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The Victorian Aboriginal Legal Service Co-operative Limited's comments to the Scrutiny of Acts and Regulations Committee concerning the *Equal Opportunity Bill 2010* (Vic) – sent 18th March 2010

Introduction

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) welcomes the opportunity to make comment to the Scrutiny of Acts and Regulations Committee (SARC) regarding the *Equal Opportunity Bill 2010* (Vic).

For the purposes of the SARC's functions set out in section 17 of the *Parliamentary Committees Act 2003*, comments will focus on issues around the *Equal Opportunity Bill 2010* that relate to the SARC's terms of reference.

VALS would specifically like to comment on the failure of the Bill to take on the concerns and recommendations of the Gardner report (2008) as it relates to discrimination on the basis of an irrelevant criminal record.

Discrimination is not unlawful unless it occurs on the basis of attributes covered under the Act. Homelessness and irrelevant criminal record are not attributes currently covered. Failure to recognise these forms of discrimination as being unlawful perpetuates a position of disadvantage. It also renders the poor treatment of homeless people as being acceptable (or at least lawful).¹

A discussion of spent convictions occurs in the context of the following sections of the *Parliamentary Committees Act 2003*:

- s17(a)(i): direct or indirect trespass unduly on rights or freedoms
- s17(a)(iv): unduly requirement or authorisation of acts or practices that may have adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*.

VALS discussion of s17(a)(viii), relating to compatibility of the Bill to the Charter of Human Rights and Responsibilities, argues that neither the Bill or Charter are effective instruments to protect people from discrimination on the basis of an irrelevant criminal record.

VALS also discusses section 17(a)(iii) and questions whether the Bill makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions in the context of investigations and public inquiries into systemic discrimination.

¹ Gardner J (2008) *An Equality Act for a Fairer Victoria: Equal Opportunity Final Report* Melbourne: Department of Justice, State of Victoria, p. 26 www.humanrightscommission.vic.gov.au/pdf/EOARReviewFinalReport.pdf

17. Scrutiny of Acts and Regulations Committee

The functions of the Scrutiny of Acts and Regulations Committee are –

- a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –
 - (i) trespasses unduly on rights or freedoms

Economic Rights

Aboriginal and Torres Strait Islander peoples experience significant disadvantages in their right to work. This is reflected by the following statistics:

- (a) In 2001, the unemployment rate for Aboriginal and Torres Strait Islander peoples was 20 per cent, approximately three times higher than the rate for the non-Aboriginal and Torres Strait Islander population;²
- (b) In 2006, the median weekly income for Aboriginal and Torres Strait Islander peoples was \$278.00, compared with \$471.00 for non-Aboriginal and Torres Strait Islander people;³ and
- (c) Aboriginal and Torres Strait Islander women are more likely to be working in low income jobs, with over 60 per cent of Aboriginal and Torres Strait Islander women on a gross weekly income of \$399.00 or less (including 41.6 per cent receiving less than \$250.00 gross each week).⁴

Article 6 of the International Covenant on Economic Social and Cultural Rights (ICESCR) requires Australia to:

recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

Australia's compliance with Article 6 is undermined by the absence of a prohibition against discrimination on the basis of an irrelevant criminal record in the Bill as outlined in the Gardner report (2008).

² Australian Bureau of Statistics, Population Characteristics, Aboriginal and Torres Strait Islander Peoples 2001, (2001) 66 per the National Association of Community Legal Centres, Human Rights Law Resource Centre and Kingsford Legal Centre (2008) *Freedom, Respect and Dignity: Action. NGO Submission to the UN Committee on Economic, Social and Cultural Rights Australia* www2.ohchr.org/english/bodies/cescr/docs/info-ngos/HRLRC.pdf

³ Australian Bureau of Statistics, 2006 Census of Population and Housing, Community Profile Series, Indigenous Profile (2007) I04 the National Association of Community Legal Centres, Human Rights Law Resource Centre and Kingsford Legal Centre (2008) op cit.

⁴ Australian Bureau of Statistics, 2006 Census of Population and Housing, Selected Person Characteristics by Indigenous Status by Sex (2006, revised 14 November 2007) per the National Association of Community Legal Centres, Human Rights Law Resource Centre and Kingsford Legal Centre (2008) op cit.

Further to this point, concluding observations of the Committee on Economic, Social and Cultural Rights for Australia 2009 included the following⁵:

14. The Committee notes with concern that the State party's anti-discrimination legislation does not provide comprehensive protection against all forms of discrimination in all areas related to the Covenant rights (article 2.2).⁶

The Committee recommends that the State party enact federal legislation to comprehensively protect the rights to equality and non-discrimination on all the prohibited grounds.

18. The Committee notes with concern the high unemployment rates among indigenous people, asylum seekers, migrants and people with disabilities, and the significant difficulties they face to enjoy their right to work equally (articles 2.2 and 6).⁷

The Committee recommends that special programmes and measures be designed to address the significant barriers to the enjoyment of the right to work faced by many indigenous people, asylum seekers, migrants and people with disabilities, including measures to protect them from exploitation.

VALS argues that the Bill's omission of considerations of discrimination on the basis of an irrelevant criminal record presents a barrier to the enjoyment of the right to work. The Bill should be acting as a special measure designed to *address* significant barriers to the enjoyment of the right to work faced by many Aboriginal and Torres Strait Islander Peoples.

In their submission to the Victorian Department of Justice Equal Opportunity Review Discussion Paper 2007, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC; 2008) highlighted a clear link between the limitations on the enjoyment of economic rights as a result of a criminal record.

*A criminal record will almost always be a barrier to gaining employment. In recognition of the inhibiting affect this will have on a person's chances of successful rehabilitation, many states have introduced spent conviction schemes which wipe some criminal convictions or other recorded outcomes, from a person's record after a specified time of non-offending. Victoria does not have such legislation and this is a matter of concern to the Commission. Introduction of spent conviction legislation would provide the most effective method of ensuring that irrelevant criminal records are not used as a basis for discrimination in a large number of cases.*⁸

⁵ Committee on Economic, Social and Cultural Rights (2009) *Consideration of reports submitted by states parties under articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights, Australia*, Forty-second session, Geneva, 4-22 May 2009

www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc

⁶ Article 2.2 The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*.

⁷ Article 6.1 The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

⁸ VEOHRC (2008) *Equal Opportunity Review: Discussion Paper 2007* submission to the Victoria Department of Justice, sent 18 January, p. 86

www.equalopportunitycommission.vic.gov.au/pdf/equal%20opportunity%20review%20response.pdf

Regardless however of the presence or not of such a scheme, the Commission believes that the EOA needs to include a protection against the use of an irrelevant criminal record to discriminate against a person in their present and future life.⁹

At the federal level, a person can complain to HREOC of discrimination in employment on the basis of a criminal record. HREOC can then investigate the complaint, and attempt to conciliate between the complainant and the employer. However, if the complaint is unable to be conciliated, HREOC's actions are limited to sending a report to the Attorney-General for tabling in federal parliament. That is, the discrimination is not unlawful. HREOC complaints in this area are increasing.¹⁰

VALS supports the principle of protecting Australian citizens from discrimination in employment on the basis of an irrelevant criminal record. VALS has produced the following submissions that support the introduction of a spent conviction scheme as a means to attempt to eliminate discrimination in employment on the basis of an irrelevant criminal record:

- Submission to Department of Justice in response to 'Uniform Spent Convictions: A proposed Model Discussion Paper August 2004 (submitted 11 October 2004).
- Submission to Scrutiny of Acts and Regulations Committee in response to 'Inquiry into Discrimination in the Law' (submitted June 2004).
- Submission to Department of Justice in response to 'Working with Children Bill 2005 Discussion Paper' December 2004 (submitted March 2005).
- Discrimination in Employment on the Basis of a Criminal Record Discussion Paper December 2004 (submitted 3 March 2005).
- VALS' submission to the Department of Justice in response to the Standing Committee of Attorneys-General 'Draft Model Spent Convictions Bill' (submitted 6 February 2009).

⁹ Ibid.

¹⁰ PILCH Homeless Persons' Legal Clinic, *Homelessness and Human Rights in Victoria: Submission to the Human Rights Consultation Committee*, 2005. The submission was based on information gathered by consultative workshops involving people who were homeless or who had previously experienced homelessness. According to the submission, on any given night there are over 100,000 people who are homeless across Australia, and 20,000 in Victoria. The submission found strong links between human rights and homelessness, as human rights violations can contribute to homelessness and homelessness renders people more vulnerable to human rights violations, whereas the protection of human rights can address the issue of homelessness. 80% of the homeless people consulted considered the current protection of human rights, including the right to adequate housing, in Victoria to be inadequate or very inadequate. Per Victorian Equal Opportunity and Human Rights Commission (2008) op cit.

VALS' Civil Law Solicitor is aware of the following examples of alleged discrimination in employment on the basis of criminal record towards Aboriginal and Torres Strait Islander Peoples¹¹:

A client applying for a position with an Aboriginal organisation was refused a job because of a conviction for a driving offence (he was to be a driver of a small bus-this position required a Comprehensive Car Insurance Policy).

A client who had a position as an Indigenous Prison Liaison Officer was sacked because of a criminal record relating back to his early childhood (he didn't disclose the minor theft conviction).

A client was a Primary Teacher who was requested to resign because a criminal record check resulted in disclosure of a breach of a Stalking Order.

A client applying for a position with a Government Department was refused an offer of employment because a criminal record disclosed a conviction for being drunk many years ago.

In February 2009, VALS made a submission to the Victoria Department of Justice on the Standing Committee of Attorney-s General's (SCAG) 'Draft Model Spent Convictions Bill'. It argued that if enacted, the draft model Bill would increase the likelihood that people with old and irrelevant criminal records will be able to (among other elements that accompany membership to full citizenry) gain meaningful employment. The presence of a criminal record poses many barriers for people wishing to reintegrate into society in a positive way. The punishment received as a result of having a criminal record extends well beyond a prison sentence. For these reasons a spent conviction scheme is critical.

The underlying issues that contribute to the over-representation of Aboriginal and Torres Strait Islander Peoples in the criminal justice system (i.e. socio-economic status, unemployment, homelessness) are in part created by the absence of a spent conviction scheme. If a spent conviction scheme existed in Victoria, thereby preventing discrimination in employment on the basis of an irrelevant criminal record, it is more likely that Aboriginal and Torres Strait Islander Peoples who have been convicted could secure employment.

It is VALS' understanding the Model Spent Convictions Bill has been finalised and it is now incumbent on the Attorney-General's of each jurisdiction to lead the introduction of the model in their jurisdictions.¹² The absence of a spent conviction scheme makes it incumbent on instruments like the Bill to ensure that discrimination doesn't occur on the basis of an irrelevant criminal record.

Spent conviction laws are premised on the idea that people who do wrong in our society should be given a second chance. This is made possible by the belief that we all have the capacity to reform our ways. There are at least 30,000 adult offenders being returned to the Australian

¹¹ Per VALS' *Discrimination in Employment on the Basis of a Criminal Record Discussion Paper December 2004* (submitted 3 March 2005).

¹² The Bill is available at [www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/Spent_Convictions_Bill_2009_Attachment_A.pdf/\\$file/Spent_Convictions_Bill_2009_Attachment_A.pdf](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/Spent_Convictions_Bill_2009_Attachment_A.pdf/$file/Spent_Convictions_Bill_2009_Attachment_A.pdf).

community from prison each year. This is in addition to the people in the community with a criminal record that have never been to prison (HREOC 2007).

This consideration for a national model for spent convictions therefore has the potential to effect vast numbers within the population and strengthens the need to limit legislative variations from one jurisdiction to the next.

Discrimination on the basis of a criminal record for employment purposes is one of many reasons a spent convictions scheme should be modelled. The Australian Law Reform Commission (ALRC) argued back in 1987 that:

*An old conviction, followed by a substantial period of good behaviour, has little, if any, value as an indicator of how the former offender will behave in the future. In such circumstances reliance on the old conviction will generally result in serious prejudice to the offender which will outweigh to a great degree its value as an indicator of future behaviour. Consequentially, it is in accordance with sound social policy that the old conviction be regarded as spent.*¹³

The Bill does not address the Equal Opportunity Review Final Report *An Equality Act for a Fairer Victoria* (2008; the “Garner report”) recommendations and proposals to improve the application of concepts such as direct and indirect discrimination. The Report recommends that ‘it be made unlawful to discriminate on the basis of homelessness and irrelevant criminal record’.¹⁴ Specifically:

- *Recommendation 48*

That the Act be amended to include “irrelevant criminal record” as a protected attribute.

- *Recommendation 49*

That guidelines be developed for employers and service providers to assist in determining whether a person’s criminal record is relevant.

- *Recommendation 50*

That discrimination on the basis of a criminal record should be unlawful in the area of employment where a person is unable to satisfy the “inherent requirements” of the position.

- *Recommendation 51*

Volunteers should be given the same protection against discrimination as employees.¹⁵

¹³ Australian Law Reform Commission 1987 *Report 37: Spent Convictions* Canberra: Australian Government Publishing Service, pp xi-xii.

¹⁴ Gardner J (2008) op cit, p. 13.

¹⁵ Gardner (2008) op cit, p.17.

The Gardner report also argues:

Discrimination is not unlawful unless it occurs on the basis of attributes covered under the Act. Homelessness and irrelevant criminal record are not attributes currently covered. Failure to recognise these forms of discrimination as being unlawful perpetuates a position of disadvantage. It also renders the poor treatment of homeless people as being acceptable (or at least lawful).¹⁶

(iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions.

Systemic Discrimination

VALS applauds the inclusion in the Bill of investigations and public inquiries relating to systemic discrimination. VALS' preliminary submission to the Equal Opportunity and Human Rights Commission, 'Have Your Say about Human Rights in Victoria Discussion Paper' (2005), argued that there is need to address systemic discrimination in the *Equal Opportunity Act* which is clearly in the government's interest in terms of reducing systemic discrimination and achieving more inclusive and cohesive work across Departments and in partnership with communities. Such aspirations are expressed in the Aboriginal Justice Agreement, Justice Statement (2004), A Vision for Victoria to 2010 and Beyond: Growing Victoria Together and A Fairer Victoria. VALS is pleased to see the *Equal Opportunity Bill 2010* gives the Commission more effective options to respond to systemic discrimination thereby removing the heavy reliance upon individual victim of discrimination, sexual harassment and victimisation complaints pursued through the Commission and the VCAT to achieve resolution.

VALS also applauds the inclusion in the Bill of investigations and public inquiries relating to systemic discrimination. However, VALS is concerned that the Bill does not make provision for review in the event that the Commission decides not to commence an investigation (clause 127) or refer the matter to the Attorney General requesting a public review (clause 128). Nor does the Bill make provision for a review if upon investigation the Commission decides to take no action in response to the investigation findings (clause 139) or the Attorney-General declines to commence a public inquiry. This omission in itself, painted in its worst light, has the potential to equate to systemic discrimination

(iv) unduly requires or authorises acts or practices that may have adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*.

The Information Privacy Principles (IPP) in schedule 1 of the *Information Privacy Act 2000* lists "sensitive information" to mean information or an opinion about an individual's –

- (i) Racial or ethnic origin; or
- (ii) Political opinions; or
- (iii) Membership of a political association; or
- (iv) Religious beliefs or affiliations; or
- (v) Philosophical beliefs; or
- (vi) Membership of a professional or trade association; or

¹⁶ Gardner J (2008) op cit. p. 26

- (vii) Membership of a trade union; or
- (viii) Sexual preferences or practices; or
- (ix) ***Criminal record*** (emphasis added)

Principle 1, “Collection”, in the IPP states that:

- 1.1 An organisation must not collect personal information unless the information is necessary for one or more of its functions or activities.
- 1.2 An organisation must collect personal information only by lawful and fair means and not in an unreasonably intrusive way.

VALS argues that there are not adequate systems in place to ensure that information about a person’s criminal record are not inappropriately provided to employers. In order to establish that a person’s criminal record is necessary for one or more of the employers functions *and* that the collection of this sensitive information be done only by a “fair means” and not in an “unreasonably intrusive way”, the following must be established:

- a) A clear definition of what the employer’s functions and activities are and the corresponding functions and activities of the employment position for which the criminal record check is being done.
- b) As a result of a), the inherent requirements of the job must be articulated.
- c) Information relating to a criminal record should only be provided as they apply to inherent job requirements.

Understandably there are some instances when the need for information regarding an individual’s criminal history *including* convictions that have become spent is needed. This information is likely to be relevant where extra protection of the public is required and justified

While it is acknowledged that some public records exist outside the control of the justice system, it is paramount to this scheme that an effective system of securing information appropriately runs concurrently.

Freedom from discrimination on the grounds of criminal record is a human right. Criminal record is often an unreliable indicator of character or of future conduct. Despite this, there are strong prejudices in society against former offenders based on negative stereotypes. It is in society’s interests that former offenders be given a fair opportunity to rehabilitate. Effective protection from criminal record discrimination in employment is central to this. At present, there is no consistent effective protection from criminal record discrimination in Australia¹⁷

Referring to a draft model spent convictions scheme, the Human Rights and Equal Opportunity Commission suggests that ‘...if a person’s criminal record doesn’t impact on the inherent requirements of the job, and that person is the best candidate for the job in every other way, these laws are designed to protect a person from being denied equal opportunity because of their

¹⁷ Brimbank Melton Community Legal Centre 2005 *Discrimination in employment on the basis of criminal record: Submission to the Human Rights and Equal Opportunity Commission* Victoria: Brimbank Melton Community Legal Centre, pp.2-3.

criminal record'.¹⁸ It is further suggested that a job applicant be assessed firstly on their ability to perform in the job role and then on the relevance of their criminal record. In instances such as this, only the short-listed applicants should be asked to disclose their criminal record. It is important to note here that the stipulation of what is an inherent requirement of a job is dependent on the employer.

Spent conviction and anti-discrimination laws are avenues through which legislators have sought to shield people from discrimination when seeking employment. With increasing numbers of employers requesting job applicants to undergo criminal record checks, this is becoming an increasingly impossible task where the relevant legislation is insufficient or alternatively does not exist.

Former offenders who are unreasonably discriminated against on the basis of their irrelevant criminal record should be entitled to protections. The Australian Law Reform Commission suggests anti-discrimination legislation (Cth) where discrimination is defined in terms of 'less favourable treatment of former offenders because of their record that is not reasonable having regard to their circumstances' and should be encouraged for adoption by the States and Territories.¹⁹

It is further recommended that this protection should extend to all convictions whether they are spent or not. The Australian Human Rights Commission would therefore need to acknowledge general responsibility under the 'other status' provisions in Article 2 of the International Covenant on Civil and Political Rights.²⁰

The Northern Territory's *Anti-discrimination Act 1992* provides that it is unlawful to discriminate against a person on grounds of an 'irrelevant criminal record' (exceptions are provided for work involving care of children and the vulnerable etc). In addition, this legislation prohibits asking another person to supply information on which unlawful discrimination could be based. This relates to Victoria's IPP "Reasonable Steps" to secure information. The IPP guidelines state that security measures should be proportionate and appropriate to the likely risk of a security breach and the gravity of harm that may result.²¹

According to the guidelines, there are a number of categories of information holdings that may require more considered protection to avoid or mitigate against potential harms that might arise from any misuse or unauthorised access or disclosure. These include information holdings that:

- a) involve vast amounts of personal information;
- b) involve information about vulnerable persons;

¹⁸ Human Rights and Equal Opportunity Commission (2007) *On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal record* Sydney: Human Rights and Equal Opportunity Commission, p.5.

¹⁹ 1987, op cit, p. xvi

²⁰ The Covenant states 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized 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).

²¹ Office of the Victorian Privacy Commissioner (2006) *Guidelines to the Information Privacy Principles* Office of the Victorian Privacy Commissioner
[www.privacy.vic.gov.au/privacy/web.nsf/download/5E419983B6FDA215CA2572130082548C/\\$FILE/OVPC%20IPP%20Guidelines%20Ed2%20September%202006.pdf](http://www.privacy.vic.gov.au/privacy/web.nsf/download/5E419983B6FDA215CA2572130082548C/$FILE/OVPC%20IPP%20Guidelines%20Ed2%20September%202006.pdf)

- c) involve sensitive information (defined in the IPPs to include personal information such as racial and ethnic origin, political opinions, sexual preferences, and criminal record);
- d) carry a risk of identity theft or financial harm; or
- e) carry a risk of harm to a person’s life, safety, liberty, reputation or livelihood.

Furthermore, in deciding what “reasonable steps” to take, organisations should consider factors such as:

- f) a the nature or sensitivity of the personal information concerned;
- g) b the likelihood of a security breach occurring; and
- h) c the gravity of any harm to an individual if a security breach occurs.

The IPP within the *Information Privacy Act 2000* states that the collection of information may be unreasonably intrusive ‘where excessive or unnecessarily intimate information is collected, or where the collection occurs in a manner that unnecessarily interferes with a person’s home life or unreasonably interferes with a person’s bodily integrity.’²²

(viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities.

The comments below highlight that while the Bill is compatible with the Charter of Human Rights and Responsibilities, neither are effective instruments to protect people from discrimination on the basis of an irrelevant criminal record.

Section 8 of the *Charter on Human Rights and Responsibilities Act 200* (Vic) provides that:

- Every person has the right to recognition as a person before the law;
- Every person has the right to enjoy his or her human rights without discrimination; and
- Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination

“Discrimination” for the purposes of section 8 of the Charter is limited to the attributes set out in the *Equal Opportunity Act 1995* and *Equal Opportunity Bill 2010*, which currently does not include irrelevant criminal record.

Even though there was consultation on a draft model spent conviction scheme for Victoria in 2009, there have yet been no moves to introduce it. This highlights a greater need for an anti-discrimination provision.

VALS’ submission to the SARC’s *Discrimination and the Law* inquiry (June 2004) suggested that section 6 of the Victorian *Equal Opportunity Act 1995* (attributes of prohibited discrimination) be amended to reflect progress made in other Australian jurisdictions. The *Anti Discrimination Act 1996* (NT) and *Anti Discrimination Act 1998* (TAS) prohibit discrimination on the basis of irrelevant criminal record.

²² Office of the Victorian Privacy Commissioner (2006) op cit, p. 33

Section of the 3(1) of the Anti Discrimination Act (NT) 1996 defines "irrelevant criminal record" as:

- (a) a spent record within the meaning of the Criminal Records (Spent Convictions) Act; or
- (b) a record relating to arrest, interrogation or criminal proceedings where –
 - (i) no further action was taken in relation to the arrest, interrogation or charge of the person;
 - (ii) no charge has been laid;
 - (iii) the charge was dismissed;
 - (iv) the prosecution was withdrawn;
 - (v) the person was discharged, whether or not on conviction;
 - (vi) the person was found not guilty;
 - (vii) the person's finding of guilt was quashed or set aside;
 - (viii) the person was granted a pardon; or
 - (ix) the circumstances relating to the offence for which the person was found guilty are not directly relevant to the situation in which the discrimination arises;

Legislation at the Commonwealth level prohibits discrimination on a number of grounds including on the basis of a criminal record.²³ Where a complaint is made to the Australian Human Rights Commission (previously named the Human Rights and Equal Opportunity Commission), the Commission has the power to investigate and conciliate. There is no power for the Commission, however, to award compensation or enforce any measures towards the breach the complaint is based on.

There are insufficient legal protections against discrimination in employment on the basis of criminal record at both State and Federal levels. The Victorian *Equal Opportunity Act 1995* and *Equal Opportunity Bill 2010* fail to prohibit discrimination on the basis of an irrelevant criminal record. The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) does not provide sufficient protection for alleged victims of discrimination on the basis of criminal record when it is not possible to conciliate a dispute.

Conclusion

VALS' concerns about the failure to include in the Bill provision to prohibit discrimination on the basis of irrelevant criminal record, in the context of Victoria not having a Spent Conviction Scheme, are relevant to the following aspects of the Scrutiny of Acts and Regulations Committees terms of reference as outlined in the *Parliamentary Committees Act 2003* (Vic):

²³ *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 3(1); Human Rights and Equal Opportunity Commission Regulations 1989 (Cth) 4(b)(ii).

- s17(a)(i): Direct or indirect trespass unduly on rights or freedoms, specifically economic rights. VALS draws upon international instruments of law as evidence of the existence of such economic rights.
- s17(a)(iv): Unduly requirement or authorisation of acts or practices that may have adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*. VALS argues that there are not adequate systems in place to ensure that information about a person's criminal record are not inappropriately provided to employers

VALS notes with disappointment that despite the Standing Committee of Attorney's-General agreeing upon a Model Spent Conviction Bill the Victorian Attorney-General has shown no indication of drawing upon this model in Victoria. VALS suggests that such inaction makes the need for the inclusion of a provision in the Bill to prohibit discrimination on the basis of irrelevant criminal record more immediate.

VALS argues that omission of such a provision in the Bill is disappointing given the Bill's direct relationship with the Gardner (2008) report. VALS' stance is consistent with Recommendation 48 of the Gardner Report: that the Act be amended to include "irrelevant criminal record" as a protected attribute. VALS, and other community organisations, are determined to remind the Scrutiny of Acts and Regulations Committee of this recommendation and that the silence of the Bill in relation to this recommendation will not go by unnoticed.

VALS welcomes moves to include in the Bill investigations and public inquiries relating to systemic discrimination, however questions the Bill in the context of the following Scrutiny of Acts and Regulations Committee term of reference: s19(1)(iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions (Parliamentary Committees Act 2003-Vic). VALS is concerned that the Bill does not make provision for review in the event that a person/stakeholder etc who draws the attention of the Commission to a systemic issue is not happy with the handling of the matter.