scheme is crucial to the full realisation of the human rights of past offenders.
3. The Centre submits that, on a national level, the Bill should comply with Australia's obligations under international human rights law, namely the treaties it has ratified, including *the International Labour Organisation Convention 111, the Discrimination (Employment and Occupation) Convention 1958, the International Covenant on Economic, Social and Cultural Rights*¹, and particularly *the International Covenant on Civil and Political Rights (ICCPR)*². In contemplating the enactment of the Bill, state and territory governments should be mindful of two matters:
 1. their obligation to protect the human rights of offenders and past offenders by virtue of Australia's ratification of these treaties; and
 2. that people do not forfeit their human rights when they are convicted of a criminal offence.³
4. Particularly in Victoria, the ICCPR is embodied in local law by the *Charter of Human Rights and Responsibilities Act 2006 (Charter)*. If the Bill is enacted in Victoria, it will be required to comply with the Charter⁴. This submission examines enactment of the Bill in Victoria and its impact on human rights by way of its compatibility with the Charter.
5. The Centre considers that the Bill engages the following human rights. The rights listed below are protected under the Charter at the sections indicated:
 1. The right to recognition and equality before the law (section 8);

¹ Lynch, P, *Discrimination on the Grounds of Criminal Record: The Human Right to Non-Discrimination*, PILCH Homeless Persons' Legal Clinic, 2005.

² *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).

³ New Zealand Human Rights Commission, *Prisoners and Victims claim Bill doesn't do Prisoners or Victims Justice*, <http://www.hrc.co.nz/home/hrc/newsandissues/prisonersandvictimsclaimsbill.php>, accessed on 20 January 2009.

⁴ Section 28 of the Charter.

2. The right to privacy and reputation (section 13); and
3. The child's right to special protection in his/her best interest (section 17).
6. These rights are interdependent in the context of the Bill; if the right to privacy is breached by virtue of a Spent Conviction being unlawfully or arbitrarily disclosed, then an offender is exposed to the risk of being discriminated against on the basis of his or her irrelevant criminal record. The interaction of these rights with the Bill is considered in further detail below in section 3 of this submission.
7. The Centre submits that where rights are engaged and promoted, this is a positive outcome because society would no longer be needlessly depriving itself of the talents and energies of people in whose positive development it has a distinct interest. The promotion of past offenders' human rights encourages them to re-enter society without fear of discrimination or breach of privacy, and provides a means by which offenders can escape the vicious circle of crime, prison and more crime⁵. Reduced recidivism is obviously also in the interests of community safety. In contrast, where rights are limited, there is scope for improving the operation of the Bill.
8. The Centre makes recommendations on how the shortcomings of the Bill may be addressed in the context of a human rights framework and analysis.

⁵ Australian Law Reform Commission, *Spent Convictions*, Report no.37, Parliamentary paper no.158, 3 June 1987, p 4.

2. Overview of Bill

9. The Bill introduces a national spent convictions scheme whereby certain criminal convictions and findings of guilt where no conviction was recorded (**Convictions**) are no longer required to be disclosed for most purposes (**Spent**) after a sufficient period of good behaviour. The long title to the Bill indicates that its purpose is to limit the effect of a person's conviction for certain offences if the person completes a period of crime-free behaviour.
10. Whether a Conviction for an offence is eligible to become Spent depends on the seriousness of the offence as measured by the duration of the sentence imposed. Adults and juveniles are dealt with separately under the Bill. Offences committed by persons under 18 years of age are only eligible to become spent if no sentence of imprisonment, or a sentence of less than 24 months, was imposed for that offence. Offences committed by adults (or juveniles who were treated as adults for the purposes of the offence) are only eligible to become Spent if no sentence of imprisonment, or a sentence of less than 12 months, was imposed.
11. The 'qualification period', being the period of good behaviour after which time an offence becomes Spent, is five years for juveniles and ten years for adults (and juveniles who were treated as adults for the purposes of the offence).
12. There are exceptions to the kinds of Convictions which may become Spent or which attract the beneficial consequences of becoming Spent (i.e. disclosure no longer required). Broadly, the exceptions fall into three categories:
 1. **Bodies corporate:** offences committed by bodies corporate cannot become Spent;
 2. **Sex offences:** the Bill is drafted with the option for sex offences to be excluded from the types of Convictions that may become Spent; and
 3. **Where public interest in community safety is paramount:** Spent Convictions are still able to be disclosed for the purposes of:
 - (i) the investigation and prosecution of offences;
 - (ii) national security;
 - (iii) courts and tribunals; and
 - (iv) special occupations.

3. Rights Engaged and Limitation Analysis

3.1 Right to equality and freedom from discrimination

(a) *Content of the right engaged*

13. Section 8 of the Charter establishes the right to equality and freedom from discrimination. While the majority of section 8 only prohibits discrimination on the basis of protected attributes set out in the *Equal Opportunity Act 1995* (Vic) (of which criminal record is not one), sub-section 8(3) is broader in that it ensures that every person is equal before the law.

14. The Victorian approach is narrower than the right to equality and non-discrimination required under Australia's international human rights law obligations as set out in the ICCPR. The ICCPR protects the right to non-discrimination, providing at Article 2 that State Parties must:

undertake to respect and to ensure to *all individuals* within its territory and subject to its jurisdiction the rights recognised in the present Covenant, *without distinction of any kind*, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*. [emphasis added]

15. Article 26 of the ICCPR enshrines the right to equality before the law, stating that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law... The *law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground* such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*. [emphasis added]

16. International jurisprudence indicates that discrimination on the grounds of criminal record is likely to be protected under the description 'other status'⁶. The Bill engages this right because it has been well-recognised for many years that persons with a criminal record are regularly discriminated against, and treated unequally, on the basis of past criminal record (even if that criminal record is very old and no longer relevant)⁷.

⁶ Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record*, Discussion Paper, 2004, p 11; *Thlimmenos v Greece*, 6 April 2000, Application No.34369/97.

⁷ Human Rights and Equal Opportunity Commission, *ibid*, pp 6-7; Australian Law Reform Commission, above n 5, p 3; Fitzroy Legal Service and JobWatch, *Criminal Records in Victoria: Proposals for Reform*, 2005, available from: http://www.jobwatch.org.au/uploaded_files/144623crvpr0706.pdf.

(b) Right promoted

17. The general objective of the Bill promotes the right to equality and freedom from discrimination because the key purpose of the Bill is to allow certain Convictions to become Spent after a period of time. Legalising the non-disclosure of Spent Convictions assists in freeing past offenders from discrimination and unequal treatment on the basis of irrelevant criminal records, enabling them to more effectively rehabilitate and reintegrate into society.

(c) Right limited

18. The Centre considers that although the Bill goes some way towards promoting the right to equality and freedom from discrimination for past offenders, it does not go far enough. The right to non-discrimination of past offenders is limited, rather than promoted, by the following aspects of the Bill:

1. **Discrimination on the basis of Spent Conviction:** The Bill does not provide adequate protection against discrimination on the basis of Spent Conviction. As currently drafted, section 11(d) purports to prevent a person from being refused (or having revoked) an appointment, post, status or privilege on the basis of a Spent Conviction. However, there are a number of problems with section 11(d), namely:
 - (i) it is placed within the 'Person not required to disclose' section, which is non-sensical because section 11(d) relates to the actions of third parties rather than the actions of the past offender like the rest of the section;
 - (ii) there are no penalties imposed upon third parties for breaching this sub-section; and
 - (iii) there are no remedies available to a past offender whose rights are violated by a breach of this sub-section.
2. **Definition of 'sentence of imprisonment':** Under sub-section 3(2), a reference in the Bill to 'sentence of imprisonment' extends to a sentence of imprisonment or detention that has been suspended in whole or in part. This means, for example, that adults with Convictions for which a wholly suspended sentence of over 12 months was imposed cannot have their Conviction Spent (and are therefore exposed to potential discrimination on the basis of a criminal record for which no prison sentence was served). The Centre submits that where an independent judge has determined that where the circumstances of an offence and conviction do not justify actual incarceration, then that Conviction should be eligible to become Spent as if no term of imprisonment had been served. This is discussed

in more detail in the context of 'judicial sentencing tools' at paragraph 33(3)(i) below.

3. **Sex offences:** The blanket exclusion of sex offences seems illogical given that any past offender intending to work with vulnerable people will be required, under section 14, to disclose all past offences including Spent Convictions. The Centre queries whether, given the breadth of the exclusions in section 14, the exclusion of sex offences is necessary. The Centre also suggests SCAG might consider whether state and territory legislation governing the registration of sex offenders⁸ is sufficient to safeguard the community against any perceived risk.
4. The right to non-discrimination is also limited by the definition of 'conviction' and the exclusions contained in section 14 of the Bill. These limitations also engage the right to privacy and are therefore considered in more detail in paragraph 33(3)(i) below.

(d) Limitations Analysis

19. Reflecting the internationally recognised Siracusa Principles⁹ regarding permissible limitations on human rights, the Victorian Charter contains a limitation provision, section 7(2), which provides that:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors.

20. Section 7(2) also sets out the following inclusive list of these relevant factors:
 1. the nature of the right;
 2. the importance of the purpose of the limitation;
 3. the nature and extent of the limitation;
 4. the relationship between the limitation and its purpose; and
 5. whether there is any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

21. Applying s 7(2) of the Charter, it is unlikely that the limitation posed by the above-

⁸ *Crimes (Child Sex Offenders) Act 2005 (ACT)*; *Child Protection (Offenders Registration) Act 2001 (NSW)*; *Child Protection (Offender Reporting and Registration) Act 2004 (NT)*; *Child Protection (Offender Reporting) Act 2004 (QLD)*; *Child Sex Offenders Registration Act 2006 (SA)*; *Community Protection (Offender Reporting) Act 2005 (TAS)*; *Sex Offenders Registration Act 2004 (VIC)*; *Community Protection (Offender Reporting) Act 2004 (WA)*.

⁹ United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985)

mentioned sections of the Bill are reasonable and justified in a free and democratic society based on human dignity, equality and freedom for the following reasons.

1. ***Nature of the right:*** the right to equality and protection from discrimination is not an absolute right, meaning some limitation of that right may be possible in certain circumstances.
 2. ***Importance of the purpose of the limitation:*** The purpose for many of the limitations described above is the protection of society by ensuring that past offenders disclose all prior Convictions. The Centre acknowledges that this is an important and legitimate purpose.
 3. ***Nature and extent of the limitation:*** The Centre considers that the above-mentioned limitations on the rights of past offenders to non-discrimination must be weighed against the purpose of the limitation (being community safety). The Centre considers that the limitations on rights discussed above are disproportionately severe restrictions on the rights of past offenders.
 4. ***Relationship between the limitation and its purpose:*** While preventing past offenders from re-entering the workforce (and society) might initially appear to promote community safety, the Centre submits that offender rehabilitation and re-integration into society is much more likely to decrease recidivism and therefore improve community safety.
 5. ***Less restrictive means:*** the Centre considers that less restrictive means are available to achieve the purpose of community safety whilst also promoting the rights of past offenders to non-discrimination. Suggestions for less restrictive means are outlined in the Recommendations section of this submission at section 4 below.
22. After undertaking the limitations analysis above, the Centre considers that the Bill is not compatible with the right to non-discrimination. However, the Centre suggests that if the amendments proposed in the Recommendations section are adopted, the Bill will be compatible with section 8 of the Charter, together with Articles 2 and 26 of the ICCPR.

3.2 Right to privacy and reputation

(a) *Content of right engaged*

23. Section 13 of the Charter establishes a person's right not to have his or her privacy unlawfully or arbitrarily interfered with and not to have his or her reputation unlawfully attacked. Section 13 is modelled on Article 17(1) of the ICCPR.
24. Pound and Evans¹⁰ state that the concept of 'privacy' defies precise definition and suggest that at its most basic, privacy is concerned with notions of personal autonomy, dignity and human development. The United Nations Human Rights Committee (**HRC**) has said that it refers to those aspects of life in which a person can freely express his or her identity, either alone or in relationships with others¹¹. The European Court of Human Rights (**ECtHR**) has held that the determination of information as private will depend on whether the person in question has 'a reasonable expectation of privacy' in all the circumstances¹².
25. As for reputation, drawing on the commentary in relation to the equivalent ICCPR provision, Nowak¹³ suggests that reputation refers to one's appraisal by others.
26. The HRC has stated that the term 'unlawful' means that no interference can take place except in cases envisaged by the law. Interference authorised by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the ICCPR¹⁴. Also, the ECtHR has said that interference will be lawful if it is authorised by a positive law that is adequately accessible and formulated with sufficient precision to enable a person to regulate his or her conduct by it¹⁵.
27. The prohibition on 'arbitrary' interference requires that a lawful interference must also be reasonable or proportionate in all the circumstances¹⁶.
28. While section 13 is couched in negative terms¹⁷, inherent in section 13 and particularly relevant for SCAG to consider in the context of the Bill, is a requirement that the State adopt legislative and other measures to give effect to the prohibition against such interferences and attacks, as well as to give effect to the protection of this right¹⁸. There

¹⁰ Alistair Pound and Kylie Evans, *An annotated guide to the Victorian Charter of Human Rights and Responsibilities*, Lawbook Co 2008, p 111.

¹¹ *Coeriel and Aurik v The Netherlands* (Communication No 45/1991) at [10.2].

¹² *Princess Caroline case* [2004] ECHR 294 at [50] – [53]; *Campbell v MGN Ltd* [2004] 2 AC 457

¹³ M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, Kehl, 1993), p 306.

¹⁴ Human Rights Committee - General Comment 16 – paragraph 3

See: <http://www2.ohchr.org/english/bodies/hrc/comments.htm>

¹⁵ See *Sunday Times v United Kingdom* (1979) 2 EHRR 245; [1979] ECHR 1 at [49].

¹⁶ Above n 14, at paragraph 4

¹⁷ Compare Article 17(2) of the ICCPR and Schedule 1 Art 8 of the *Human Rights Act 1998* (UK)

¹⁸ Above n 14, at paragraph 1

is also a further obligation on public authorities to ensure that any personal information they collect is necessary, secure and accurate.¹⁹

(b) Right promoted

29. The Bill engages and promotes the right to privacy and reputation by providing that certain offenders are not required to disclose information about their Spent Convictions. This enables offenders to keep matters private and their reputation untainted by the prejudice and stigma that is likely to be experienced when a Spent Conviction is disclosed. This is based on the sound policy consideration that the older a Conviction becomes, the less relevance it has in predicting the person's future conduct²⁰ and therefore it should not be taken into consideration by decision makers for the purposes of, for example, gainful employment or housing.

(c) Right limited

30. Conversely, where an offender falls outside the Bill, that offender's right to privacy and reputation is limited. It is then a question of whether the limitation is consistent with Australia's human rights obligations (as, for example, expressed in clause 7(2) of the Charter); that is, whether the limitation is reasonable and demonstrably justified in a free and democratic society, based on human dignity, equality and freedom.
31. Sections 5 (Scope of the Act), 7(1) (determination of qualification period) and 14 (Exclusions) of the Bill, limit an offender's right to privacy and reputation. The limitations operate in the following ways:
1. section 5 – limits the types of offences which are eligible to become Spent depending on seriousness of offence;
 2. section 7 – limits the offences which are eligible to become Spent depending on the period of 'good behaviour'; and
 3. section 14 – dealing with circumstances in which Spent Convictions may be disclosed, governs authorised interference with one's privacy and reputation.
32. The ECtHR, in considering the equivalent right to privacy under the European Convention on Human Rights, has held that "any interference by a public authority with the exercise of the right to privacy must be in accordance with the law, for a legitimate aim and necessary and in a democratic society, in the interests of national security, public safety or the economic well-being of the country and for the prevention of disorder or crime, for

¹⁹ *Norman Baker MP v Secretary of State for the Home Department* [2001] UKHRR 1275; *Gunn-Russo v Nugent Care Society and Secretary of State for Health* [2002] 1 FLR 1.

²⁰ Above n 5, p 12.

the protection of health or morals, or for the protection of the rights and freedoms of others”²¹.

33. In the case of this Bill, the interests considered to be competing are the individual’s interest in protecting his or her right to privacy and reputation and the public interest of community safety. The limitation analysis which follows assists to determine whether an appropriate balance between these interests is achieved by the Bill.

(d) Limitations Analysis

34. Applying s 7(2) of the Charter, it appears that sections 5, 7 and 14 of the Bill are unlikely to be reasonable and justifiable in a free and democratic society based on human dignity, equality and freedom for the following reasons.

1. **Nature of the right:**

The right to privacy and reputation is an important right which may be subject only to the reasonable limitations which are internal qualifications on the scope of the right – lawfulness and arbitrariness²².

2. **The importance and purpose of the limitation:**

- (i) **Section 5** – The Bill excludes ‘serious offences’ from being Spent. It has been found that the more serious the offence, the longer it is likely to remain relevant to decision making. Also, there is a lack of public acceptability for violent or dangerous crimes to become Spent²³. Therefore, the limitation that excludes serious offences is important.
- (ii) **Section 7** – The Bill provides for a qualification period, being a period of good behaviour after which time a Conviction becomes eligible for becoming Spent; it is ten years for adults (and children who are treated as adults for the purposes of the offence) and five years for children. (See section 3.3 below in relation to the Centre’s submission regarding the distinction between children, and children treated as adults). The underlying rationale for a Spent Convictions scheme is that there is a particular time at which a Conviction ceases to become relevant for any future indications about the offender’s behaviour²⁴. It is important to draw a line at a point where it can be said with reasonable confidence that, in

²¹ Lord Lester of Herne Hill QC, David Pannick, *Human Rights Law and Practice*, Butterworths 2004, p 305.

²² Pound and Evans submit that section 7(2) of the Charter should not permit the imposition of additional limitations on the right, but that the words “unlawfully and arbitrarily” in section 13(a) of the Charter should be interpreted consistently with section 7(2).

²³ Above n 5, p 28.

²⁴ Above n 5, p 35.

the vast majority of circumstances, the fact of a criminal Conviction has simply become irrelevant and out of date in the context of any future judgment or decision which might reasonably be expected to be made about a former offender²⁵. The drawing of this line admittedly has elements of arbitrariness (which is contrary to and in breach of the right to privacy in section 13 of the Charter). The Centre acknowledges that while there is no scientific basis for setting the length of the waiting period, the purpose of such a time limit is administrative practicality²⁶.

- (iii) **Section 14** – operates to permit disclosure regarding Spent Convictions in the context of investigation and prosecution of offences, national security, courts and tribunals, parole authorities and special occupations that involve representation of, a degree of responsibility for, or interaction with, vulnerable members of the community – especially the disabled, elderly and children. While the limitation is for the important purpose of addressing the public’s interest in community safety, the extent of the limitation may need to be reconsidered (as discussed at paragraph 33(3)(iii) below).

3. **The nature and extent of the limitation:**

- (i) **Section 5** – The limitation is relatively broad; the practical effect being that only a limited number of less serious offences are eligible for becoming Spent²⁷.

Also, findings of guilt without conviction are included within the definition of ‘conviction’. The Centre submits that findings of guilt without conviction should not need to become Spent as they should not need to be disclosed for any reason in the first place, nor should they be permitted to be disclosed.

Findings of guilt without conviction are judicial sentencing tools intended to allow minor offenders to avoid the stigma of a conviction for employment and other purposes²⁸. Requiring offenders to wait up to ten years to spend a finding of guilt without conviction undermines the aims

²⁵ Above n 5, p 35.

²⁶ Above n 5, p 37.

²⁷ In the Sentencing Advisory Council’s guide to sentencing options, for adults – only three offences fall into this category, namely – loitering near schools, cultivation of a narcotic plant (not for any purpose relating to trafficking) and possession of a drug of dependence (not for a purpose related to trafficking). See: www.sentencingcouncil.vic.gov.au, visited 6 January 2009.

²⁸ The Centre refers to, and concurs with, the submission of The Loddon Campaspe Community Legal Centre to SCAG on the Draft Model Spent Convictions Bill in relation to the meaning of ‘conviction’.

of the *Sentencing Act 1991* (Vic) (under which a finding of guilt without conviction must not be taken to be a conviction for any purpose²⁹) and exposes minor offenders to prejudice and discrimination on the basis of petty crimes that an independent judge has determined are irrelevant for employment and other purposes. Nevertheless, in practice, what constitutes a criminal record varies from one jurisdiction to another, creating significant confusion and uncertainty. For example, under the Victoria Police Records Information Release Policy (2005) findings of guilt without conviction and findings resulting in a good behaviour bond will be released³⁰. Implementation of a nationally consistent criminal records disclosure system, as referred to in the Recommendations section at paragraph 4 below, should harmonise practice and internal policies with the law.

- (ii) **Section 7** – In 1987, the Law Reform Commissions produced a report on Spent Convictions. That report reveals that many submissions believed that in respect of adult offenders, the ten year waiting period was unduly conservative and should be abbreviated. This is indicative of the fact that many may consider that the extent of the limitation imposed by the qualification period under section 7 is too broad.
- (iii) **Section 14** – The exclusions limitation is also broad. There are many circumstances in which Convictions are not eligible to become Spent. The exclusions mean many people will be required to disclose past Convictions despite those Convictions being deemed irrelevant and Spent pursuant to the Bill, which negatively impacts a past offender's right to privacy and reputation and may expose past offenders to discrimination on the basis of irrelevant criminal record. As an example of the excessive breadth of the exemptions, section 14(6)(e) specifies that the benefits attaching to Convictions that have become Spent (being non-disclosure) do not apply to persons who have obtained, or are seeking to obtain, registration in an occupation that requires them (by statute) to be a 'fit and proper person' or a 'person of good character'. Our research indicates that hundreds of occupations Australia-wide carry this requirement, ranging from fish farm operators³¹ to pawnbrokers and

²⁹ *Sentencing Act 1991* (Vic) s 8(2).

³⁰ Criminal Records in Victoria, Proposals for Reform, Fitzroy Legal Service Inc,

³¹ *Fisheries Management (Charter Boat Fishery) Regulations 2005*

second-hand dealers³², and even industry participants in professional combat sports³³.

The exemption in section 14(6)(e) means that past offenders would almost always be excluded from such professions as they would not be deemed a fit and proper person or of good character, merely because of their previous conviction. This would be so regardless of how old that conviction is or how relevant the offence may be to the offender's ability to undertake a particular position.

The exclusions are also poorly drafted so as to make it uncertain when a Spent Conviction may or may not be disclosed and by or to whom. For instance, in section 14(1), justice agencies (including police) are excluded from the operation of sections 11 and 12 in 'the performance of a function or the exercise of a power'. Given that responding to requests for a police record check are a function of the police, the wording of the exemption suggests that police will be able to disclose Convictions on a request for a police record check even after they become Spent, which is highly concerning and undermines the purpose of the Bill. In this regard, the Centre strongly suggests that criminal record disclosure guidelines be implemented as part of the Bill to ensure national consistency in relation to those Convictions that are revealed as part of a criminal record check.

The Centre also submits that a relevance test, as proposed in the Recommendations section of this submission, would alleviate some of the concerns about the breadth of the exclusions in section 14 of the Bill.

4. **Relationship between limitation and purpose:**

The limitations are not reasonably adapted to the underlying interest of community safety for the reasons discussed at paragraph 20(4) above.

5. **Less restrictive means available:**

The Centre acknowledges that the restrictions on human rights resulting from the Bill are for the legitimate aim of broadly meeting the public's expectations about community safety. However, the operation of the Bill does not necessarily address this concern. There are equally serious implications for the broader community where a person who cannot obtain rewarding employment is at risk of

³² *Pawnbrokers and Second-hand Dealers Act 1996* (NSW)

³³ *Professional Combat Sports Act 1987* (WA)

social exclusion and ultimately re-offends³⁴. The then United Kingdom Prime Minister Tony Blair noted, in the foreword to a report on social exclusion of ex-offenders, that 'public safety is not safeguarded when prisoners are released into homelessness, with no prospects of employment'. This also supports the finding that 'incarceration is associated with limited future employment opportunities and earnings potential, which themselves are amongst the strongest predictors of recidivism'³⁵.

The Centre submits that the public concerns about community safety could be more adequately met through means which are less restrictive to the individual past offender's rights. These less restrictive means are set out in the Recommendations in section 4 below.

³⁴ Bronwyn Naylor, Moira Paterson and Marilyn Pittard, "*In the shadow of a criminal record: proposing a just model of criminal record employment checks*" [2008] MULR 6. Refer: Department of Justice, Victoria, Statistical Profile of the Victorian Prison System 2002-2003 to 2006-2007 which shows that in Victoria, 63% of people in custody were unemployed before conviction.

³⁵ n 33 above.

3.3 Children's rights

(a) *Content of the right engaged*

35. Section 17(2) of the Bill specifies that every child (being a person under 18 years of age) has the right to such protection as is in his or her best interests and is necessary by reason of being a child. Section 23(3) of the Bill specifies that a child convicted of an offence must be treated in a way that is appropriate for his or her age.

(b) *Right promoted*

36. The special protection of children is promoted by Division 2 of the Bill, which provides that Spent Convictions must be disclosed by a person undertaking, or seeking to undertake, work or any other activity involving the care, supervision or instruction of children.
37. The Bill also promotes the special protection of children by setting a shorter qualification period of five years for most juveniles (section 7(1)), compared to the adult qualification period of ten years. This is a sound policy decision based on research that suggests many young people go through periods of criminality which they abandon as they grow older³⁶.

(c) *Right limited*

38. Under the Bill, a child who was convicted of an eligible juvenile offence but was 'dealt with as an adult' must wait ten years (rather than the standard five years for other juvenile offenders) for their Conviction to become Spent. This is a limitation on the right to special protection that is afforded to children under sections 17(2) and 23(3) of the Charter and required by the Convention on the Rights of the Child, to which Australia is a party..
39. The phrase 'dealt with as an adult' is not defined. The Centre considers this phrase must be defined in the Bill. For the purposes of this submission, we assume that the phrase 'dealt with as an adult' refers to children under 18 who are dealt with in the adult criminal system rather than by the juvenile justice system because of the seriousness of the offence. The only state in which children are treated as adults once they turn 17 (rather than 18) is Queensland³⁷.

(d) *Limitations Analysis*

40. Applying s 7(2) of the Charter, it is unlikely that the limitation imposed by sub-section 7(1)(a) is reasonable and justified in a free and democratic society based on human dignity, equality and freedom for the following reasons.

³⁶ n 5 above, p 39.

³⁷ *Juvenile Justice Act 1992* (Queensland).

1. **Nature of the right:** A child's right to such special protection as is in his or her best interests is paramount, as recognised by Article 3 of the Convention on the Rights of the Child.
 2. **Importance of the purpose of the limitation:** It would appear that the intention of the limitation is community safety.
 3. **Nature and extent of the limitation:** The Centre considers that the limitation on children's rights must be weighed against the purpose of the limitation (being community safety). The Centre considers that the limitation is disproportionately severe and disregards the importance of the special protection of children.
 4. **Relationship between the limitation and its purpose:** While community safety might appear to result from preventing young offenders having their Convictions Spent, the Centre considers that young offenders are much more likely to rehabilitate if they are allowed to re-enter the community through the workforce.
 5. **Less restrictive means:** the Centre considers that less restrictive means are available to achieve the purpose of community safety whilst also promoting the rights of children to such special protection as is in their best interests. Suggestions for less restrictive means are outlined in the Recommendations section of this submission at section 4 below.
41. Consequently, the Centre considers this aspect of the Bill is incompatible with the special protection of children required by the Charter and the Convention on the Rights of the Child and requires amendment so that convictions for all eligible juvenile offences become spent after five years. This reflects the view that juveniles are less likely to re-offend than adults and promotes the rehabilitation of young offenders.

4. Conclusion / Recommendations

42. The Centre recommends that in order to strengthen human rights, the Bill should be amended in the following ways:

1. In order to more effectively protect the right to non-discrimination on the basis of a Spent Conviction, the Centre recommends that s 11(d) be re-drafted as an entirely new section in the following terms:

11A – Unlawful use of spent conviction

A person is guilty of an offence if –

- (a) the person refuses another person any appointment, post, status or privilege; or
- (b) the person revokes any appointment, status or privilege held by another person; or
- (c) the person dismisses another person from any post,

on the grounds of a spent conviction, or the non-disclosure of a spent conviction.

Maximum penalty: \$10 000.

Irrelevant criminal record and spent conviction are protected attributes for the purposes of anti-discrimination laws in many Australian jurisdictions³⁸. In Western Australia, it is the *Spent Convictions Act 1988* which prohibits discrimination on the basis of spent convictions in employment, independent contracting or conferral of qualifications. Currently the only avenues for redress available to people in Victoria, New South Wales and South Australia who are discriminated against on the basis of an irrelevant criminal record are unfair dismissal proceedings and complaints to the Australian Human Rights Commission, both of which are problematic³⁹. As anti-discrimination legislation in these states does not include 'irrelevant criminal record' or 'spent conviction' as a protected attribute, and in the interest of harmonising protection against discrimination for all Australians, the Centre urges SCAG to adopt the proposed prohibition against discrimination on the ground of Spent Conviction as specified above.

³⁸ *Anti-Discrimination Act 1998* (Tas) (irrelevant criminal record); *Anti-Discrimination Act 1992* (NT) (irrelevant criminal record); *Discrimination Act 1991* (ACT) (spent conviction).

³⁹ The Commission's powers are limited to preparing a report with recommendations to the Attorney-General, for tabling with Parliament, but this does not make the discriminatory conduct unlawful: Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record*, Discussion Paper, 2004, p 12. Unfair dismissal proceedings may not be available to casual or probationary employees, or if the discrimination takes place at the recruitment stage: Fitzroy Legal Service and JobWatch, above n 7;

2. In order to ensure that findings of guilt without a conviction recorded are dealt with as the *Sentencing Act 1991* (Vic) (and comparative state and territory sentencing laws) intended, the definition of 'conviction' in section 3 of the Bill should be amended to provide as follows:

Conviction means a conviction, whether summary or indictment, for an offence but excludes a formal finding of guilt by a court, or a finding by a court that a charge has been proved, where no conviction was recorded.

3. In order to ensure that findings of guilt where there is no recorded conviction, details of arrests or criminal investigations, or details of disciplinary proceedings are not be made available on a person's official criminal record⁴⁰, a nationally-consistent criminal records disclosure system should be implemented as part of the Bill.
4. The definition of 'sentence of imprisonment' under section 3(2) should be amended to clarify whether combined custody and treatment orders, and similar alternative sentencing options, are included or excluded from the definition. The Centre also considers that suspended sentences should be excluded from the definition, in order to properly give effect to judicial sentencing intentions.
5. Further consideration should be undertaken to determine whether the blanket exclusion of sex offences is necessary, particularly in light of the broad exclusions under section 14 and the state and territory legislation governing the registration of sex offenders⁴¹, which may be sufficient to safeguard the community against any risk.
6. Considering the arbitrary nature of the limitation period and in favour of rehabilitation, further investigations should be undertaken into the adoption of variable waiting periods such that, for example, the limitation periods reflect the length of the sentence imposed, rather than a blanket limitation period.⁴²
7. Problems with the current wording of the exemptions were discussed at paragraph 33(3)(iii) above. The Centre considers that the exceptions set out in section 14 of the Bill should be re-drafted to ensure they are clear and will operate effectively.

⁴⁰ Fitzroy Legal Service and JobWatch, above n 7.

⁴¹ *Crimes (Child Sex Offenders) Act 2005* (ACT); *Child Protection (Offenders Registration) Act 2001* (NSW); *Child Protection (Offender Reporting and Registration) Act 2004* (NT); *Child Protection (Offender Reporting) Act 2004* (QLD); *Child Sex Offenders Registration Act 2006* (SA); *Community Protection (Offender Reporting) Act 2005* (TAS); *Sex Offenders Registration Act 2004* (VIC); *Community Protection (Offender Reporting) Act 2004* (WA).

⁴² Fitzroy Legal Service and JobWatch, above n 7; Refer: *Rehabilitation of Offenders Act 1974* (UK)

8. The Centre proposes that the exclusions in section 14 should be amended in order to implement the model suggested by Bronwyn Naylor, Moira Patterson and Marilyn Pittard in 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks'⁴³. The key to this model is that only *relevant* information about a past offender should be accessible by potential employers or other third parties. The model proposes a central body that would manage the selective disclosure of criminal record information, which would only be available to employers in *relevant sectors* (i.e. working with vulnerable persons) and would only disclose convictions that are *relevant to the specific position*. By ensuring there is a clear and close correlation between the inherent requirements of the job and the criminal record in question, the right to privacy of past offenders can be safeguarded and future discrimination can be avoided.

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⁴³ n 33 above