



# Victorian Aboriginal Legal Service Co-operative Ltd.

*Head Office:*  
6 Alexandra Parade,  
P.O. Box 218  
Fitzroy, Victoria 3065  
Phone: (03) 9419 3888 (24 Hrs)  
Fax: (03) 9419 6024  
Toll Free: 1800 064 865

**VALS' submission to the Department of Justice in response to the  
Standing Committee of Attorneys-General 'Draft Model Spent Convictions  
Bill' – sent 6 February 2009.**

## TABLE OF CONTENTS

<b>INTRODUCTION</b> .....	1
<b>Significance of spent conviction scheme for Indigenous Australians</b> .....	3
<b>Impact of a Criminal Record in particular on employment</b> .....	4
<b>Restrictions via Sentencing Outcomes</b> .....	5
<b>Serious Offences</b> .....	6
<b>Sexual Offences</b> .....	7
<b>Canadian Example</b> .....	8
Sexual Offences.....	9
Unsuccessful Application for Pardon.....	9
<b>Use of a Tribunal</b> .....	9
<b>Qualifying Period – Demonstration of ‘Good Behaviour’</b> .....	10
<b>Juvenile Offenders</b> .....	11
<b>Treatment of Spent Conviction Information</b> .....	11
<b>Exceptions</b> .....	13
<b>Absence of Effective Anti-discrimination Protections/support structures for     reintegration</b> .....	13
<b>Legislating a lie</b> .....	15
<b>Miscellaneous Provisions</b> .....	16
<b>Accessibility</b> .....	17
<b>CONCLUSION</b> .....	18

## INTRODUCTION

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) thanks the Standing Committee of Attorneys-General (SCAG) for the invitation to comment on the project to design a draft model Bill for a spent convictions scheme. As Victoria stands as one of only two jurisdictions in Australia without a scheme for spent convictions, VALS responds with enthusiasm in participating in this consultation process.

VALS urges the timely resolution of whether and what type of national model for spent convictions is implemented given that the process of inquiry has been lengthy to date. VALS will argue about the benefits of a national spent conviction scheme to disadvantaged people, such as Indigenous Australians.

VALS is supportive of restorative justice and agrees with the suggestion of Knowler that spent conviction legislation should be seen not as a sign of Government “going soft” on criminals, but instead considered a method of ensuring that ‘the punishment suffered by an individual with criminal convictions is fair and just and in accordance with the law’ (Knowler 1994:2).

VALS considers that a national spent convictions scheme represents an important undertaking for a number of reasons. It represents a commitment to assisting offenders in rehabilitation and reintegration into the community aided by alleviating stigma arising out of old convictions. The draft Bill endorses the belief that positive possibilities are obtainable for past offenders through rehabilitative measures. This process is therefore aligned with restorative justice ideals that promote healing of the past and measures towards reintegration into community life.

If enacted, the draft model Bill also increases the likelihood that more people with old criminal convictions will be able to gain access to travel, various insurance, and gain meaningful employment along with other elements that accompany membership to full citizenry. It is from this perspective that VALS will begin comment on the Draft Model Spent Convictions Bill, referred to as the *Spent Convictions Act 2008*. The areas covered in this submission are:

- *Significance of spent conviction scheme for Indigenous Australians.*

There are benefits of a national spent conviction scheme to disadvantaged people, such as Indigenous Australians, given statistical evidence that at 30<sup>th</sup> June 2006 “Indigenous prisoners represented 24% of the total national prisoner population”.<sup>1</sup>

- *The impact of a criminal record, in particular 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

---

<sup>1</sup> Cunneen Chris and Schwartz Melanie ‘Funding Aboriginal and Torres Strait Islander Legal Services: Issues of Equity and Access’ (2008) 32 Crim LJ 38, page 39

having a criminal record extends well beyond a prison sentence. For these reasons a spent conviction scheme is critical.

- *The draft Bill is restrictive.*

To base eligibility for spent convictions on sentencing outcomes alone is highly restrictive and conceptually narrow. The exclusion of sexual offences of any manner to a spent convictions scheme, simply because of the category of offence, is also a blanket approach. While sexual offences are of a particularly sensitive nature, consideration in relation to this area requires attention. Please refer to the wider body of this submission for further comment.

- *Canadian example.*

Strategies from Canada provide some insight into the benefits of tribunal-style additions to spent conviction schemes, processes for application and reapplication if a spent conviction is denied and the clear accessibility of the system.

- *'Good behaviour' qualifying period.*

The draft Bill is unreasonable in provisions made to disruptions to the qualifying period. Offences that are increased in likelihood as a result of disadvantage have not been taken into account here. A tribunal mechanism would be useful in this area. VALS also believes the 5 year waiting period for juveniles to qualify for spent convictions for minor offences is overly punitive.

- *Treatment of spent conviction information.*

Clarity is needed in respect to the control and handling of access to spent conviction information. The increase in employer access to criminal record information also stresses the need for a centralised and regulated system that protects spent conviction information.

- *Inadequate anti-discrimination protections.*

Current systems do not adequately address discrimination on the basis of a criminal record which means a spent convictions scheme is essential. The potential a spent convictions scheme could have in Victoria is completely diluted by the lack of power people have when their criminal record information is accessed without their consent, or used to deny an individual something they are entitled to because of an irrelevant and old conviction.

- *Accessibility and miscellaneous provision.*

VALS argues for the application process for spent convictions to be accessible. VALS suggests that eligible convictions should be automatically reviewed after

the qualification period rather than require individuals to apply for their conviction to be spent. VALS questions the model's lack of consideration that applications appearing inadequate or vexatious may be a result of lack of understanding of the process or lack of legal advice.

### **Significance of Spent Conviction Scheme for Indigenous Australians**

There are benefits of a national spent conviction scheme to disadvantaged people, such as Indigenous Australians. The over-representation of Indigenous Australians in the criminal justice system is a reason alone to introduce a spent conviction scheme. Indigenous Australians in Victoria are disadvantaged by the absence of such a scheme. The underlying issues that contribute to the over-representation of Indigenous Australian Victorians in the criminal justice system (ie: 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 criminal record, it is more likely that Indigenous Australians who have been convicted could secure employment.

According to the 2001 census, unemployment among Indigenous Victorians was 3 times higher than for non- Indigenous Victorians.<sup>2</sup> To take the point to the next step, if unemployment figure were improved then arguably the over-representation in the criminal justice system would reduce. VALS continually advocates for measures that have the potential to reduce the over-representation of Indigenous Australians in the criminal justice system. It needs to be noted that there are multitude of factors that contribute to the over-representation.

VALS advocates for a "smart on crime" approach as opposed to a "tough on crime" approach. Restorative justice is an example of a "smart on crime" approach and does not equate to a soft on crime approach. Restorative Justice is an example of an approach to crime that recognises that getting tough on crime and imprisoning people is not the only, or necessarily the smartest, option. The notion of healing and restoration within the concept of restorative justice is particularly appealing to Indigenous Australians. Indigenous Australian culture values healing and restoration as ingredients in a response to crime in light of Indigenous Australian's experience of colonisation.

The trauma experienced by the Indigenous Australian community as a result of injustices of the past is trans-generational in that it has an effect on Indigenous Australians living today which highlights the need for healing. In saying this VALS is not discounting the value Indigenous Australians place on accountability of offenders. The restorative justice model of the Koori Court strikes a balance between healing and holding offenders accountable for their actions. Noticeably, Elders and Respected Persons have a role to play in this process in accordance with Aboriginal culture.

---

<sup>2</sup> Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody Statistical Information  
Volume 2 October 2005 p. 20

## **Impact of a Criminal Record in Particular on Employment**

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 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. Ex-prisoners and offenders face many challenges involving circumstances that contributed to offending behaviour, and those involving integrating into society following offending behaviour. One significant element in the success of the feat of reintegration is the sense of purpose and personal fulfilment that accompanies meaningful employment.

Ex-prisoners and ex-offenders encounter numerous barriers to employment such as lack of training, limited experience in looking for work, no current references, outdated or limited work and skills history, drug and alcohol rehabilitation, lack of social network, financial hardship, problems with accommodation and the variety of challenges stemming from connections to the criminal justice system. Indigenous Australian ex-offenders arguably face further disadvantage through the reluctance of employers to hire them based on negative images of Indigenous Australians in society which is largely driven by the media.

It is the presence of criminal convictions, new and old, that act as the predominant and unavoidable hurdle which limit individuals' ability to gain employment. The availability of a spent convictions scheme has the power to 'assist people with a criminal record rehabilitate by providing them with a legally sanctioned means of "moving on" with their lives and putting their past behind them' (HREOC 2007:15). This is not possible if one cannot financially support themselves and the prospect of a future.

Ken Kelly of Workability Employment Strategies suggests that additional disadvantages that face Aboriginal people with a criminal record in attaining employment rests with a public perception that the majority of Aboriginal people are offenders based on the data showing the comparison of Aboriginal and non-Aboriginal incarceration rates (2005).

The Public Interest Advocacy Centre (PIAC) further points out that discrimination on the ground of criminal record tends to impact most adversely on groups within society that are already socially and economically disadvantaged. 'Particularly at risk are Indigenous Australians and people who are homeless or at risk of homelessness'. PIAC is well placed to comment on the impact of this form of discrimination on Indigenous and homeless populations through its Indigenous Justice Project and Homeless Persons' Legal Service' (2005). Specialising in matters that have systemic impact, PIAC believes that the rehabilitation of people who have been convicted of criminal offences is in the public interest and should be encouraged.

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 (xi-xii).*

Two examples are provided by via enquiries to the Equal Opportunity Commission, Victoria (2005, please note that all identifying details have been changed):

*John worked for a transport company on a casual basis for 12 months. Because of his good work with the company, and because of his good employment history, at the expiration of his 12 months casual work, John was offered a permanent position. Following this offer, a criminal record check was undertaken which revealed a criminal record going back 20 years. The offer of employment was subsequently rescinded.*

*Janice called the Commission to discuss the circumstances her son, Paul, found himself in. Paul was in remand and, as a result, his insurance company refused to renew his house insurance. This left Paul exposed to an extreme potential liability were anything to happen to his house whilst he was incarcerated and, indeed, subsequently.*

VALS is aware that the Fitzroy Legal Service gained funding to undertake a Criminal Records Project which involved gathering case studies to determine the extent to which people with criminal records are being treated unfairly. The Report also aimed to identify the impact of criminal records on marginalised and disadvantaged people in the community. VALS is not sure of the status of the report. Further discussion on discrimination on the basis of a criminal record can be found later in this submission.

### **Restrictions via Sentencing Outcomes**

VALS wishes to express concern over the draft model's conditions attached to applying for a conviction to be spent. VALS questions whether the sentence given to the offender should act as the sole indicator for an appropriate applicant. Here lies the potential of entrenching disadvantage at the point of sentencing. Indigenous Australian's historical experience with the judiciary has been chequered. A factor that is raised in academic articles about the over-representation of Indigenous Australians in the criminal justice system is the discretion of the judiciary being used in a manner to discriminate against Indigenous Australians.

VALS recognises that society requires offenders to pay for crimes committed. It should be stressed, however, that irrelevant and old convictions have the potential to punish individuals long after a prison sentence or compliance with a court order has run its course. An offence resulting in no prison or no more than 12 months prison for adults and no detention/prison or no more than 24 months detention/prison for juveniles as the primary requirement necessary to be eligible to have a conviction spent is highly restrictive and an inappropriate measure<sup>3</sup>

The draft Bill states that ‘it does not matter whether it (the offence) is one of violence, dishonesty, contempt or in some other category. What matters is how seriously the court viewed this particular offence in its circumstances, as demonstrated by the sentence imposed’. This presents a highly problematic method of administering justice.

VALS strongly opposes eligibility for spent convictions resting on sentencing outcomes alone. A sentence does not indicate a person’s circumstance, ability to rehabilitate, commitment to reform, ability to learn from old mistakes or a demonstration of good character or otherwise.

VALS supports a model where eligibility for spent convictions is determined on a case by case basis. This is the only way through which the nature of the offence and the surrounding circumstances can be effectively considered in order to administer informed and appropriate decisions around spent convictions eligibility. In line with the recommendations by the ALRC, VALS supports all convictions, including serious offences, should be included in the scheme.

VALS questions how the scheme would operate and requests clarification: how will the scheme handle un-sentenced time in prison (ie: remand, fine converted to prison time)?

### **Serious Offences**

*The more serious the offence, the longer it is likely to remain relevant to decision making. Seriousness is relative ... One of the main objects of the spent convictions scheme is to make the offender’s transition back into the community easier. A hostile public reaction to a scheme designed for this purpose will not make the transition any easier. For these reasons, special attention has to be given to serious offences in designing any spent convictions scheme (ALRC 1987:28).*

VALS argues for serious offences to be included in the scheme, but be dealt with in a way that addresses community concern about such offences. It is difficult to attempt in making distinctions based on the seriousness of an offence as this is a highly subjective exercise. Just as excluding an application for a conviction to be spent on the basis of the imposed sentence is unfair, so too is to exclude on the basis on the *kind* or *category* of the offence alone. In order to accommodate a solution to the above complications, flexibility is required in the process through which a conviction becomes spent.

---

<sup>3</sup> . As an indicator of whether an alleged offender is capable of reforming in a way that makes their old conviction irrelevant

It has been suggested that one way to curb concerns about including more serious offences is to impose different waiting periods for different classes of offences. It has also been suggested that such waiting periods should be determined at the time of sentencing. This raises additional concerns. While it has been made clear that the model Bill considers the length of sentence as an indication of the seriousness of the crime, to also impose a period of time to be served before being eligible for spent convictions at time of sentencing results in two things:

- a) assumptions are made at the time of sentencing regarding a individuals future capacity to reform inside the justice system and in life after departure from the justice system; and
- b) furthers the likelihood that disadvantage will be imposed at the time of sentencing.

While a single period for all convictions is advantageous for reasons of simplicity of administration, especially in the light of the various sentencing policies and practises for various offences between jurisdictions, this should not deter from considering the benefits of having more than one qualifying period available to accommodate offences of varying nature and seriousness.

### **Sexual Offences**

Dealing with alleged sex offenders is a highly sensitive and topical issue. In addition, the scope of what is considered a sexual offence and the varying sentences and court orders attached to the offence are broad. VALS argues against the blanket condition that no sex offences should ever become spent under any circumstances. Instead, consideration for spent conviction eligibility for sex offences should operate on a case by case basis though a tribunal mechanism (see discussion of tribunal below).

Failing to do so under this model increases the likelihood of ongoing punishment for some individuals who should be afforded opportunity to demonstrate the irrelevance of an old conviction to their current state of 'good character' and diminished likelihood that they will reoffend as is apparent through the following case study that has been de-identified:

*'A' was convicted for having consensual sex with 'B' who was under the age of consent by two months. 'A' was in a relationship with 'B' and was misled by 'B' about her age. 'B' is now married with two children and wants to gain employment working with children but is not able to do so because of his conviction.*

The eligibility for some individuals with old sexual convictions to apply for spent convictions does not act to put the public at risk. A spent convictions scheme should be equally driven in rejecting applications in the interest of public safety, as it is for alleviating the stigma of other irrelevant convictions. There will always be convictions

belonging to all categories of offences that should never become spent. While serious and sensitive, sexual offences should not be automatically excluded from the scheme because they have been categorised in a certain way. To reiterate, the only way to determine appropriate outcomes in complex areas such as this is to adopt a case by case consideration in a tribunal setting.

It should be noted that consideration should be given to the existence of Sexual Offenders Registry. It is likely that the public will question the existence of the Registry if sexual offences can become spent.

### **Canadian Example**

A useful point of comparison lies with a well established scheme in Canada. A procedure under which applications for pardons are heard was established through their *Criminal Records Act 1970* (CRA). These applications for pardon are heard by Canadian National Parole Board who express their satisfaction to the Solicitor-General of the applicant's good behaviour (or otherwise) and whether the conviction should still reflect on his or her character which can result in a recommendation for a pardon. Individuals seeking a pardon generally expressed a need for this facilitation for reasons such as employment, need to acquire a licence, overseas travel, and death bed absolutions (Clemency Review Summary 1982 in ALRC 1987).

If the pardon is granted, records containing information about spent convictions are stored separately and may not be disclosed without ministerial authority. The pardon, in effect, removes any disqualification imposed by Canadian law based on the fact of the conviction (ALRC 1987). In its current state, the CRA also specifies that information about pardons of offences shall not be sought in the employment applications of organizations under federal jurisdiction. The *Canadian Human Rights Act* forbids Federal agencies and Departments to discriminate against an individual based on a pardoned record (Government of Canada, National Parole Board 2008).

It has been noted that not all eligible offenders have applied due to concerns that the process will inadvertently make known their record. In the earlier operation of the scheme it was noted that people who did apply were generally males in their late twenties with a minor offence usually committed as a juvenile.

In 2007-2008, 24,846 pardons were granted in Canada and 86,000 in the last five years. The total number since the review of the CRA 1970 totals more than 350,000 with approximately 97 percent of these still in force. This indicates that the vast majority of pardon recipients remain crime-free in the community (Government of Canada, National Parole Board 2008).

Being established some time ago, the Canadian scheme has undergone review and the passage of time has revealed some interesting points to consider for a spent convictions scheme that will be incorporated in discussions below.

## Sexual Offences

The CRA lists certain sexual offences that if an individual was pardoned for, their record will be kept separate but his/her name will be flagged in the Canadian Police Information Centre computer system (CPIC). In effect, individuals will be asked to let employers see their record if the individual is seeking to work with children or other vulnerable people. This flag is applied regardless of when the conviction occurred or when the pardon was granted.

Flagging of offences other than sexual may also be useful. If an employer wants to know more information about an offence they should apply to see it, but it should not be automatically available for them.

## Unsuccessful Application for Pardon

If for reason such as the Board finds the applicant is not of good behaviour and the pardon is denied, the applicant may reapply after one year. VALS believes this process of reapplication would be most useful if explanatory material regarding reasons for the application being unsuccessful were provided so the applicant can be guided in what needs to be done before reapplying.

## **Use of a Tribunal**

A tribunal mechanism is an attractive way to consider applications for serious offences where there is a need for a body to deal with the complex nature of balancing rival interests of society and the offender. At a tribunal an offender can demonstrate their degree of reform, evidence of their present 'good character', and their requirement to have a conviction spent. At a tribunal offenders can have questions answered regarding their ineligibility which could then act as a guide for future actions.

Assessing offenders on a case by case basis in a tribunal setting will bring some disadvantages such as:

- Delays;
- The need to surrender sensitive information in a more public manner than would be the case in a more standardised written application format;
- Intimidation felt by the offender by the tribunal process; and
- An increase in records created (relevant when considering a major motivation in spent conviction schemes is to reduce the volume of criminal record information in activity).

It is vital that the creation of such a tribunal be uniform in all jurisdictions otherwise a uniform national spent convictions scheme would have its merit undermined by creating a new inconsistency in the place of one erased by having a national model for spent convictions scheme.

In light of the Canadian experience up until 1987, the ALRC decided that a spent convictions scheme in Australia should be self-executing and that a tribunal is not needed. VALS believes that a self-executing system is important for increased participation in a spent convictions scheme, however argues that a tribunal is appropriate and necessary in some cases and suggests the following:

- A self-executing system appears appropriate for minor crimes where complexity of the offence and the conditions around it are low.
- In the case of an application being rejected in the situation above, a facility should exist where the applicant can appeal the decision to a tribunal.
- A tribunal is necessary for the consideration of more serious crimes where greater amounts of information are required and conversation between numerous interested parties is necessary to make informed decisions about the appropriateness of a conviction becoming spent.
- Serious offences should not be excluded from the scheme. Applying for a conviction to be spent does not act to remove criminal record information at the sake of community safety. On the contrary, a tribunal system exists to increase the chances of a well informed decision.

### **Qualifying Period – Demonstration of ‘Good Behaviour’**

Of concern to VALS is the potential for disruption caused by disadvantage to the proposed qualifying period required before applying for a conviction to be spent. Not all convictions should prevent or delay a previous conviction from being spent. Examples such as public drunkenness (yet to be decriminalized in Victoria) and failure to pay fines that lead to compounding offences have the power to greatly prolong the qualifying period one must serve before becoming eligible to apply for a spent conviction.

The requirement of ‘good behaviour’ for 5 or 10 years (juvenile and adult respectively) as a reflection of rehabilitation therefore making a ‘conviction no longer relevant as a guide to that person’s character’ is a clearly expressed stance in the draft model (Department of Justice Victoria 2008: 4). What is lacking is ‘good behaviour’ defined in any certain terms. Consideration needs to be given to the fact that offending sometimes occurs as a symptom of other factors outside of someone’s ‘general character’.

Ideally the waiting period requiring ‘good behaviour’ should be conviction free, however some who could be described as being of ‘good character’ and of general good behaviour may be diminished in their capacity to meet requirement the draft Bill demands.

The draft Bill proposes that the qualifying period should not be broken if the person commits a further offence that results in no penalty, or in a fine of no more than \$500.

VALS questions whether this is too restrictive. For example, if a conviction for a minor parking or littering offence results in a penalty less than \$500, would an additional fee

resulting from a failure to pay result in the qualifying period being broken? The same could be asked for a public drunkenness offence. In such instances there is room for the economically and socially disadvantaged to be unjustly punished in a very significant way. This point is imperative when considering the severity of having a 10 year qualifying period disqualified and started over. This is overly punitive. Clearly defining convictions that should be disregarded when considering spent conviction eligibility is challenging but should allow a wider scope than the model proposes.

## **Juvenile Offenders**

Society recognises that young people should be treated differently to adults in the justice system. The existence of separate courts and sentencing options for juveniles is evidence of this. VALS considers the special problems posed by juvenile offenders requires separate consideration for a spent convictions scheme. Despite the tendency of the media and members of the public to endorse a punitive approach towards offenders regardless of circumstance, evidence suggests that many young people experience periods of criminality which is often deserted as they enter adulthood. As recidivism studies show, around 70% of offenders will not reappear before the court (Cain 1996). The evidence therefore highlights how few young people are acute or persistent offenders.

In light of this, VALS argues for increased flexibility in a national model for spent convictions. Some jurisdictions find it sufficient to half the qualifying period for juveniles to 5 years for minor offences. For someone in their formative years, this length of time is excessive and disproportional to a young persons potential to change offending behaviour. If the major motivator to the establishment of a national model for spent convictions is to afford people a second chance, in the case of juveniles all efforts need to be focused on support and diversion, not further punishment.

Flexibility is also required in order to cater for more serious juvenile offenders. While eligibility to a spent conviction scheme should always be available to juveniles, a longer qualifying period may be appropriate in the case of serious crimes. This time should not simply be considered as further punishment in payment of a more serious crime. That is what the courts and sentencing mechanisms are for. Instead this time should focus heavily on rehabilitation and diversion from re-offending behaviour for the benefit of the individual and the wider community.

## **Treatment of Spent Conviction Information**

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, such as:

- When an individual with a spent conviction seeks employment in a position with high levels of power or responsibility of care to others such as a Magistrate, Judge, doctor or child-care worker and so on;

- If a parole authority is required to make an appropriate and informed decision around an offenders release;

The above exceptions pose a challenge in the sensitive handling of offender information. 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 Australia (Brimbank Melton Community Legal Centre 2005: 2-3).*

Without a well-managed criminal record management system, the likelihood for spent conviction information to be unlawfully obtained will remain high. As the Fitzroy Legal Service highlight, the scheme is vulnerable to variable interpretations of when exceptions to the non-disclosure policy arise. The lack of a tailored criminal record management system together with potential alteration to non-disclosure guidelines by police resulting from lack of prescriptive legislation exists as a potential force to undermine any positive intentions for this spent convictions model.

In addition, deciphering which areas of employment warrant spent conviction information relevant requires extremely careful consideration. Further, how information provided to individuals employing for such positions is regulated presents a complex and delicate task. Clarity is needed in these areas as they appear vague in their current presentation in the model. It is therefore difficult to comment on in its current form.

As a general guide, the Australian Human Rights Commission (then known as 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 criminal record’ (2007:5).

The Commission further suggests 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.

In consideration of the above, VALS supports the draft Bill’s proposal that ‘it should generally be unlawful for a person who has access to official records of conviction, and

who knows, or should know, that a conviction is spent, to disclose information about it'. VALS also finds appropriate the proposal to make it an offence if a business that trades in criminal-record information discloses a conviction that it knows, or should know, is spent. Further, anyone who fraudulently or dishonestly obtains information about a spent conviction from public records commits an offence and should be prosecuted for this offence.

It is necessary for effectiveness of a spent convictions scheme to ensure that the control of conviction information is given ample attention. Of course no matter what form this control would take, a clear and simple instruction is vital for all record-keepers, former offenders, employers, authorities and decision makers around respective rights and obligations in this matter. All the above concerns need to be addressed in order for an appropriately comprehensive national model to be produced and supported.

### **Exceptions**

VALS argues that the "catch all" section 14(6)(f) is too broad. VALS is concerned by the requirement to share information about a spent conviction if someone wants to register amongst other things for a license in an occupation that requires a person to be 'a fit and proper person or to be a person of good character'. VALS consider that this section undermines the spirit of the spent conviction scheme relating to second chances. It is too broad as arguably every occupation requires an employee to be a fit and proper person or of good character. VALS argues that this provision should be interpreted narrowly if it is legislated.

### **Absence of Effective Anti-discrimination Protections/ Support Structures for Reintegration**

Spent convictions laws along with 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 criminal record should be entitled to protections. The ALRC 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 (1987: xvi).

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.<sup>4</sup>

---

<sup>4</sup> 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,

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. HREOC 2007). In addition, this legislation prohibits asking another person to supply information on which unlawful discrimination could be based. Tasmania's *Anti-discrimination Act 1998* has very similar provisions and together they serve as the only jurisdictions that provide anti-discrimination laws that give this specific protection against discrimination on the basis of a criminal record.

This represents another mechanism that needs to be fashioned to compliment a spent convictions model. If the giving, receiving or handling of spent convictions information is done so unlawfully, avenues need to exist that empower ex-offenders to hold accountable those responsible for the use of their personal information.

The occurrence of obtaining criminal record information through channels other than a formal police check without consent has been noted. The Correctional Services Employment Pilot Program (CSEPP) reported a client of theirs was dismissed after the employer accessed information from a private internet sight without the employee's consent (2004). The case is as follows.

*GH, an Indigenous client of an employment agency, applied for a job with a public sector employer and was advised that she had been successful in gaining the position. However, before she started in the job the employer contacted the agency and advised that they would have to delay employing GH until her pending court case was heard.*

*GH had not revealed the pending court case to the employer, and assumes that it was revealed on a police record check. The case relates to an alleged assault by GH, which she claims took place in the context of domestic violence towards her (PIAC 2005).*

*Because of delays in the hearing of the case, GH has not been able to work for several months.*

In addition, the CSEPP note that in examples of clients being dismissed from employment after employers learning of their criminal record, frequently the reason given for dismissal is not the presence of the criminal record, but instead cited as the lack of honesty. This is a poignant considering the area of discussion below.

Including discrimination on the basis of criminal record as grounds to complain about discrimination would complement the national spent conviction scheme. The scheme would also be complemented by support structures being put in place for individuals during the transition period from prison to every day life. Funding should be provided for

---

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).

Indigenous Australian specific transition housing and pre/post release services. The pre/post-release services should perform case management. It appears that there is a lack of such services for Indigenous Australians and this is contributing to Indigenous Australian recidivism rates.

### **Legislating a Lie**

Reasonable circumstances exist where authority figures/bodies and members of the public can insist details of a persons past convictions are revealed. Problems arise when the offender believes there is no legitimate reason for interest in this information and therefore feels valid in not disclosing information about spent convictions. Giving an individual statutory authority to lie about a spent conviction should be considered a dangerous move, however there needs to exist a provision that enables some level of control to individuals with spent convictions in such cases. What essentially could be considered as legislating a lie raises inescapable ethical predicaments supports an alternative where the responsibility is placed on the person asking the questions.

Strong criticism for this suggestion rests on the fact that the effectiveness of prohibiting certain questions would have to be enforced by a law or regulatory body. This creates a situation where people asking questions about criminal record information of others have an increased potential that they are themselves committing an offence. If the appropriate response, then, is to provide that there be no obligation to disclose a conviction that has been spent, questions asked relating to prior convictions should be taken to mean only those that have not been spent.

*In the absence of express legislative provision to the contrary there should be no obligation to acknowledge a spent conviction. The protection should be extended to questions about charges, arrests and other matters relating to a spent conviction. Failure to acknowledge a spent conviction should not in itself prevent a person from obtaining a remedy in a legal or administrative proceeding to which he or she is otherwise entitled, nor should it give rise to a civil liability (ALRC 1987: xii-xiii).*

An example of a financial institution that requires criminal record checks as part of the recruitment process attempting to limit questions to relevant convictions takes form in the following application question:

*"Have you had any criminal conviction for, or pleaded guilty to, a crime involving dishonesty or violence which is not lapsed or spent?" (Westpac Banking Corporation 2005).*

This of course does not ensure that problems with criminal record checks and the admission to prior conviction are removed. As Westpac Banking Corporation's submission to the Human Rights Commission on Discrimination in Employment on the Basis of Criminal Record (2005) provides:

*An applicant for a position in a Westpac branch said that she did not have any convictions within the last ten years. When the Federal police check was returned, it indicated, however, that there was a State criminal record. When questioned about this, the applicant subsequently withdrew her application and never provided any further information about her criminal record as requested. She then claimed discrimination on the basis of criminal record. Westpac's position was that it was unable to progress her application on the basis that she appeared to have been dishonest in the statements she had made about her criminal record, and was not prepared to provide information to disprove this.*

An additional problem noted in the submission above was that because criminal record checks often take several weeks to complete, employment is offered conditional on the police check. This sometimes results in termination of employment after commencement.

### **Miscellaneous Provisions**

A drafting note present in Part 4 of the model suggests that ‘jurisdictions may choose to make local variations, especially if the usual practice in that jurisdiction would be to provide for an application to be made to a Judge of the relevant Court rather than to the Court itself’ (Spent Convictions Bill (Draft), South Australia 2008: 14). VALS promotes this provision in order to make a point about the importance of cultural sensitivity. Perhaps the provision to make local variations can be used in order to increase cultural sensitivity. Useful tools for the engagement of the Indigenous population of Victoria can be referred to as visible in the Koori Court system.

Concern is warranted in relation to the ‘Principles governing hearings’ section where ‘The court may, if satisfied that an application for a spent conviction order is vexatious, misconceived or lacking in substance, dismiss the application without holding a hearing’ (Spent Convictions Bill (Draft), South Australia 2008: 15). While recognizing the value of time in the courts, attention should not be withheld from applications that appear ‘lacking in substance’ or ‘misconceived’. Instead it should be considered whether this is the result of other factors such as:

- *Accessibility.*

Are the application documentation and the application process easy to navigate? Issues of readability can often present great hurdles to people who have limited literacy capabilities.

- *Lack of legal representation.*

Is the offender disadvantaged in their ability to provide a sufficient application resulting from a failure to obtain legal advice?

Additionally there is a need, if a spent convictions scheme is adopted, to have mechanisms that make ex-offenders aware that the scheme exists, and how the provisions surrounding the application process operate. Without this awareness element there is an immediate 'access to justice' problem apparent.

### **Accessibility**

In order for a spent convictions scheme to be effectively utilised, the systems through which someone with a conviction must engage with must be accessible. This is vital if applicants are required to engage the process without legal representation or advice. VALS suggests that eligible convictions should be automatically reviewed after the qualification period rather than individuals being required to apply for their conviction to be spent. This would mean reversing the onus of proof proposed in the Bill (s.9). A conviction should not be reviewed by the Courts as they already experience extreme delays and a new role would add to the delay. A tribunal designated to review convictions should be established instead.

VALS is concerned that Indigenous Australians will fall into the category of people who do not find accessible the process of applying for spent convictions, especially if it involves going back into a Court room which is associated with a bad experience that resulted in imprisonment. It is likely to appear to members of the Indigenous Australian community that they are going to Court to be judged again, or even convicted again if their application is refused. The matters that should be considered in reviewing a conviction should not mirror those to be taken to account in sentencing (ie : section 9(5), such as nature of the offence, length of sentence). It should relate to matters after the conviction and sentence (ie: length of time since the conviction etc).

It is reasonable to establish a database that flags when a conviction should be reviewed. Individuals should be sent a letter about the outcome of their review. If a decision has been made to refuse to spend a conviction that individual should be notified of their right of appeal (ie: to tribunal). It may be an incentive to live a crime free life if people receive an update on their conviction status (ie: 12 months to go until the conviction is eligible for review).

The Canadian system discussed earlier stresses the accessibility of their application process through numerous notices that legal representation is not required. Through their National Parole Board website, the application itself along with a step-by-step instruction guide on how to complete and file the paperwork is downloadable. Further assistance is also provided by a toll-free number.

## CONCLUSION

VALS urges the timely resolution of whether and what national spent convictions model is implemented given that the process of inquiry has been protracted

There should be an end to punishment for an offence which has been satisfactorily paid for in a manner fashioned appropriate by the justice system. The hardship in incarceration is the way in which punishment is administered to offenders. The reintegration of offenders back into society in a positive way benefits all of society. This cannot be achieved if ex-offenders have no chance of having a true second chance by way of an irrelevant and old conviction creating barriers over a lifetime.

The adoption of the draft model spent convictions Bill in all States and Territories has the potential to change lives. In its current form, however, VALS is critical of the model in that it is restrictive, insensitive to the circumstances in which offending occurs, hesitant to deal with the complexity yet important inclusion of sexual offence considerations, punitive to juveniles, vague on the issue of protections around criminal record information and narrow in vision.

## BIBLIOGRAPHY

Australian Law Reform Commission 1987 *Report 37: Spent Convictions* Canberra: Australian Government Publishing Service.

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.

Cain M 1996 *Recidivism of Juvenile Offenders in New South Wales* NSW: Department of Juvenile Justice.

Correctional Services Employment Pilot Program 2004 *Submission No 47: Discrimination in employment on the basis of criminal record* Submission to the Human Rights and Equal Opportunity Commission [online] [www.humanrights.gov.au/human\\_rights/criminalrecord/submissions/sub47\\_csepp.html](http://www.humanrights.gov.au/human_rights/criminalrecord/submissions/sub47_csepp.html) [accessed 21 January 2009]/.

Department of Justice Victoria 2008 *Draft Model Spent Convictions Bill: Consultation Paper* [online] [www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eb25314bc63c44f/DraftSpentConvictionsBillConsultationPaper.pdf](http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eb25314bc63c44f/DraftSpentConvictionsBillConsultationPaper.pdf) [accessed November 2008].

Equal Opportunity Commission, Victoria 2005 *Submission No 71: Discrimination in employment on the basis of criminal record* Submission to the Human Rights and Equal Opportunity Commission [online] [www.humanrights.gov.au/human\\_rights/criminalrecord/submissions/sub71\\_eocvic.html](http://www.humanrights.gov.au/human_rights/criminalrecord/submissions/sub71_eocvic.html) [accessed 20 January 2009].

Government of Canada, National Parole Board 2008 *Policy Manual: Clemency and Pardons* [online] [www.npb-cnrc.gc.ca/infocntr/policym/polman-eng.shtml#a419](http://www.npb-cnrc.gc.ca/infocntr/policym/polman-eng.shtml#a419) [accessed 15 January 2009].

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.

Ken Kelly 2005 *Submission No 23, Discrimination in employment on the basis of criminal record: An Aboriginal perspective* Submission to the Australian Human Rights Commission [online] [www.humanrights.gov.au/human\\_rights/criminalrecord/submissions/sub23\\_kenkelly.html](http://www.humanrights.gov.au/human_rights/criminalrecord/submissions/sub23_kenkelly.html) [accessed 21 January 2009].

Westpac Banking Corporation 2005 *Submission No 34: Discrimination in employment on the basis of a criminal record* Submission to the Australian Human Rights Commission [online] [www.humanrights.gov.au/human\\_rights/criminalrecord/submissions/sub34\\_westpac.html](http://www.humanrights.gov.au/human_rights/criminalrecord/submissions/sub34_westpac.html) [accessed 20 January 2009].